

assessed. By this we mean that the modelling has demonstrated that the footbridge as a structure does not have any significant impact on flood risk to the consented site or elsewhere. In extreme flood scenarios (0.1% annual probability event) the retention of the footbridge would provide some betterment to existing properties at Ash Grove.

In summary, we have no objection to the proposed removal of condition 13 attached to this consent and subsequently the retention of the footbridge at Llanthomas Lane.

2nd Response

Thank you for your letter on 16 November 2016 asking us to inform the Planning Authority whether, in light of further information, there has been any change in our advice since that reported to Committee on 18 December 2014.

Having revisited our previous advice, the further information from third parties and in consideration of our own internal guidance; our advice has changed and we wish to raise the following issues.

As you're aware the principle of development was established through P/2008/1607 on the basis that the existing footbridge could increase flood risk on the Phase 1 site due to its potential to obstruct flood debris/block. Therefore the Planning Authority attached condition 13 to ensure its removal.

There has been differences of opinion over recent years on whether the footbridge is likely to obstruct flood debris / block. Previously we have not considered blockage on the footbridge in isolation, but provided advice in the context that the 6 culverts under Llanthomas Lane are the more critical factor in blockage terms. Our reasoning for this is due to the historic flooding evidence we have at this location. For information the current modelling from the applicant includes a 75% blockage on the 6 culverts.

In light of your reconsultation we have considered this issue again. Since our letter dated September 2014 we have been issued new internal guidance (attached) which indicates that for medium to high risk the blockage factors to be applied to bridges are 25% and 80% respectively. It should be noted that local knowledge and engineering judgement can be used to apply varying proportions if considered appropriate. In applying this guidance and taking account of the point raised in the letter from Edenvale Young dated 15 December 2014, it seems reasonable to assess the consequences of flooding in the event the footbridge became blocked.

Our reasons for this is that further model runs, to include a blockage at the footbridge, would ensure all parties are made reasonably aware of the risks and consequences associated with a blockage of the footbridge before any decision is made by the Planning Authority. There are various ways of assessing further blockage, whether this is in-combination with the 6 culverts or in isolation. We can offer further advice on this if necessary, but the approach should be agreed if further modelling is undertaken.

Further model runs to take account of blockage at the footbridge are likely to demonstrate an increase in flood risk to the Phase 1 site and the effects of this increase have not been considered in the application. However, you should note that the site is currently at risk of

flooding and it is our opinion that the site will continue to be at frequent risk of flooding, regardless of the outcome of the application to remove condition 13. We also confirm the site will continue to be situated within flood zone C2 of the Development Advice Maps accompanying TAN 15.

In addition to the above issue, the modelling outputs used in the application include a single "flood relief" culvert (with a cross section of 1.2m²) from the ephemeral channel through the Phase 1 site. This is referenced in Section 3.4.3 of the Hydraulic Modelling report provided by Martin Wright Associates.

However, it is our understanding that the construction of this relief culvert has not been given the appropriate permission(s). Therefore this raises a question over whether the current model can be relied upon in this application. We understand the Planning Authority has discussed this with the applicant. The applicant would need to demonstrate that the conditions in the model can be met on the site. We have concerns with this as there are discrepancies between the proposed relief culvert dimensions applied within the model and the dimensions indicated on FMW's drawing number FMW 0658 – SK03 Rev A. The drawing shows twin culverts with cross section of either 0.72m² or 0.88m² to the model which has a single culvert area of 1.2m². In addition there has been no assessment of a blockage on this culvert, or whether the culvert can be designed, built and maintained as required.

We recommend that you seek the views of your Authority's Drainage Team on consenting this proposal to permanently divert the ephemeral channel, under the requirements of Section 23 of the Land Drainage Act 1991, including any culverting policy that may be in place.

We acknowledge the complexity of these matters, therefore if you have further questions please write to us.

3rd Response

Thank you for your letter dated 30 March 2017. You also forwarded an email from the Applicant's agent dated 8 March 2017 for our information.

Your Authority has sought our technical advice on the risks and consequences of flooding in relation to the removal of condition 13. It is our understanding that the condition had been imposed on the permission due to the footbridge's potential to obstruct flood debris / block. The Applicant hasn't fully demonstrated the effects of a blockage and the potential consequences of flooding remains unknown. We have previously advised that further modelling work should be carried out. In the absence of this we are not able to advise further.

