

## Council of the Isles of Scilly report

# **P/18/0842 Matthews Field, Church Road, St Martin's: Application to vary condition C6 of planning permission P/18/052/FUL (Extension and Alteration of 2 Matthews Field) to enable commencement of the development before the next bat roosting season in May 2019.**

---

<b>Date</b>	15 January 2019
-------------	-----------------

---

<b>DELEGATED</b>	Originally called in to Full Council but agreement reached on the outcome and Cllrs content with a delegated decision
------------------	---

---

<b>Part</b>	1
-------------	---

---

<b>Authors</b>	Dean Kinsella, Head of Planning and Sustainable Development (on behalf of The Council for the Isle of Scilly)
----------------	---

---

## **Recommendation**

---

That Members Approve the application with the following condition

- No development shall take place until a bat mitigation (EPS) licence has been obtained from Natural England. The applicant to provide the Planning Authority with copies of all relevant documentation and the results of any required further survey work as applicable. Works to be completed in strict compliance with the terms of any licence issued by Natural England. Planning Authority to be provided with a copy of all relevant bat mitigation provision and the results of any required post-development monitoring as applicable. All bat survey records arising from this project to be provided to the relevant Biological Recording Centre.
- 1.

REASON: To enhance biodiversity in accordance with Policy 1(e) of the adopted Isles of Scilly Local Plan 2005 and Policy OE2 of the Draft Isles of Scilly Local Plan 2015-2030.

---

1. The application site is located off Church Road, St Mary's. The application site comprises of a chalet style semi-detached house with a flat roofed extension to the rear, east elevation, with a pitched roof porch to the front, western elevation.
2. The dwelling is set facing east within the application which is at an angle to the surrounding curtilage which runs at a north-east to south west direction. There is a generous front garden onto Church Road and a track running to the rear. The application site is bounded by hedges to the south west and north east elevations and there are residential properties surrounding the site.
3. Members may recall the decision at 11<sup>th</sup> September Full Council, to approve a first floor extension to the rear of this property under planning application P/18/052/FUL. The decision was approved subject to the submission of a bat survey. Following the submission of a Preliminarily Ecological Appraisal report, which highlighted the moderate potential for bats, two further bat emergence surveys were recommended. As required by recent changes in legislation any pre-commencement conditions have to be agreed in writing by the Applicants'. As the applicant's did not object to the imposition of the pre-commencement condition to carry out further bat emergence surveys, condition 6 was attached to the decision to approve the rear extension, which was issued on 6<sup>th</sup> November 2018.
4. The current application seeks to specifically vary condition 6 of planning permission P/18/052/FUL from:

*No development shall take place until two further bat emergence surveys have been carried out during the bat active season (March to September inclusive) to ascertain the presence of bats and, in the event of bats being found, appropriate mitigation measures shall be carried out in accordance with details to be submitted and approved, in writing, by the Planning Authority.*

To:

*In light of the additional information submitted by the applicants in letter dated 12.11.18 and that the IOS Wildlife Trust Survey did not positively identify the presence of any bats during their Primary Ecological and Roost Assessment, the development, hereby permitted, be begun in accordance with the approved details as Condition 2 and that two further bat emergence surveys are carried out in the bat active season (March-September) to ascertain the presence of bats and in the event of bats being found , appropriate*

*mitigation measures shall be carried out in accordance with details to be submitted and approved, in writing, by the Planning Authority.*

## **Background and Relevant History**

5. The relevant history for this application site relates to planning permission P/18/052/FUL, which granted planning permission for the first floor extension to the east (rear) elevation of the property.
6. Following the granting of planning permission the applicant contacted the Planning Authority to raise concerns regarding the inclusion of a condition (C6) which in effect would prevent the implementation of the permission prior to May 2019. The applicant considered that the ecologist, which was appointed by themselves, were overly precautionary which has resulted in an unreasonable delay in implemented the planning permission.
7. Members are asked to note that other than applying to vary or remove a condition they also have the option of Appealing against the condition. No appeal has been made against the imposition of this condition.

