

**IN THE MATTER OF:**

**LAND AT INDIO HOUSE, BOVEY TRACEY, TEIGNBRIDGE DISTRICT**

---

**OPINION**

---

**I. INTRODUCTION**

1. I am instructed by PCL Planning to advise Kach Developments in connection with their current application to Teignbridge District Council (“**the Council**”) for reserved matters approval (“**RMA**”), reference 20/00647/MAJ, in relation to residential development, comprising 22 dwellings, on Land to the North of Indio House, Bovey Tracey, Teignbridge District (“**the Site**”).
2. The Site was allocated for residential development “*of at least 45 homes*” by Policy BT2A of the Teignbridge Local Plan, which was adopted in May 2014.
3. The application for RMA was made pursuant to an outline planning permission (“**the Outline Permission**”) granted on appeal by Inspector K Taylor BSC(Hons) PGDip MRTPI in a decision letter (“**DL**”) dated 4<sup>th</sup> December 2018 (PINS reference APP/P1133/W/18/3207470). The Outline Permission is for “*up to 30 dwellings and associated works*” with all matters reserved except access.
4. At DL para. 25, the Inspector stated:

“A condition is necessary to control lighting to safeguard foraging paths for bats. It is also necessary to ensure any trees to be removed are inspected for the presence of bat roosts and mitigation secured if necessary. To prevent harm to the trees on and near the site it is necessary to prevent works, such as the provision of services, under the private drive and to secure an adequate buffer, with suitable landscaping, between the northern boundary and the proposed houses. It is necessary to secure adequate open space and landscaping within the site and that this incorporates biodiversity enhancements.”

5. Consistently with this, Condition 8 of the Outline Permission provides:

“The development shall be carried out in accordance with the mitigation strategy contained in the Ecology Report, Including Bat Survey And Greater Horseshoe Bat Mitigation Scheme, dated 6 September 2017.”
6. An objection to the application for RMA was submitted by the Council’s Biodiversity Officer on 30<sup>th</sup> June 2020, primarily based on the uncompensated loss of MG5 Lowland Meadow grassland at the site. Devon Wildlife Trust also objected in a letter dated 10<sup>th</sup> June 2021, as did a group of local residents whose names are at the end of an undated objection letter. I have been provided with and read all these objection letters.
7. The application for RMA was recommended for approval by the Council’s case officer, in a report (“**the Officer’s Report**”) prepared for the meeting of the Council’s Planning Committee on 15<sup>th</sup> June 2021. On the issue of ecology, the advice in the Officer’s Report included the following:

“3.87 When the appeal was allowed the Inspector imposed a condition requiring the development to be undertaken in accordance with approved Ecological Survey (‘Ecological Report and Greater Horseshoe Bat Mitigation Scheme’, by George Bemment Associates, dated Sept 2017). **There was no requirement in the approved Ecological Survey or as part of the appeal decision that required the applicant to retain the grassland or to provide compensation.**

3.88 Letters of representation have suggested that ecology reports for an earlier development at this site (13/02292) are referred to in the outline approved Ecology Survey and therefore there is the ability at RMA stage for the LPA to require retention and/or compensation.

3.89 In 2013, application 13/02292 (which was for a larger area) submitted three ecological reports and a Bat and Dormouse Report by Bluebell Ecology:

  - The July 2013 Preliminary Ecological Appraisal by Sunflower International recognises the diversity of the 2 ‘North of Indio’ fields, one of which, at the time was to be retained as POS. It recommends mitigation for species but not for habitats; and
  - The November 2013 Preliminary Ecological Appraisal by

Sunflower International recommends: "Such is the complexity of the site that a wildlife and habitat management plan will need to be produced for the site" and "5.2 The needs of the Local Authority could, I believe, be met by retention of as much of the old grassland as possible to the north of the main drive – particularly the northwestern field that adjoins St Johns Close." These two fields recommended for retention are of course the two fields that were later granted permission at appeal.

- 3.91 Imposing a requirement to compensate for the loss of the grassland at RMA stage would not be reasonable as it is not an issue that is specifically addressed though the approved Ecology Survey or a requirement of the Inspector in the conditions imposed at appeal. In addition to this, a financial contribution for the delivery of off an *[sic]* off-site compensatory habitat would need to be secured though a S106 agreement and this cannot be imposed at RMA stage.
- 3.92 It is also important to note, that while this site is classified as a priority habitat, there is no protection for the grassland, the applicants could legally cut or spray the grassland and remove its current wildlife interest.
- 3.93 Notwithstanding the above, the greatest effort has been made to consider steps that can be taken within the scope of the RMA application. The following options have been discussed with the applicant and the TDC Biodiversity Officer
- a) Provide additional biodiversity within the site: The TDC Biodiversity Officer has advised they have secured everything they can and there is no room left for further biodiversity enhancements
  - b) Remove the area of grassland to be developed and translocate it to another site – The TDC Biodiversity Officer would require an available site for this to be undertaken. This approach would also be subject to conditions and require the applicant to work with a third party which would be out of the scope of the RMA application.
  - c) Retained areas of grassland that are not being developed and positioning of protective fencing before site clearance commences.
- 3.94 Taking into consideration the scope of the RMA application, it is considered that option c) provides the right solution and would provide some protection of the grassland that can be retained. Following this, the applicant has prepared a grassland retention and protection drawing (below)."

