

# Public Document Pack

**Southend-on-Sea Borough Council**

**Legal & Democratic Services**

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22 January 2020

Dear Councillor

## **DEVELOPMENT CONTROL COMMITTEE - WEDNESDAY, 15TH JANUARY, 2020**

Please find enclosed, a copy of the supplementary report considered at the meeting of the Development Control Committee held on Wednesday, 15th January, 2020, which was unavailable when the agenda was printed.

Tim Row  
Principal Democratic Services Officer

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**SUPPLEMENTARY INFORMATION**

Page 5

18/02302/BC4M

**Seaway Car Park, Seaway, Southend-on-Sea**

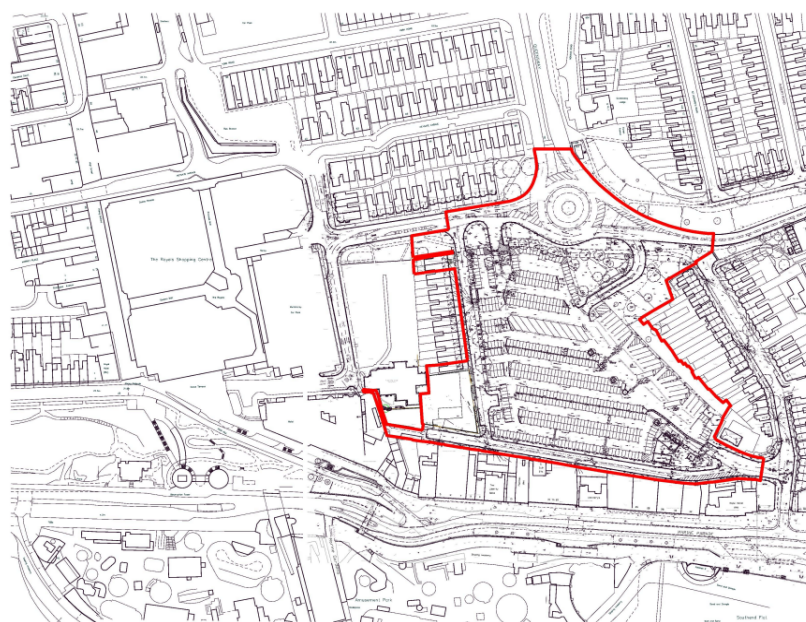
**Covering Report**

On 9<sup>th</sup> January 2020, the Secretary of State made a decision as requested by RPS for a Screening Direction under Regulation 5 of the Town & Country Planning (Environmental Impact Assessment) Regulations 2017. The Secretary of State has confirmed that the development is **not** 'EIA development'

*"In the opinion of the Secretary of State and having taken into account the selection criteria in Schedule 3 to the 2017 Regulations, the proposal is **not likely to have significant effects on the environment...**Accordingly, in exercise of the powers conferred on him by regulation 5(3) of the 2017 Regulations the Secretary of State hereby directs that the proposed development is **not 'EIA development'** within the meaning of the 2017 Regulations."*

**Page 11 – Site Plan**

There is a slight discrepancy in the site location plan included within the agenda. For clarity, the site location plan submitted with the application is included below.



## **2.0 The Proposal**

Correction: Paragraph 2.1: Please note that the habitats Regulations Screening Report was not submitted until the September update.

There is a typographical error in the fourth bullet point of paragraph 2.75 on page 30 and paragraph 2.28 on page 25. As per condition 19, it is proposed to restrict service vehicles associated with the development along Herbert Grove between the hours of 19:00 to 07:00 Monday to Friday, 13:00 to 08:00 Saturdays and at no times Sundays and Bank or Public Holidays.

## **3.0 Consultation**

Since the publication of the agenda, 76 standard letters of support to the application have been sent in by the applicant's agent. **Officer Comment:** officers consider the weight that can be placed on the letters of support is limited by their receipt directly from the applicant.

## **6.0 Planning Considerations**

### **2) Traffic and Transport**

Paragraph 6.39 has a typographical error. The third sentence in this paragraph should read *'The Council has granted a temporary planning permission and the Council is committed to retaining this facility for at least one summer season after completion of Seaway.'*

### **3) Parking**

Paragraph 6.70 includes a typographical error. As per the letter from Head of Corporate Property and Assets Management (see Appendix 6), the Gas Works site currently provides 169 parking spaces and 22 coach bays (rather than 156 parking spaces as referenced in this paragraph).

### **6) Design**

There is a typographical error at paragraph 6.160. The Historic England comments are included in more detail in paragraphs 6.195 to 6.196 rather than 6.193-6.194.

