

REFERENCE NO - 11/1948		
APPLICATION PROPOSAL Part retrospective planning application for the retention of two lakes known as 'Bridges' and 'Puma' and works to create 3 additional lakes all for recreational fishing, erection of clubhouse, building and associated works and landscaping.		
ADDRESS Monk Lakes, Staplehurst Road, Marden, Maidstone, Kent, TN12 9BU		
WARD Marden & Yalding	PARISH COUNCIL Marden	APPLICANT Mr & Mrs Harrison
DECISION DUE DATE 23/02/20		PUBLICITY EXPIRY DATE 03/12/19

1.0 BACKGROUND & PROCEDURE

1.01 This application was heard at Planning Committee on 23rd January 2020. The application was recommended for approval and the Committee Report and Urgent Update Report are attached at the **Appendix**. Contrary to the recommendation of the Head of Planning and Development, the Committee voted to refuse the application for the following reasons:

Contrary to the recommendation of the Head of Planning and Development, the Committee agreed to refuse permission. In making this decision, Members had regard to the changes to the proposals since the Council's previous assessment in 2012 and, taking into account all considerations including the material consideration of the previous consent and changes to the application since then, considered that:

- 1. The overpowering height and proximity of the new formulation of the landscaping, particularly the western bund, causes less than substantial harm to the setting of the adjacent Grade II listed heritage asset which is not outweighed by an acceptable level of public benefits contrary to paragraph 196 of the NPPF;*
- 2. Because of the configuration of the land, in particular the height, there is a loss of residential amenity to the neighbouring buildings to the west of the site contrary to Policy DM4 of the Maidstone Borough Local Plan 2017; and*
- 3. The effect on the landscape is contrary to the guidance set out in the Landscape Character Assessment and, in light of the clear views from the footpath KM129, there is a clear harm in that the changed landscape can be clearly viewed from that footpath and other locations.*

1.02 Pursuant to paragraph 30.3 (a) of Part 3.1 of the Council's Constitution and paragraph 17 (a) of the Local Code of Conduct for Councillors and Officers Dealing with Planning Matters (Part 4.4 of the Constitution), planning officers advised the Committee that they did not consider each reason for refusal was sustainable and they could have significant cost implications

before a vote was taken. Therefore the decision of the Planning Committee was deferred to its next meeting.

1.03 Paragraph 17(b) outlines that at the next meeting, should the Committee vote to continue with a decision which it has been advised cannot be sustained at appeal and which could have significant cost implications for the Council's budget, Councillors will be requested to refer the consideration of the application to Part II of the meeting (private session), to offer Members further advice on the legal and financial implications, and the likelihood of success at appeal. If the Committee still decides to refuse the application/impose an unreasonable condition, the Head of Planning and Development will on the advice of the Legal Officer present and in consultation with the Chairman of the meeting, immediately after the vote has been taken, refer the application to the Policy and Resources Committee for determination.

2.0 ADVICE

2.01 Officers have sought Counsel's advice on the grounds of refusal and the risk of costs at appeal and have taken this into account in reaching the views set out below. Counsel's full advice is attached as an **Exempt Appendix** to this report.

2.02 In considering each ground of refusal it is important that Members are reminded of the following principles and matters:

- The need to give clear reasons in a case where Members disagree with an officer's recommendation to grant.
- Recent case law underlines the fact that where a committee has made a previous decision on a development and then makes a contrary decision on a similar scheme on the same site, the need to give very clear and cogent reasons for taking a different viewpoint is heightened. The public need to know why a consistent view is not being taken.
- Reasons for refusal need to be full, clear and precise and refer to all relevant Development Plan policies.
- The differences of the development from that assessed in 2012 consist of lower sloped banks in places around Lakes 2 and 3 by no more than 2m, and slightly higher slopes in places of no more than 1m. The height of the lake crests for Lakes 2 and 3 have not significantly changed but where they have, they would be marginally lower. The western banks begin to rise around 6m closer to the western boundary in some places. The corners of the lakes are at slightly different angles and the islands within the lakes would be different in shape and location.
- The baseline or assessment position must be on the basis of there being no development where Bridges and Puma Lakes, and Lakes 1-3 are located and so when the site was generally level. However, the access onto the A229, the access road and car park, and the raised lakes in the southeast part of the wider complex are all lawful and form part of the

baseline context for assessment. As do the substantial lawful raised lakes at Riverfield Fish Farm to the east.