Cllr Geraint Hopkins

I have been contacted by several residents of Llanigon who live near the land given planning approval ref P/2008/1607, asking me to call in application P/2014/0910 for determination by the Planning Committee. The reasons given:-

- a) Significant issues relating to flooding
- b) The level of community interest and concern
- c) The fact that the Planning Committee made the original decision

I would be obliged if you could action this request and acknowledge that it will be so done.

Representations

Representations were received from nine third parties. A third party has also commissioned a planning consultant and hydrologist to comment on the application. The representations raised the following summarised objections:

- The land is agricultural land and is in an unsightly condition, being surrounded by heras fencing and excavations on site.
- The landowner has degraded the local environment, it should be agricultural land but is now scrubland as the applicant describes it.
- Notes errors in the supporting statements including in relation to passing places and the safety of the public highway.
- The bridge is used only in high flow events at other times the lane can simply be used.
- Request to see detail of dialogue with NRW specifically which shows that the flooding and drainage problems have been satisfactorily resolved.
- The comments of NRW are noted and these state that the retention of the footbridge would offer betterment to the existing properties...”, clearly because it allows safe passage of pedestrians up to a certain degree of culvert overflow. It does not however actually state that there is “betterment brought about in flood risk terms...” because the footbridge, it is now admitted, does not affect flooding / flood risk as such so it cannot therefore be “better” than it is now with no action taken: i.e. there is no improvement at all on the current situation by retaining the footbridge.
- Question the discharge and compliance with conditions imposed on condition 8.
- Challenge the question for the last FCA, so it is hard to accept any further comments without the input of our hydraulic expert. The proposed dwellings within phase 1 may remain “flood free during all flood events..” as claimed, but question the impact on other parties such as Ty Golchi and Water’s Edge.
- The importance of the ephemeral channel does indeed seem to be more than a potential flood risk and has been exacerbated by the applicant’s works on site.
- Express concerns regarding the conveying of water over the strip of land next to Ty Golchi and the discharge. Water discharging the other side of the culvert will raise the level of water, which in May 2012 flowed up into Glen-yr-Afon – opposite the rear of Ty Golchi and Llanthomas Lane. The ford is an “Irish Ford” and designed to overflow in high flow levels. Building in this location is inappropriate and risky.
- Any betterment at the site relates to the properties proposed and not to neighbours. The compliance with TAN15 is questioned.
- The applicant’s excavations of the ephemeral channel in 2001 caused backing up the channel.
- The May 2012 flood is not the worst flood that anyone can remember it is one of the worst floods.
- It would be proposed to set the access road level to the site one metre lower than the dwellings within the intention of forming a flood flow route. Where will this discharge, presumably onto the lane – which would be flooded and towards Ty Golchi where previous flood events have already reached the car park area.
- Even if the flood event in May 2012 were 1 in 10 years is it acceptable to wait and be flooded every 10 years. Climate change and its effects are unpredictable.
- It is considered very unfair and inappropriate in the face of all the long history of evidence provided over time by a number of witnesses concerning flooding, water run off, nuisance and safety, if the local planning authority allows this building to take place. We need much

more detailed information for analysis and consideration by our hydraulic expert. Surely it is a matter of simple common sense to understand that it cannot be appropriate to build in an area which is, after all, effectively a flood plain which should be allowed to function as such.

- Representations have also raised concern over any loss of the footbridge and although expressed as objections indicate that they consider that the footbridge plays no part in flooding and provides a valuable link over the ford in times of flooding and should not be removed.
- Permitting this application will allow for the development of family housing in an area of flood risk putting lives at risk.

A representation was received from a hydrological consultant employed by a third party. This representation states the following:

Edenvale Young is a specialist flood risk consultant and at the time of the original representation we wrote several letters to the Local Planning Authority and the Environment Agency (now NRW). At the time we felt that the quality of the hydraulic modelling and the FCA in general was poor and that there were a number of serious omissions and error in the development of the FCA. I would be happy to supply these documents if you do not have them to hand.

Andrew Bevan has now passed me a copy of a new FCA which includes the results of modelling associated with the footbridge. I have had a brief look at the information contained in the various documents which make up the FCA (Martin Wright Associates - MCW) but I can't pretend to have undertaken a detailed review. As you probably realise the reports are aimed at discharging a condition associated with the footbridge. However, when we last looked at this issue, I think that I am correct in saying that the Environment Agency had issued Anne with an apology stating that they had made errors in the assessment of the original FCA submitted by the developer and that the serious concerns raised by Edenvale Young into the FCA were valid. I am not entirely sure what the status of the planning application was following this admission bearing in mind that the EA changed their opinion at a very late stage in the process.