### **10) Ecology**

Following the submission of a number of objections from RPS regarding ecology, chiefly the impact of the proposal on bats, with particular concern raised regarding building 7, the Council has commissioned an independent Ecologist to review the ecology related submissions, responses from statutory consultees and third party representations relating to ecology. A full copy of the independent ecology review is included in Appendix 1 and a summary is provided below.

The Council appointed Adrian Meurer, the Director of Ecology at HDA, an ecological, landscape and environmental planning practice. Adrian Meurer has worked as a professional ecologist for over 15 years and is a full member of CIEEM (Chartered Institute of Ecology and Environmental Management). He specialises in the survey and assessment of the effects of development on protected species, habitats and designated sites, including Special Protection Areas (SPAs), Special Areas of Conservation (SACs) and Sites of Special Scientific Interest (SSSIs).

In terms of the Habitats Regulations Assessment, Adrian Meurer concludes '*I consider that the Habitats Regulations Assessment prepared on behalf of the applicant is correct in concluding that the proposed development would not be expected to result in any likely significant effect on internationally designated sites, either alone or in combination, and therefore an appropriate assessment is not required...*'

In terms of birds, it is stated '*As the presence of low numbers of common and widespread nesting birds cannot be ruled out, it is recommended that a condition of planning consent be included which requires that demolition of buildings and the removal of trees and shrubs avoids the bird breeding season (generally taken as March to August inclusive)...In the event that clearance during this period is unavoidable then a search of nesting birds should be undertaken by a suitably qualified ecologist immediately prior to clearance. In the event that breeding birds are discovered, sufficient habitat will need to be retained to ensure birds are not disturbed until nesting activity has been completed and the nest vacated...it is recommended that a condition of planning consent is attached to any planning permission granted requiring agreement of a scheme of bird box provision within the completed scheme.*'

In terms of bats, HDA note that no roosting bats have been recorded, concluding '*it is considered that the suite of Phase 1 and Phase 2 bat survey work carried out by Applied Ecology in support of the application is proportionate to the limited risk of roosting bats being present at site. I am subsequently satisfied that reasonable effort has been made at this time to demonstrate that the proposed development would not be expected to adversely affect the favourable conservation status of the local bat population.*'

With regard to building 7, it is stated '*HDA has visited the site and reviewed the condition of B7 and whilst we agree that the building is highly unlikely to support roosting bats, the building does support some features suitable for roosting bats albeit compromised by the building's setting. In view of this, although I consider that sufficient survey has been undertaken in support of the application to demonstrate the likely absence of roosting bats at this current time, and therefore the application accords with planning guidance in this regard, as a precautionary measure I recommended that the Phase 1 bat*

*inspection is updated prior to demolition and that, assuming the condition of the building has not materially changed, a single-visit Phase 2 emergence survey is also undertaken unless otherwise agreed with the planning authority. This could be subject to a condition of planning consent. Notwithstanding the current limited value of the site for roosting bats, it is recommended that a condition of planning consent is attached to any planning permission granted requiring agreement of a scheme of bat box provision within the completed scheme.'*

**Officer comment:**

Condition 42 requires details of the number, location and specifications of bat and bird boxes to be submitted to the local planning authority and condition 43 requires all clearance, conversion and demolition work in association with the approved scheme to be carried out outside the bird nesting season, but where it is necessary for works to commence in the nesting season, then a pre-commencement inspection of the vegetation and buildings for active bird nests shall be carried out by a suitably qualified ecologist.

The Local Planning Authority has already recommended a precautionary condition (condition 44) in relation to bats, however, following the advice received from HDA it is recommended that this condition is amended as follows:

Condition 44

~~Notwithstanding the details submitted and otherwise hereby approved, no demolition hereby approved shall take place in the bat breeding season unless and until all buildings to be demolished have been first checked by a suitably qualified ecologist and it has been demonstrated that there are no signs of any bat roosting activity in the buildings to be demolished.~~

Notwithstanding the details submitted and otherwise hereby approved, no demolition hereby approved shall take place unless and until all buildings to be demolished have been first checked by a suitably qualified ecologist and it has been demonstrated that there are still no signs of any bat roosting activity in the buildings to be demolished. In the event that evidence of bat roosting activity is found no further works that might otherwise affect roosting bats shall take place until a suitable scheme of mitigation for impacts on bats has been submitted to the local planning authority and approved in writing. The scheme shall only be progressed in full accordance with the scheme of mitigation as approved under this condition.

It should be noted that HDA are satisfied that this revised condition is adequate.

An additional representation has been received from RPS in response to the Council's independent ecology review. A copy of the RPS representation is included in Appendix 2. RPS comment that the review indicates that a Phase 2 survey should be undertaken and refers to Circular 06/05 and the PPG, commenting that this guidance states that ecological surveys should only be left to coverage under planning conditions in exceptional circumstances. RPS comment that there are no exceptional circumstances in this case.