Ground 1 (Harm to the Setting of Grade II Listed Hertsfield Barn)

1. The overpowering height and proximity of the new formulation of the landscaping, particularly the western bund, causes less than substantial harm to the setting of the adjacent Grade II listed heritage asset which is not outweighed by an acceptable level of public benefits contrary to paragraph 196 of the NPPF.

2.03 This reason for refusal refers to harm to the setting of the Grade II listed Hertsfield Barn which is approximately 30m west of the proposed raised lakes. The NPPF at paragraph 190 requires the local planning authority, when assessing an application to "*identify and assess the particular significance of any heritage asset that may be affected by the proposal (including by development affecting the setting of a heritage asset)*". Therefore if a development is to harm the setting of the Barn it is important to identify what is the harm to the 'significance' of the Barn.

2.04 As advised in the Committee Report at paragraph 7.48, the application site to the east of the listed Barn was previously generally level and largely open and this formed part of the historic setting of the Barn. There is direct inter-visibility between the Barn and the application site and if Members considered that this open and level land is important to the Barn's history and therefore its significance, on further consideration by officers and based on the legal advice, there is a reasonable evidence base from which to allege that the development would cause 'less than substantial harm' to the heritage significance of the Barn.

2.05 Paragraph 196 of the NPPF states that, "*where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal*". National Planning Practice Guidance states that, "*public benefits may follow from many developments and could be anything that delivers economic, social or environmental objectives.*" The development would provide economic benefits through employment at the site and to the rural economy through direct and indirect spend associated with the use. However, officers consider that the economic benefits and thus public benefits are not significant. The Environmental Statement also considers the proposals would bring environmental benefits to the wider landscape and through biodiversity improvements, and provide access to a leisure and recreation facility for the public. Biodiversity enhancements would be provided through the planting of new landscaping and the creation of waterbodies but again it is not considered that this would represent a significant public benefit.

2.06 In this regard, there may be an arguable case for taking the view that the 'less than substantial' harm is not outweighed by the public benefits flowing from the development.

2.07 Based on the above, should Members wish to continue with this ground of refusal it is advised that the following changes should be made:

- The reason for refusal should refer to the size, height and proximity of the proposed raised lakes, in particular the western banks of the lakes, as causing less than substantial harm to the setting and significance of the Grade II listed Hertsfield Barn.
- Reference to policies SP18 (Historic Environment) and DM4 (Development Affecting Heritage Assets) of the Local Plan being breached should be made in the reason for refusal.
- The reason for refusal should make clear that Members consider the open and level historic setting of the Grade II listed Barn forms an important part of its significance and setting.

2.08 In terms of providing clear and cogent reasons for taking a different viewpoint from the 2012 decision, as advised at paragraph 7.04 of the committee report and reiterated above, the changes since the 2012 decision are minor in nature and the development remains very similar. The changes consist of lower sloped banks in places around Lakes 2 and 3 by no more than 2m, and slightly higher slopes in places of no more than 1m. The height of the lake crests for Lakes 2 and 3 have not significantly changed but where they have, they would be marginally lower. The western banks begin to rise around 6m closer to the western boundary in some places. This is based on a land survey in September 2019 commissioned by the Council and so is accurate. It would therefore be difficult to rely on changes to the proposals as a reason for taking a different view.

2.09 Members could consider that since the last decision they have given enhanced attention to the duty under Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and the need to have special regard to the desirability of preserving the building or its setting. There was a particular emphasis on this duty and the weight it should be given after the case of *East Northamptonshire DC v Secretary of State for Communities and Local Government* (Barnwell Manor) [2014] EWCA Civ 137. This post-dates the 2012 Committee decision to grant planning permission. However, Members must still be able to rely upon a proportionate assessment of the significance of the listed Barn and the harm to its setting they consider arises.

Ground 2 (Harm to the Residential Amenity of Neighbouring Buildings)

2. Because of the configuration of the land, in particular the height, there is a loss of residential amenity to the neighbouring buildings to the west of the site contrary to policy DM4 of the Maidstone Borough Local Plan 2017.