8. Despite this advice, at the meeting on 15<sup>th</sup> June 2021, the Committee resolved to defer consideration of the application in the light of the ecology objections.
9. Against this background, I am asked to advise: on the following questions:
  - a. Whether the matters relating to the loss of MG5 grassland are legitimate grounds for objection to the RMA application
  - b. Whether there is any legal protection for the grassland (outside of the planning process) and therefore whether the applicants could cut/ spray/ plough the land; and
  - c. Whether the Council could require the RMA proposals to deliver 'biodiversity net gain', which would likely require some form of off-site compensation.
10. In summary, I consider that the answer to each of these questions is 'No'. I agree with the reasoning on this issue in the Officer's Report, which is legally sound.

## **II. ANALYSIS**

### **Whether the matters relating to the loss of MG5 grassland are legitimate grounds for objection to the RMA application**

11. It is well established that outline planning permission operates as the framework for approval of reserved matters pursuant to it. In particular:
  - a. Reserved matters may not be used to alter the nature of the development for which outline permission has been granted: see e.g. *Centre Hotels (Cranston) Ltd. v. Secretary of State for the Environment* [1982] J.P.L. 108
  - b. The local planning authority cannot refuse to approve reserved

matters on grounds going to the principle of the development itself, including the parameters approved by the outline planning permission. There are many cases that demonstrate this. A good example is *Proberun Ltd. v. Secretary of State for the Environment* [1990] 3 P.L.R. 79. In this case, outline permission had been granted by the Secretary of State on appeal, notwithstanding that it was clear that satisfactory access could not be provided on the site. The Court of Appeal held that the Secretary of State could not subsequently refuse an application for RMA on the ground of inadequate access, because it must have been in his contemplation when granting the outline permission that the only available access was unsatisfactory.

12. The principle of the development of “*up to 30 dwellings and associated works*” at the Site is fixed by the Outline Permission and cannot be questioned at the RMA stage. By necessary implication, the same also applies to the loss of MG5 grassland associated with that development. Whether that loss ought to be compensated by off-site enhancements was a matter which bore upon the decision in principle to authorise the development at the outline stage.
13. Consistently with this, the Inspector considered that ecological matters were relevant to the decision to grant the Outline Permission, hence the reasoning at DL para. 25 and the imposition of Condition 8. It is not open to objectors or the Council to contend that the Inspector’s reasoning and/or Condition 8 were inadequate in this respect. The DL was not challenged and therefore is required by law to be accorded all the effects of a valid decision.<sup>1</sup>

---

<sup>1</sup> There is authority at the highest level to the effect that a public law decision, including in the planning and environmental context, is to be treated as having all the effects in law of a valid decision unless and until it is quashed by the High Court or an appellate court; it cannot be collaterally challenged in the context of a subsequent decision-making process. See *R (Noble) v. Thanet District Council* [2006] 1 P.& C.R. 13 per Auld LJ at paras. 42-61.

14. I therefore agree with the analysis expressed in the Officer's Report, quoted at para. 7 above, to the effect that the uncompensated loss of MG5 grassland is not a legitimate ground for objecting to the RMA application. The Council would face a real risk of an award of costs, for unreasonable behaviour, if it were to refuse or continue to fail to determine the application on this ground.

**Whether there is any legal protection for the grassland (outside of the planning process) and therefore whether the applicants could cut/ spray/ plough the land**

15. No. The Officer's Report is correct in this respect too.

**Whether the Council could require the RMA proposals to deliver 'biodiversity net gain', which would likely require some form of off-site compensation.**

16. No. For the reasons outlined at paras. 11-15 above, the effect on biodiversity of the principle of developing "up to 30 dwellings and associated works" at the Site was a matter for the outline stage and the decision at that stage cannot be questioned or undermined at the RMA stage.

17. Further, and in any event:

- a. there is currently no legal requirement for planning applications to demonstrate biodiversity net gain ("BNG"). Such a legal requirement may come into force in future if the Environment Bill obtains Royal Assent and is enacted, but the Bill is not yet law.
- b. NPPF para. 170(d) refers to "net gains" but does not require a specific %age BNG. Mere enhancement is sufficient. As to this, the Inspector's conclusion at DL25 that the open space and landscaping proposed "incorporates biodiversity

enhancements". It is not open to the Council or objectors belatedly to challenge this conclusion now.

### **III. CONCLUSION**

18. I have nothing to add as currently instructed but would be happy to answer any further questions arising out of the advice above, if and when required.

**CHARLES BANNER Q.C.**

**Keating Chambers  
15 Essex Street  
London WC2R 3AA**

**5<sup>th</sup> July 2021**