**Officer Comment:** HDA have confirmed that the proposal is acceptable in respect of bats with the conditions recommended. Officers agree with this conclusion. Officers and HDA consider that there are no bat related grounds for refusal or deferral of the application.

### **13) Policy CS1.2**

The commentary at row (b) states *'The opportunity to improve the footway that passes the church has not been taken and this is unfortunate...'* However, it is noted that the proposals do include enhanced landscaping to part of this route.

## **7.0 Other Issues**

### **Community Infrastructure Levy Charging Schedule (CIL) (2015)**

Since the publication of the agenda the 2020 table of CIL rates has been published. As such, the CIL rate for this development has increased from £12.23 per square metre to £12.85 per square metre. As such it is calculated that the CIL charge for this development would now be £184,037.70 (subject to confirmation).

## **8.0 Planning Obligations and Conditions**

For clarity, pages 124-126 and Appendix 8 refers to Plan 739\_PL\_001\_P07\_General Arrangement Plan – this plan is subject to confirmation and the latest plan we have is S019/P3072/pl1.

## **Other Matters**

An extension of time to determine the application has been agreed until 15<sup>th</sup> January 2020.

## **Appendix 1 – HAD Ecology Review**

**PROJECT: Seaway Car Park, Southend-on-sea**

**CLIENT: Southend-on-Sea Borough Council**

**HDA Ref: 951.1**

**Date: 10<sup>th</sup> January 2020**

### **CONSIDERATION OF ECOLOGY RELATED SUBMISSIONS IN RELATION TO THE PROPOSED DEVELOPMENT OF LAND AT SEAWAY CAR PARK, SOUTHEND-ON-SEA, ESSEX (SBC Ref: 18/02302/BC4M)**

#### **1 INTRODUCTION**

- 1.1 My name is Adrian Meurer and I am the Director of Ecology at HDA; an ecological, landscape and environmental planning practice working across the UK. I have worked as a professional ecologist for over fifteen years and I am a full member of CIEEM. I specialise in the survey and assessment of the effects of development on protected species, habitats and designated sites, including Special Protection Areas (SPAs), Special Areas of Conservation (SACs) and Sites of Special Scientific Interest (SSSIs).
- 1.2 I have been appointed by Southend-on-Sea Borough Council (SBC) to review ecology-related submissions in support of the application for the proposed redevelopment of the Seaway Car Park site (SBC Ref: 18/02302/BC4M), including responses from statutory consultees and third parties.

#### **2 DESIGNATED AREAS**

- 2.1 The updated Preliminary Ecological Appraisal submitted in support of the application (Applied Ecology, November 2019) identifies that no statutory or non-statutory designations pertain to the site or adjacent land.
- 2.2 The Benfleet and Southend Marshes SPA and Ramsar is located 100m to the south of the site and a further two SPAs, namely the Outer Thames Estuary SPA and the Foulness [mid-Essex Coast Phase 5] SPA, are also located within the identified 10km potential zone of influence of the proposed development.



2.3 A bespoke Habitat Regulations Assessment of the scheme has subsequently been prepared by the applicant (Applied Ecology, July 2019). This identifies that the proposed development would not be expected to result in any likely significant effect on these SPAs, either alone or in combination with other projects, in view of (1) the scale, nature and location of the proposed development, (2) the current ecological character of the proposed development area, (3) limited potential for water sports, particularly at times when birds are most susceptible to disturbance, (4) consideration of restrictions on access and/ or (5) the habitat requirements of the bird species for which the SPAs are designated.

2.4 I consider that the Habitats Regulations Assessment prepared on behalf of the applicant is correct in concluding that the proposed development would not be expected to result in any likely significant effect on internationally designated sites, either alone or in combination, and therefore an appropriate assessment is not required in support of the application. This is supported by the June 2016 Southend-on-Sea *Habitat Regulations Assessment – Screening Report (draft)* which assessed the site alongside other allocations in the Borough in addition to Natural England’s consultation responses relating to the application<sup>1</sup> which state that “*Based on the plans submitted, Natural England considers that the proposed development will not have likely significant effects on statutorily protected sites and has no objection to the proposed development*” before going on to state that “*... we advise you to record your decision that a likely significant effect can be ruled out.*”

### **3 ON-SITE HABITATS**

3.1 The updated Preliminary Ecological Appraisal submitted in support of the application (Applied Ecology, November 2019) identifies that the site is dominated by habitats of limited ecological interest being dominated by hardstanding with limited areas of amenity, semi-improved grassland and ephemeral/ short perennial vegetation. Scattered trees, scrub and shrubs are also present.