The MWA FCA submitted to the LPA recently compares the "existing" situation (i.e. with the footbridge and housing development) to the proposed situation (without the footbridge but with the housing development). It should be recognised that the former of these two scenarios is not the "existing" situation as the properties have not been built. The existing situation and hence the baseline for the FCA should be pre-development with the footbridge and this scenario should have been considered against the post development situation without the footbridge but with the housing.

1D-2D modelling of this nature was never presented during the original application. However, the modelling contained in the report appears to support the concerns we had at the time for a number of reasons. Firstly the outputs clearly show that the proposed plots 2 and 3 are inundated in the 1 in 100 year event and under these circumstances the flood risks to the properties would be deemed to be unacceptable in accordance with TAN 15. In addition, the two proposed plots adjacent to Llanthomas Lane are surrounded by flood water and access and egress to these properties during flooding must be compromised. These properties must be raised on platforms above the existing land to achieve this "dry" status.

More seriously the plots show flow contracting and accelerating between the above properties clearly changing the flow paths from the "existing" condition (no housing development but with the footbridge). In my opinion there is a very high probability that this contraction and acceleration of flows would have a detrimental impact downstream; notably on Ann's house. I am struggling to see how the development can proceed given this information even if there have been procedural errors in the past. It would be extremely unlikely that the properties would be insurable.

Again, I have not been able to review the information in detail and I think that given the sites history there should be a thorough review of the model. Accordingly we would ask for an extension in the time to evaluate the flood modelling. In particular we would like to have a copy of the model developed by MCW so that we can ensure that the model is robust and meets the high standards required for an FCA.

Planning History

Planning permission P/2008/1607 was granted subject to the following conditions:

1. The development to which this permission relates shall be begun no later than the expiration of five years from the date of this permission.
2. Prior to their first use full details or samples of materials to be used externally on walls and roofs of the dwellings hereby permitted shall be submitted to and approved in writing by the Local Planning Authority.
3. Areas of hard surfacing within the development hereby permitted shall be paved in materials of a type and colour to be agreed in writing by the Local Planning Authority prior to their first use.
4. All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with the programme agreed with the Local Planning Authority.
5. Prior to the occupation of a dwellinghouse erected pursuant to this permission provision shall be made for off highway vehicular parking and turning to serve that dwelling in accordance with the details shown in the approved plans.
6. Prior to the commencement of building operations on the dwellinghouses hereby permitted the Class III road (C74) serving the site shall be widened and a footpath provided in compliance with the details shown in the approved plans.
7. The access road and paviour margins serving the development hereby permitted shall be finally surfaced and kerbed in accordance with the details shown in the approved plans prior to the occupation of any dwellinghouse erected pursuant to this permission.
8. The development hereby permitted shall not be commenced until a scheme for the provision and implementation of a surface water regulation system has been submitted to and approved in writing by the Local Planning Authority. Such a scheme shall be implemented

prior to the construction of any impermeable surfaces draining to the system unless otherwise agreed in writing by the Local Planning Authority.

9. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any order revoking and re-enacting that Order with or without modification), no fences, gates, walls or other structures shall be erected within the land to the north of the development site which adjoins the Dgeddi Brook (as shown hatched green on plan bearing the number P/2008/1607 (Plan 1) attached hereto). Nothing shall be stored in this area and ground levels within the area shall not be altered, nor shall any excavation be made, without the written consent of the Local Planning Authority.

10. Before commencement of development a scheme of landscape maintenance in respect of the land referred to in 9 above shall be submitted to and approved in writing by the Local Planning Authority. The schedule shall include details of the arrangements for its implementation.

11. Notwithstanding the provisions of the Town & Country Planning (General Permitted Development) Order 1995 (or any order revoking and re-enacting that Order with or without modification) no fences, gates, walls or other structures shall be erected or ground levels altered on the land hatched in green as shown the plan bearing the number P2008/1607 (Plan 2) attached hereto (i.e. 5 metres of the top of the bank of the Dgeddi Brook and the 'ephemeral channel').

12. Before commencement of development a method statement including details of the arrangements for its implementation for cutting boundary hedges and mowing grassed areas within the maintenance strip referred to in condition 11 above - such as to keep the said hedges below 1.2 metres in height and the area free of trees and other substantial shrubs - shall be submitted to and approved in writing by the Local Planning Authority. Subsequent to commencement of development, the area shall thereafter be maintained in accordance with the approved method statement.