2.10 This reason for refusal refers to the living conditions of the occupants of dwellings adjacent to the western boundary of the application site. The reason is not clear on what particular amenities are affected but based on the debate and discussion at the meeting it is assumed this relates to a loss

of outlook due to the height of the raised lakes and a loss of privacy from anglers at the top of the banks.

- 2.11 It remains the view of officers that there is not a reasonable case for maintaining that there is a loss of outlook caused by an undue sense of enclosure. This is on the basis that the proposed banks of the raised lakes are not so steep or so close to the curtilages/gardens or buildings of the affected properties to give a sense of enclosure. Should a costs application be made against this ground there is a high risk that it would be successful.
- 2.12 With regard to a loss of privacy and based on the legal advice, officers consider there may be a reasonable argument for loss of privacy to an unacceptable degree. Members would need to make clear that they consider potential or perceived overlooking from anglers from an elevated position would result in an unacceptable loss of privacy to the buildings and gardens of Hertsfield Barn, and numbers 3, 4, 5, and 6 Hertsfield Farm Cottages, resulting in harm to their amenity contrary to policy DM1 of the Local Plan (not policy DM4). Members would also need to have regard to the proposed landscaping along the west boundary including new trees. In time these trees would serve to break and even screen views from the top of the banks but this would take some time and they could not be secured in perpetuity.
- 2.13 However, it is difficult to give a strong reason why a different view is being taken since the 2012 decision. As stated above, it would be difficult to rely on changes to the proposals as a reason for taking a different view. On this basis and taking into account the legal advice, a refusal on the grounds of loss of privacy is a tenuous reason, and may be difficult to defend at appeal.

Ground 3 (Harm to the Landscape)

3 The effect on the landscape is contrary to the guidance set out in the Landscape Character Assessment and, in light of the clear views from the footpath KM129, there is a clear harm in that the changed landscape can be clearly viewed from that footpath and other locations.

- 2.14 The view of officers and based on the legal advice is that there is not a defensible basis for coming to a different conclusion on the impact on landscape character and visual amenity than Members came to in 2012. The proposed landform is not significantly different to that determined in 2012 and the High Court held that Members correctly compared the 2003 mainly flat landscape with what was proposed (so it was a sound decision in this respect).
- 2.15 As outlined at paragraph 7.12 of the committee report, since the 2012 decision the Council produced the 'Maidstone Landscape Capacity Study: Sensitivity Assessment' (LCA:SA) in 2015. However, this does not provide any materially new information over and above the Maidstone Landscape Character Assessment (2012) that was taken into account by Members in 2012.

- 2.16 The 2012 assessment covered the potential for harm from all major viewpoints being the A229, Hertsfield Lane, the public footpath north of the river and further up the Greensand slope. Therefore, it will be extremely difficult to find a convincing reason for taking a different view about character and visual amenity now and it is advised that this reason for refusal is not pursued. Should a costs application be made against this ground it is likely to be successful.
- 2.17 Notwithstanding the above, the ground of refusal relies solely on the Maidstone Landscape Character Assessment (2012). It refers to some conflict with this guidance (because the development would introduce further raised lakes) and does not specifically explain why or what part of the proposed development is harmful to the character and appearance of the area as required by policy SP17 of the Local Plan.

3.0 CONCLUSION

- 3.01 With each reason for refusal it is very difficult to give a strong and convincing reason why a different view is now taken on the impacts of the scheme on heritage, landscape and residential amenity given the Council's decision to the contrary in 2012. In the case of heritage it is advised that there is a reasonable evidence base to allege harm provided Members demonstrate that they consider the open and level historic setting of the Grade II listed Barn forms an important part of its significance and setting and enhanced attention to the duty under Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 could be cited. In terms of privacy there would arguably be an unacceptable loss of privacy but it is a tenuous reason. In the case of landscape, it is advised that there is no good reason at all to differ from 2012. In the case of outlook, it is advised that this is not a reasonable ground for refusal.
- 3.02 It is difficult to advise the precise level of costs, however, it is expected that any appeal would be carried out under the Public Inquiry procedure where legal representation and expert witnesses would be required by all parties. The amount of any adverse costs award is likely to be significant and this excludes the Council's usual liability to bear its own costs associated with defending any appeal.