## **Consultations and Representations**

8. The initial site notice was displayed in the vicinity of the application site for a period of 21 days. No consultation responses or representations have been received.

## **Primary Legislation and Planning Policy**

### **Primary Legislation**

#### **The Town and Country Planning Act 1990**

9. Section 70(2) of the Planning Act requires the Local Planning Authority to have regard to the development plan, so far as material to the application, and any other material considerations when determination planning applications.

#### **The Planning (Listed Buildings and Conservation Area) Act 1990**

10. The site is within a Conservation Area where there is a requirement to ensure that any development preserves or enhances the character or appearance of the area, as embodied in Section 72 of the Planning (Listed Buildings and Conservation Area) Act 1990.

#### **The Countryside and Rights of Way Act 2000**

11. The Isles of Scilly is also a designated Area of Outstanding Natural Beauty (AONB). The legal framework for such areas is provided by the Countryside and Rights of Way Act 2000. The Act places a statutory duty on the Local Authority

to have regard to the purpose of conserving and enhancing the natural beauty of the AONB when exercising or performing any functions affecting land within it.

**The Conservation of Habitats and Species Regulations 2010  
(Consolidation of Conservation (Natural Habitats, &c.) Regulations 1994)**

12. It is a legal duty of a Local Planning Authority, when determining a planning application for a development, to assess the impact on European Protected Species ("EPS"), such as bats, great crested newts, dormice or otters. A LPA failing to do so would be in breach of Regulation 3(4) of the 1994 Regulations, which requires all public bodies to have regard to the requirements of the Habitats Directive in the exercise of their functions.

**Planning Policy**

**National Planning Policy Framework (NPPF) 2018**

13. At the heart of the NPPF is a presumption in favour of sustainable development. The NPPF does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place. With respect to general development and the Strategic Policies it is considered that the Local Plan remains up to date and conforms to the requirements of the NPPF.
14. Chapter 15 of the NPPF relates to the conservation and enhancement of the natural environment. Paragraph 175 states that if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused; The conservation of wildlife and cultural heritage are important considerations.

**Isles of Scilly Local Plan 2005**

15. Policy 1 relates to environmental protection and seeks to permit development proposal only where they respect and protect the recognised quality of the island's natural, archaeological, historic and built environment. Proposals should (a) conserve or enhance the natural beauty, wildlife and cultural heritage of the Area of Outstanding Natural Beauty and protect the unspoilt character and good appearance of the heritage coast.

**Isles of Scilly Design Guide 2007**

16. The Isles of Scilly Design Guide is a Supplementary Planning Document (SPD) that forms an important part of the local Development Plan. This states that "It is important that the nature of the surrounding area is understood and reflected

in any development proposal. Without this awareness it is likely that a development will be unsympathetic”.

### **Consultation Draft Isles of Scilly Local Plan 2015-2030**

17. The emerging policies within the consultation draft of the Local Plan set out a clear range of policies designed to protect the landscape character (Policy OE1) as well as the natural (Policy OE2) and historic environment (Policy OE3).
18. Policy OE2 sets out that development which in combination or stand-alone have an adverse impact upon the integrity of an international or European nature conservation designation will need to satisfy the requirements of the Habitat Regulations. The policy continues to development which are likely to result in the loss, deterioration or harm to species or habitats will not be permitted unless the need or benefit outweigh the harm on the relevant biodiversity interest; it can be demonstrated that the development could not reasonably be located in an alternative location; measures to mitigate the harm can be secured through a planning condition.
19. A link to this consultation Draft Local Plan has been set out below. Clearly the consultation draft Local Plan has not been formally adopted by this Council, at the time of writing this report, and as such the policies it contains can only be given limited weight. However, it is important to ensure Members are fully aware of relevant policy requirements being proposed, moving forward.