3.2 A biodiversity impact assessment calculation of the development scheme has been carried out. This identifies that the proposed scheme would deliver a +0.09 gain in biodiversity units. This reflects a 5.5% increase in the current calculated biodiversity value of the site and therefore indicates that the proposed development would result in no net loss of biodiversity. Additional

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<sup>1</sup> Natural England consultation responses dated 22<sup>nd</sup> January 2019, 26<sup>th</sup> September 2019 and 17<sup>th</sup> October 2019. Text cited is taken from the 17<sup>th</sup> October 2019 response.

measures to enhance the ecological value of the site through provision of bat and bird boxes within the completed scheme are described below.

#### **4 PROTECTED AND NOTABLE SPECIES**

- 4.1 The updated Preliminary Ecological Appraisal submitted in support of the application (Applied Ecology, November 2019) identifies that no suitable habitat for reptiles is present and that no evidence of Badger was recorded during the field survey. Potential for the presence of breeding birds to be present and buildings with potential to support roosting bats were however noted. This is discussed further below.

##### *Birds*

- 4.2 The site is considered unlikely to support an important assemblage of breeding birds and no further survey for this group is recommended. Notwithstanding this, the Preliminary Ecological Appraisal notes the likely presence of common and widespread bird species including Robin, Blue Tit and Woodpigeon.
- 4.3 As the presence of low numbers of common and widespread nesting birds cannot be ruled out, it is recommended that a condition of planning consent be included which requires that demolition of buildings and the removal of trees and shrubs avoids the bird breeding season (generally taken as March to August inclusive), as wild birds, their nests and eggs are protected under the 1981 Wildlife and Countryside Act (as amended). In the event that clearance during this period is unavoidable then a search for nesting birds should be undertaken by a suitably qualified ecologist immediately prior to clearance. In the event that breeding birds are discovered, sufficient habitat will need to be retained to ensure birds are not disturbed until nesting activity has been completed and the nest vacated.
- 4.4 Notwithstanding the current limited interest of the site for breeding birds, it is recommended that a condition of planning consent is attached to any planning permission granted requiring agreement of a scheme of bird box provision within the completed scheme.

##### *Bats*

- 4.5 Phase 1 Bat Roost Scoping Surveys and Phase 2 Bat Emergence Surveys have been carried out in support of the planning application. No roosting bats have been recorded and it is considered

that the suite of Phase 1 and Phase 2 bat survey work carried out by Applied Ecology in support of the application is proportionate to the limited risk of roosting bats being present at the site. I am subsequently satisfied that reasonable effort has been made at this time to demonstrate that the proposed development would not be expected to adversely affect the favourable conservation status of the local bat population.

- 4.6 Building 7, located in the south east of the site, has become the focus of third-party objections to the scheme which cite deviation away from the approach to survey set out in the Bat Conservation Trust's 2016 '*Bat Surveys for Professional Ecologists: Good Practice Guidelines*'. It should be noted that the BCT 2016 document provides guidelines for the approach to survey, indeed at para 1.1.3 the document states "*The guidelines do not aim to either override or replace knowledge and experience. It is accepted that departures from the guidelines (e.g. either decreasing or increasing the number of surveys carried out or using alternative methods) are often appropriate. However, in this scenario an ecologist should provide documentary evidence of (a) their expertise in making this judgement and (b) the ecological rationale behind the judgement.*'
- 4.7 Applied Ecology have surveyed Building 7 on a number of occasions including, most recently, a detailed inspection of the building by Dr Duncan Painter CEnv MCIEEM, a Director at Applied Ecology who holds 3 Natural England bat licences. The first survey carried out of this building identified it as having 'low' potential to support roosting bats but the building was subsequently downgraded to having 'negligible' potential in view of the surrounding habitats and very low number of bats recorded during Phase 2 emergence surveys of buildings elsewhere within the site. Furthermore, the subsequent detailed internal and external inspection of the building identified no evidence of the building supporting roosting bats, either at the time of survey or previously.
- 4.8 Notwithstanding the outcome of the Applied Ecology surveys, HDA has visited the site and reviewed the condition of B7 and whilst we agree that the building is highly unlikely to support roosting bats, the building does support some features suitable for roosting bats albeit compromised by the building's setting. In view of this, although I consider that sufficient survey has been undertaken in support of the application to demonstrate the likely absence of roosting bats at this current time, and therefore the application accords with planning guidance in this regard, as a precautionary measure I recommend that the Phase 1 bat inspection is updated prior to demolition and that, assuming the condition of the building has not materially changed,

a single-visit Phase 2 emergence survey is also undertaken unless otherwise agreed with the planning authority. This could be subject of a condition of planning consent<sup>2</sup>.

- 4.9 Notwithstanding the current limited value of the site for roosting bats, it is recommended that a condition of planning consent is attached to any planning permission granted requiring agreement of a scheme of bat box provision within the completed scheme.