13. Prior to the commencement of development on the site the footbridge across the Dgeddi Brook (location shown by the abbreviation 'FB' on the plan bearing the number P2008 1607 (Plan 1) attached hereto) shall be removed to the written satisfaction of the Local Planning Authority.

Principal Planning Constraints

C2 Flood Zone

Historic Landscapes Register - Outstanding

Principal Planning Policies

National Policy

Planning Policy Wales (Edition 9, 2016)

TAN 15 - Development and Flood Risk (2004)

Local Policy

Powys Local Development Plan 2018

SP1 – Housing Growth
SP5 – Settlement Hierarchy
SP6 – Distribution of Growth across Settlement Hierarchy
DM5 – Development and Flood Risk
DM6 – Flood Prevention Measures and Land Drainage
DM13 – Design and Resources
H1 – Housing Development Proposals

RDG=Powys Residential Design Guide NAW=National Assembly for Wales TAN= Technical Advice Note UDP=Powys Unitary Development Plan, MIPPS=Ministerial Interim Planning Policy Statement

Officer Appraisal

Site Location and Description

The site of development is an area of agricultural land in the settlement of Llanigon adjoining Llanthomas Lane. The development of the land for Erection of 4 dwellings and private access road was granted full planning permission on the 4 November 2014 under planning permission P/2008/1607.

In the Local Development Plan, Llanigon is designated as a small village. No development boundaries are given for small villages and there are no allocations. Open market housing will be restricted to small infill plots capable of accommodating a maximum of two dwellings or larger infill schemes capable of accommodating five dwellings maximum, provided no more than two are for open market.

The site is adjoining the Digeiddi Brook and at the date that planning permission was issued was partially within Zone C2 of the Development Advice Maps that support Technical Advice Note 15 – Development and Flood Risk (2005).

Condition 13 requires that before commencement of development “the footbridge across the Digeiddi Brook ... shall be removed to the written satisfaction of the Local Planning Authority”. The footbridge forms part of the public highway and is under the control of Powys County Council as highways authority. The condition has not been complied with and no agreement has been reached with Powys to remove the bridge. The full wording of condition 13 is given below and the reason for the condition on the decision notice is as follows: “To minimise flood risks in compliance with policy DC13 of the Powys Unitary Development Plan.”

Introduction

This is an application made under section 73 of the Town and Country Planning Act 1990. This is an application to continue with development without complying with conditions previously imposed, Welsh Government Circular 016/2014 describes the nature of such an application in paragraph 2.4, stating the following: “Section 73 of the Act provides for applications to be made for planning permission to develop land without complying with conditions previously imposed on a planning permission i.e. to vary or remove a condition. The local planning authority can grant such permission unconditionally or subject to different conditions, or they can refuse the application if they decide the original condition(s) should continue. The original planning permission will continue to subsist whatever the outcome of the application under section 73. Section 73 will not apply if the period in the previous condition limiting the duration within which the development could begin has now expired

without the development having begun. Paragraph 5.21 details how section 73 can be used to renew planning permissions.”

Determination of an application made under section 73 is limited to consideration of the merits of the conditions that the application seeks to remove or vary. This limits the consideration of this application to the merits of condition 13 only, this is an important consideration given the concerns and objections expressed by third parties which relate to a wider

The merits of the application – does condition 13 still serve a useful planning purpose?

Conditions should only be imposed where they comply with “The six tests” which are outlined in section 3.0 of WGC 016/2014. Conditions must meet the following requirements: necessary; relevant to planning; relevant to the development; enforceable; precise; and reasonable.

The condition appears to have been imposed as the bridge was seen as contributing to flooding in the locality and a condition to require its removal would improve the flood situation at the site and this is reflected in the reason given for the imposition of the condition. A Flood Risk Assessment (Revised Phase 1) (Updated March 2007) submitted with the original application states that the ‘footbridge just upstream of the culvert’s inlet, however, is a serious flood risk to the site as it is very likely to cause large objects to block the channel and form a damming effect that could lead to very high headwater levels that would result in flooding of the Phase 1 site.’ The assessment concludes that the footbridge over Digedi Brook and Llanthomas Lane and any other features that could cause blockage and damming pose a serious risk.