### **Planning Assessment**

20. The single issue to be considered in relation to this application relates to the potential impact the development could have upon the local bat habitats and species and whether development should not commence until the appropriate bat surveys have been carried out?

### **Impact upon the nature conservation interests**

21. Relevant legislation includes the Wildlife and Countryside Act (1981) (as amended); the Countryside and Rights of Way Act, 2000; the Natural Environment and Rural Communities Act (NERC, 2006); and the Conservation of Habitats and Species Regulations (2010) and the EU Habitats Directive. Local planning authorities have a legal obligation to consider whether European protected species are likely to be affected by a proposed development.
22. The Natural Environment and Rural Communities Act 2006 requires that “Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.” Further, the Conservation of Habitats and Species Regulations 2010 (Habitats Regulations 2010), Regulation 9(5) provides that “a competent authority, in exercising any of their functions, must have regard to

the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions”. A Local Planning Authority is a competent authority for the purpose of these regulations and is exercising a function in deciding whether or not to grant a planning permission.

23. The original application (P/18/052/FUL) was submitted with an ecological survey carried out by the Isles of Scilly Wildlife Trust. The conclusion of the survey was that the dwelling has *“several potential roosting sites for a small number of bats, in particular crevice-dwelling bats (such as Common or Soprano Pipistrelle). To assess whether bat roosts in the building, two surveys are required; one dusk survey and one separate dawn survey should be carried out between mid-May and Mid-September. If bats are found to be roosting in the dwelling then the status of the roost(s) will need to be identified. Further surveys, will then be required to inform a mitigation Strategy which would need to be implemented.”* . The survey continued that in accordance with the Good Practice Guidelines (3rd edn) two further surveys are recommended (Dusk & Dawn surveys).
24. The application was subsequently approved and relevant condition added. The applicant then contacted the Planning Authority to raise concerns regarding the contents of the [Wildlife Trust] report stating that a number of the crevices highlighted with the ecological report would not be affected by the development, bats have not used the crevices highlighted or that no bats were identified during recent maintenance to the dwelling.
25. Since the submission of the application the applicant has sought further advice and second opinion from another ecologist and has also had the droppings, found within roof space at the time of the initial survey, sent off for DNA testing. The results of the DNA testing show that the droppings are likely to originate from a Common Pipistrelle bat. This would support the findings of the original ecological survey submitted by the applicant.
26. The second opinion sought by the applicant, and submitted to support this current application to vary condition 6, is from an experienced ecologists Focus Ecology. This report states that the condition of the building, coupled with the DNA analysis result and survey findings to date would indicate that 2 Matthews Field is very likely to support a day roost (or roosts) of common pipistrelle bats. The response continues that the proposed development is likely to give rise to damage/modification of a bat roost, but also that a number of potential roost features and access points would remain and wholesale destruction of a bat roost would be unlikely. The ecologist considers that in accordance with the various guidance, such as:

*“The number of visits you’ll need to make will depend on the local conditions and how much risk the proposed work and the location will be for bats.”*

And

**Collins**

*“When presence is established, this should trigger roost characterisation surveys unless sufficient information has already been collected to inform impact assessment and design of mitigation measures.”* (see Collins, 2016, p.52, 7.2.1).

27. That the need for a dusk and dawn survey are not required and that the condition should be varied to the following:

***No development shall take place until a bat mitigation (EPS) licence has been obtained from Natural England. The applicant to provide the Planning Authority with copies of all relevant documentation and the results of any required further survey work as applicable. Works to be completed in strict compliance with the terms of any licence issued by Natural England. Planning Authority to be provided with a copy of all relevant bat mitigation provision and the results of any required post-development monitoring as applicable. All bat survey records arising from this project to be provided to the relevant Biological Recording Centre.***

28. Having given careful consideration to all the information, the revised suggested condition does now appear to be acceptable. The use of the roof space has been established as accommodating common pipistrelle bats and while not confirmed, it is the ecologists opinion that the use of the roof is likely to be infrequent. The varied condition does still require the applicant the carry out necessary surveys to establish the appropriate mitigation before any works commence on site.
29. However, as the applicants’ ecologist acknowledge that a bat survey is likely to be required it is necessary to consider the Derogation test.