**Adrian Meurer BSc (Hons) MCIEEM**

**Director of Ecology, HDA**

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<sup>2</sup> As is normal practice, updated bat survey work may need to be extended to other buildings within the site pending the timeframe between any planning permission being granted and construction commencing.

## **Appendix 2 – RPS representation received 14/1/2020**

Dear Charlotte,

I have seen the attached independent Ecology report that was uploaded today to the application website. I note its conclusions set out in Paragraph 4.8 that Phase 2 bat emergence surveys should be undertaken. It states: *“assuming the condition of the building has not materially changes, a single-visit Phase 2 emergence survey is also undertaken unless otherwise agreed with the planning authority.”* This is effectively the same conclusions as we have drawn, in that additional surveys **are clearly required**, as otherwise they would not have stated a Phase 2 survey should be undertaken.

As regards the use of a conditions to require the provision of Phase 2 survey results, I re-draw your attention to ‘Circular 06/05: BIODIVERSITY AND GEOLOGICAL CONSERVATION – STATUTORY OBLIGATIONS AND THEIR IMPACT WITHIN THE PLANNING SYSTEM’. It states at Paragraph 99:

*“It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision. The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted. However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development. Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, **before the permission is granted.** In appropriate circumstances the permission may also impose a condition preventing the development from proceeding without the prior acquisition of a licence under the procedure set out in section C below.”*

The PPG re-iterates this position, as I have previously provided to you below. Your independent advisor’s report effectively confirms that there are no exceptional circumstances that exist by way of their report. I do not need to remind you that any decision of the Council can be subject to judicial review, and the independent ecologist’s findings will carry weight alongside RPS’s findings.

I trust therefore that you will provide a revised recommendation for tomorrow’s meeting, indicating to Councillors that the application should be refused (or at least deferred) on lack of ecology information grounds.

I look forward to tomorrow’s meeting.

Kind regards,

Nayan

**Nayan Gandhi**

Principal Planner

RPS | Consulting UK & Ireland

T +44 1235 821 888

E [nayan.gandhi@rpsgroup.com](mailto:nayan.gandhi@rpsgroup.com)

**From:** Nayan Gandhi  
**Sent:** 11 December 2019 14:26  
**To:** Charlotte White < >  
**Cc:** Nick Laister < >; [alisongriffin](#); [andrewlewis](#); [petergeraghty](#)  
**Subject:** RE: Application Ref: 18/02302/BC4M - Objections on behalf of The Stockvale Group  
**Importance:** High

Dear Charlotte,

We have become aware of the additional survey of Building 7, submitted by the Applicant's team on 25<sup>th</sup> November 2019 (attached for reference). This represents the submission of substantial information (it amounts to a new 'bat survey'), and on which you should have engaged in further consultations as the presence/absence of protected species represents a material consideration. There is precedent, as you had carried out further consultations following receipt of other substantial reports (the Air Quality Memorandum). It is unclear why you did not re-consult on this information upon receipt and requested a deferral of Committee (which occurred in any event for other reasons, as you know). You will be well aware that failure to consult on key pieces of (new) information will increase the risk of a successful legal challenge against any positive decision on procedural grounds. In this regard, when you do consult on this information, the Essex Bat Group and Essex Wildlife Trust (both of whom are copied to this email) should be asked for comment to ensure site-specific advice is received from local conservation trusts (as you know, Natural England's advice is generally generic and not site or proposal specific). This would also mean it would be wholly inappropriate to attempt to determine the application at the 8<sup>th</sup> January Committee meeting without undertaking a new consultation, for the avoidance of doubt, but I also note that the EIA Screening Direction request is still outstanding.

Before you engage in further consultations, I wish to draw to your attention that there are further shortcomings with the report, and therefore it would be inappropriate to rely on this information to satisfactorily confirm that there are no bats roosting in the building and discharge your statutory responsibilities towards protected species. Further information – in the form of bat emergence surveys – remains required and only after these are provided should a consultation be undertaken. Unless of course the Council refuses the application due to a lack of information, which is warranted given how long the Applicant has had to supply emergence survey data.

Our key concerns with the latest report:

- The author of the report was the reviewer of all of the applicant team's ecology reports, including the original November 2018 PEA which indicated that the building had 'low' potential for a bat roost and re-iterated in the July 2019 PEA. As the signing authority within the Applicant's team, the person was satisfied that bat emergence surveys would be required for the building based on the evidence provided at the time. It is noted that the original survey of the building also used endoscopes as part of the survey when drawing the conclusion that 'low' roost potential existed. There is nothing to suggest that the other surveyors (including the RPS surveyor) were any less qualified to draw their conclusions regarding the bat roost potential of the building. As such, it is unclear why the author would deviate from the precautionary approach that was established in the PEA November 2018.