The case put forward by the applicant is that the condition is not necessary and serves no useful planning purpose. They also consider it to be imprecise in its wording as it does not, in their view, prevent development commencing.

The case that the condition is not necessary forms the main justification for this application. The applicant argues through a supporting flood modelling exercise and flood consequences assessment that the removal of the bridge will have no effect on the flooding situation at the site and that the condition serves no useful planning purpose. It is noted that third parties, including a professional hydrological consultant, have questioned the validity of the assessment and the strength of the conclusions in relation to the bridge. While noting these concerns it is considered that the local planning authority should be guided in these matters by the specialist advice available from Natural Resources Wales (NRW).

NRW initially offered no objection to the proposed development however following the submission of information from third parties were reconsulted on the application. NRW also advised that they had been issues with further internal guidance which led to them amending the advice given. NRW have stated that they require further information to consider whether the removal of the condition is acceptable. NRW state that the applicant would need to demonstrate that the conditions in the model can be met on site. They state that they have concerns with this as there are discrepancies between the information submitted. There has also been no hydrological modelling on aspects of the development.

In a further response NRW state that the applicant has not fully demonstrated the effects of a blockage and the potential consequences of flooding remains unknown and in the absence of this information they can provide no further guidance.

In light of NRW's representation it is considered that insufficient information has been submitted to demonstrate that condition 13 is no longer necessary. It is therefore considered that the application is contrary to policies DM5, DM6, DM13, Technical Advice Note 15 and Planning Policy Wales.

Lawful commencement of P/2008/1607

Any determination of this application will follow the ending of the period of time available for the commencement of planning permission P/2008/1607. Section 73(4) states that:

“This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.”

The position is that consent for this application would not be possible if planning permission P/2008/1607 has not been lawfully commenced.

This raises two questions:

- Were works undertaken at the site begun before the expiration of the planning permission?
- If so, are the works relied upon as constituting implementation lawful?

On the first point the applicant's agent has indicated that in his view development has in fact lawfully commenced at the site. There have been site clearance works undertaken with some excavations apparent on site. There has also been an indication from the agent that further works which unequivocally represent the beginning of development (e.g. material operations under section 55 of the Town and Country Planning Act 1990) will be undertaken prior to the lapsing of the planning permission on the 4 November and that these works will be documented. It has been requested that if this occurs the Authority is notified and the matter appropriately evidenced. It seems likely that works will be undertaken to implement planning permission prior to the expiration of the consent.

This leads onto the second point in relation to whether conditions would prevent a lawful commencement. There is no certificate of lawfulness, but it is considered that a judgement can be made on this in determining the application. A view needs to be taken on this by the local planning authority. A development may not be lawfully implemented where it breaches pre-commencement conditions, requiring actions prior to the commencement of development, Advice on this matter is given in WGC 016/2014, which states in paragraph 3.30:

“Where pre-commencement conditions have not been satisfied the implementation of planning permission may not be lawful. In order to make the development lawful, the conditions would have to be complied with or varied under section 73 of the 1990 Act. However, it has been held that this principle does not apply to all conditions but only those that go to the heart of the permission i.e. those that are fundamental to the development. Pre-commencement conditions should be carefully worded to be expressively prohibitive i.e. state that development must not commence until the condition has been complied with, since non-

compliance with such conditions can mean the permission has not been lawfully implemented.”

The December 2014 report to Committee provides an assessment of the relevant case law with regards to condition precedent. Legal opinion was also taken on this issue. In this report however, the Officer concluded that as NRW offered no objection to the removal of the condition it no longer served a proper planning purpose and as such would not be a condition crucial to the permission, or as stated within *Hart Aggregates*, one that goes to the heart of the permission.

However, clearly since the time of the original reports being written for Committee, NRW have amended their view based on additional information from third parties and their own internal advice. NRW no longer conclude that the condition is not necessary and have requested additional information to inform their opinion. No further information has been received and NRW maintain that there is insufficient information.

As such it is considered that the condition does is necessary and as the condition relates to flood risk for highly vulnerable development, it is considered that the condition does go to the heart of the consent and as such the development could not have been lawfully commenced.

Recommendation

In light of the above it is considered that insufficient information has been submitted to demonstrate that condition 13 no longer serves a proper planning purpose and as such the application is recommended for refusal.

Reason

1. Insufficient information has been submitted to demonstrate that condition 13 no longer serves a proper planning purpose contrary to policies DM5, DM6, DM13, Technical Advice Note 15 and Planning Policy Wales.

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