**Derogation tests**

30. As bat habitat may be lost or at least damaged and with further possibility of disturbance to bats it is considered necessary to assess the application against the Conservation of Habitats and Species Regulations 2010 and the derogation tests, in accordance with Regulation 53 pursuant to the likelihood of a Protected

Species licence being granted by Natural England, and taking into account the Guidance Note: “European Protected Species and the Planning Process Natural England’s Application of the ‘Three Tests’ to Licence Applications”.

31. The 3 tests are:

- Regulation 53(2)(e) states: a licence can be granted for the purposes 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”.
- Regulation 53(9)(a) states: the appropriate authority shall not grant a licence unless they are satisfied “that there is no satisfactory alternative”.
- Regulation 53(9)(b) states: the appropriate authority shall not grant a licence unless they are satisfied “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”.

32. With regards to the first test, it is considered that there is an overriding public interest in approving the variation of condition as this allows a member of the public to extend and improve the existing housing stock in the area which the Planning Authority consider that the impact upon the local bat population will be minimal.

33. In the case of test 2, it is often difficult to demonstrate that no satisfactory alternative exists for a site of this scale. In this particular case, given that the proposal relate to the applicants own property it is unlikely that there would be an alternative.

34. For test 3, having regard to the application and the survey work and assessment, officers are satisfied in this case that the development will not be detrimental to the maintenance of the population of European Protected Species potentially affected, at a favourable conservation status in their natural range.

35. The proposals would not give rise to unacceptable adverse impacts on the ecological and biodiversity interest of the site and will result in considerable enhancements. In accordance with Policy OE2 of the Draft Local Plan 2015-2030 and paragraph 175 of the Framework.

## **Financial implications**



36. None

### **Legal implications**

37. There is a requirement to determine planning applications within statutory timescales. In this case the application should be determined by 14th January 2019. After this date the applicants can appeal to the Planning Inspectorate against non-determination of this application.
38. Members will note that the determination of this application, if a decision is made at the 15<sup>th</sup> January 2019 Full Council meeting, will not be within this 8 week determination date.

### **Other implications**

39. Should Members be minded to remove condition 6 of P/18/051/FUL altogether which would, in effect, remove any consideration of bats at this property, this Authority is at risk of legal challenge by permitting development to proceed without full information with respect to bats, which are a statutorily protected species. Case law does highlight the problems such decision making can have for a Local Authority. Which can lead to extensive fines of up to £XX if the Authority have been found to have disregarded or not given sufficient consideration to the requirements with respect to protected species. Appendix A highlights recent case law for reference.
40. Due to the application being located in a sensitive environment, as denoted by the AONB, the application has been screened for environmental impacts through an Environmental Impact Assessment, Screening Opinion. This screening concluded that the development proposed does not constitute EIA development requiring an Environmental Statement.
41. The planning application engages certain human rights under the Human Rights Act 2008 (HRA). The HRA prohibits unlawful interference by public bodies with conventions rights. The term 'engage' simply means that human rights may be affected or relevant. The rights potentially engaged by this application, including the right to a fair trial and the right to respect for private and family life, are not considered to be unlawfully interfered with by this proposal.

### **Links**

Consultation Draft Local Plan 2015-2030:

<http://www.scilly.gov.uk/sites/default/files/document/planning/Draft%20Local%20Plan%202015%202030.pdf>

## Appendices

### Appendix A – Recent Case Law with respect to Protected Species

## Report Approval

<b>Senior Manager</b>	Craig Dryden Senior Manager Infrastructure & Planning	31/12/2018 [DATE]
	[Russell Ashman, Section 151 Officer]	
<b>Financial</b>	Only required if the report has financial implications.	[DATE]
<b>Legal</b>	Matt Stokes, Monitoring Officer	[DATE]