- The report indicates that the building and area are largely devoid of well-connected or extensive seminatural habitats. This is factually incorrect. The site is linked way of the rear gardens of Hartington Road to vegetation along the Queensway, and which leads to more attractive bat foraging vegetation located along the east-west railway route. This is completely ignored by the report, although this is clearly set out in RPS's 14<sup>th</sup> November note and other evidence presented to you. Indeed, applying the Applicant's comments, it appears that the author of this report would have also drawn the same conclusion as regards the potential of the church graveyard for bat roosts and foraging (i.e. that it too would also not support use by bats because it too would be 'isolated' given the extent of unsupportive development around it). However, the Applicant's team is well aware that foraging occurs at the graveyard (they actively recorded 2x *Common Pipistrelles* bats during their survey). As such, it can be concluded that the 'Context' section of the report is not sufficiently accurate and detailed, and omits relevant facts, to enable you to consider it to be appropriate.
- The presence of suitable habitats surrounding the building and the presence of foraging bats in the area are facts excluded from the Applicant's team arguments put forward in their email dated 17<sup>th</sup> October 2019, and which are repeated in this report (see attached, which was obtained via FOI although it is clear it should have been published to the application website as critical information). I note that the commentary in the email also fails to recognise that the Principal Ecologist who carried out the May 2019 (i.e. the in-season survey) is not licenced to use endoscopes as part of a roost survey because of licence restrictions, but the person who carried out the October 2018 survey was (and this was approved by the author of this report). The may survey reports, which was omitted from the July 2019 PEA, can be considered to be limited as compared with those in undertaken in October 2018. This fact completely undermines the conclusions of that email, as we have previously noted, and the current report.
- The report indicates that the roof void was too narrow to support bats. However, the Applicant's team would be well aware that a lack of space only limits use by certain types of bats. As mentioned above, *Common Pipistrelles* were found in the area and these bats will roost in small crevices and cavities, and will crawl into entrances. Again, it is simply not accurate to draw a blanket conclusion when factual data collected by the Applicant's team clearly indicates the types of bats that are known to use such narrow spaces forage in the area. We come to this again below.
- In the final sentence of the third paragraph of Page 2, it states that the view across the void was limited ("the view that could be achieved"). The limited nature of the view is clearly shown in Photo 2 of the report. The Applicant's team cannot state with certainty that the whole of the void is not suitable as they clearly could not inspect the space in its entirety, noting the type of species that are found within the area. In this regard, I draw reference back to the Bat Conservation Trust's (BCT) guidance, which is clear at Paragraph 5.2.9 that information as presented "*must estimate the likelihood of bats being present at other times of the year. It there is a reasonable likelihood that bat roosts could be present, and particularly if there are areas that are inaccessible for survey, then further surveys may be needed.*" Part of the void has not been surveyed, and the Applicant's team, of which the author was a part, had already stated that bat emergence surveys must be undertaken. They have not surveyed the whole of the relevant space during the optimum period to confirm bats are or could not be present.
- The author indicates that the roof void was dry and cobwebby in places, with no signs of water ingress. The author effectively confirms that the space provides suitable conditions internally for roosting bats, such as *Common Pipistrelles*. The cobwebs are meaningless, as these can be established within hours, and there are many examples where roosting takes place in and around spiderwebs.

- The PPG regarding Protected Species is clear that: *“You only need to ask an application to carry out a survey if it’s likely that protected species are: present on or near the proposed site, such as protected bats.”* I refer to the fact that *Common Pipistrelles* are found near to the site. The timing of this detailed inspection (which was limited due to there being inaccessible areas) raises questions regarding whether the information can be relied on. Indeed, the original PEA 2018 included a survey in October 2018, which is much closer to the optimum period than the current report.

RPS’s survey on 14<sup>th</sup> November 2019 was not undertaken at a time when bats would be expected to be seen; we acknowledge this point and to suggest otherwise is wholly misleading by the Applicant’s team. It is simply not RPS’s responsibility to conduct a full and appropriate survey the building. That responsibility remains with the Applicant’s team. The reality is that the Applicant has failed to follow recognised guidance and have conducted ecology surveys in a very haphazard way, with three revisions of the PEA, one key email and a further bat report having been submitted. You will have seen in my previous emails that demonstrate how far the Applicant’s team has deviated from guidance, and many of these deviations remain with the latest report. For example, the Applicant’s team will be well aware of the BCT’s guidance in Paragraph 5.2.1, which states: *“In many situations it is not possible to inspect all locations where bats may be present and therefore **an absence of bat evidence does not equate to evidence of bat absence.**”* Their conclusions are clearly contrary to that unambiguous position in the BCT Guidance. To go back to our original position, we are simply requesting that the Council following standard practice regarding the surveys (because you do not have reliable information or ability to check the information that enables you to deviate). More appropriately, you should simply **refuse the application if the Applicant does not want to provide them** based on a lack of information (there are other reasons to refuse the application, as you know).

The fact is that the report does not change the risk to the Council that a legal challenge will likely be successful without the provision of emergence surveys data. Our conclusion is further supported by the fact that you have no suitably qualified (independent) wildlife advisor at the Council who can verify the Applicant’s information and approach are sufficiently accurate and according to guidance, and you have not consulted on the latest report or the 17<sup>th</sup> October 2019 email to confirm the accuracy of the approach (which we note above, raises significant concerns). It remains unclear how the Council can be certain that the submitted information will enable you to satisfactorily discharge your duties with respect to the 3 legal tests regarding licensing.

We still object to the scheme on ecology grounds, notwithstanding this report. Our client will ensure that the Council complies with all statutory responsibilities towards protected species before making any determination of the application. Indeed, as you know, there were previous lapses with regards to the removal of the Rossi Ice Factory, so it becomes more imperative that guidance is adhered to with this proposal because bats are present in and around the Seaway site and the building’s potential remains classified as ‘low’.

I would be grateful if you kindly confirm receipt of this email.

Kind regards,



Nayan

**Nayan Gandhi**

Principal Planner

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**From:** Nayan Gandhi

**Sent:** 25 November 2019 17:10

**To:** 'Charlotte White' <>

**Cc:** Nick Laister <>; 'alisongriffin <[alisongriffin](mailto:alisongriffin)>'; 'andrewlewis <[andrewlewis](mailto:andrewlewis)>'; 'petergeraghty <[petergeraghty](mailto:petergeraghty)>

**Subject:** RE: Application Ref: 18/02302/BC4M - Objections on behalf of The Stockvale Group

Dear Charlotte,

You may be aware that we received a cache of correspondence between SBC and its advising partners and the applicant earlier today following a FOI request. I attach an email from the applicant's team dated 17<sup>th</sup> October 2019 which provides a response to our email of 10<sup>th</sup> October in relation to missing bat emergence surveys (see below). It appears that their email may have formed the basis of Paragraph 6.224 of the Committee report, along with the PEAOct19.

The email contains a serious error which leads to the wrong conclusion, and SBC's reliance on it would therefore be incorrect. The email states that no bat activity was recorded during the after dark survey of the buildings to the west and so the value of the block (Building 7) was downgraded from low to negligible. This is an incorrect statement. I refer you to Paragraph 2.16 of the PEA July 2019 version, which states: *"Two foraging common pipistrelle bats were heard by surveyors and record foraging in the church yard and back gardens off Herbert Grove from 21.36 (30 minutes after sunset)." A similar statement exists at Paragraph 3.24 of the PEAOct19 (extract attached).*

As you will know, there are a number of buildings along Herbert Grove that fall within the Site (including the ones that were being surveyed on the night the bats were recorded). It is misleading to categorically state that the Site was devoid of bat activity when actual reporting states otherwise. It undermines the evidence (or lack thereof), on which the Council may have relied to draw its conclusion on this matter. In any event, we note that that the applicant is drawing conclusions about bat activity over the entire the Seaway site, despite only surveying one area of it (the far west).

As for the experience, I note that the October 2018 surveyor held a higher level licence, and their results are confirmed by RPS's ecologist, as you will have seen.

RPS also raises concerns that SBC did not undertake a preliminary bat roost survey of the former Rossi Ice Cream factory before it was demolished, according to FOI records. However, It is noted that the applicant's team have identified the presence of bats in and around the Seaway car park, so it appears to be an error that the Council did not undertake roost surveys before the Rossi building was demolished. As set out in the BCT Guidance, damage or destruction of a roost is an offence as identified in the Habitats Regulations, and could be committed accidentally. Whilst the Rossi building is now long lost, to avoid future mistakes regarding accidental or otherwise damage to roosts, it is

imperative that SBC refuse the current application as there are no bat emergence surveys for Building 7, the building has been classified as 'low' and the justification provided by the applicant to deviate from the guidance is absent or inaccurate.

In addition to the guidance that I have referred to below, Clause 7.3 of the BS42020:2013 indicates that Preliminary ecological appraisal reports are inadequate to inform the planning process unless no further surveys or mitigation area required, to add to your arsenal that any decision to refuse the application on lack of survey information will be upheld by an Inspector.

I look forward to confirmation that you have now withdrawn Paragraph 6.224 and put forward a recommendation for refusal.

Please confirm receipt of this email.

Kind regards,

Nayan

FAO: Charlotte White

CC: Senior SBC Executives

BCC: Clare Foster, Natural England

Deputy Chief Scientist at Natural England (Trustee at Bat Conservation Trust)

Neil Harvey and Sue Hooton, Essex County Council Ecology

Essex Bat Trust

Andrew Impey, Essex Wildlife Trust

Kit Stoner, Bat Conservation Trust Chief Executive

To be forwarded to all Councillors and the Southend Echo.

Dear Charlotte,

I write to regarding the ecology matter (further to my email below and our representations of 7<sup>th</sup> November 2019). First, I do not apologise for the length of the email. I want to be clear to you: this email will be forwarded to DCC members, other Councillors, Natural England, Essex Bat Trust, Essex Wildlife Trust, Bat Conservation Trust and the Southend Echo. All parties can see the evidence, and draw their own conclusion regarding what SBC should be doing on 27<sup>th</sup> November 2019 when DCC considers the application. Indeed, I have done this because we want transparency in decision making: the reasons to refuse permission are fully justified and any other decision does not enable the Council to discharge its statutory responsibilities as set out in the Government's PPG and BCT Guidance. The details in this email are also designed to dispel at the outset any myths that might be perpetuated by the applicant's lobby team after my email is circulated. I have sent the email as a blind copy to external parties so their data can be protected if the email is published.

You have clearly set out in Development Control Committee's (DCC) Committee Report Paragraph 6.224 that clarification was obtained from the applicant regarding the ecologist surveys, and which you appear to accept at face value. Unfortunately, this appears to be a fatal mistake on the Council's part as the evidence supplied by the Applicant in October 2019 is contrary to guidance and remains unjustified. To the point, the Council should not have relied on the applicant's evidence before it drew the conclusion that Building 7 is of negligible bat roost potential. This is because the downgrade is not justified (indeed, there is no evidence submitted by the applicant which would warrant the change), and in fact the applicant's conclusions are incorrect given the building's features etc, as I'll set out below. Ultimately, the implications are that as no bat emergence surveys are forthcoming before the DCC meeting this Wednesday, so you must therefore change your recommendation to one of **refusal on a lack of information on the impact of the development on protected species (there are other issues which warrant refusal, but that is not relevant to this email but could form further justified reasons)**. I provide all the evidence of the reason for this below, so you (and DCC) will be fully confident that such a refusal will be upheld by an Inspector with any Planning Appeal.

**There is no doubt that DCC must refuse the application on the lack of bat emergence surveys alone.** For example, the Government's Protected Species Checklist (as attached) is clear that without the emergence surveys, the decision falls under Category F: *"Inadequate survey. Request this is done properly as in question 3 or refuse application."* It is supported by the Government's Planning Practice Guidance (PPG), which states: ***"You can refuse planning permission, or ask for a survey to be redone..."*** (PPG Chapter: *'Protected Species: How to Review Planning Applications – As a Planning Authority use Natural England's standing advice to review planning applications that might affect protected species'*). It goes on to state: ***"Use Natural England's guidance (known as 'standing advice') to help you decide whether to reject or approve an application if a protected species could be affected. You need to take standing advice into account when making your planning decision."*** Under the checklist for 'Making a Decision' within the same PPG section, it is clear that the proposal fails all criteria (no additional surveys carried out, no confidence a licence can be granted, no mitigation or compensation plans put forward, etc). You can be wholly confident that the scheme's refusal is justified by the PPG and other guidance, and will be upheld by a Planning Inspector at Appeal (who will take their responsibilities towards protected species very seriously given EU and UK law on the matter). Indeed, without changing the current recommendation, the report could be conceived as being misleading noting the evidence that we have already submitted, and additional information that we submit to you with this email. So the conclusion that can be drawn is that DCC would be falsely informed when making their decision if our information below is not supplied to them. There could be substantial negative consequences arising.

We can draw this conclusion because RPS's own ecologist, who holds Natural England Levels 3 and 4 bat licences, has conducted an independent survey of the building (see attached report). You will see that that the report clearly concludes that the building should be subject to further emergence surveys because it remains classified as a building which hosts 'low' potential for a bat roost (and the evidence to support that conclusion is supplied). You will see by their report that they state on Page 3: ***"There was potential for bats to roost within the roof void and/or behind the wooden fascia of Building 7, and the building was considered to have low roost potential. Demolition of this***

**buildings is planned as part of the proposed development and therefore further surveys on this building are required in advance of planning.”**

Furthermore, there are other reasons as to why you should withdraw Paragraph 6.224 of your report and alter your recommendation to one of **refusal**, which can be summarised as follows:

- The PEA November 2018 incorporated survey results from a high bat licenced ecologist. It clearly drew the conclusion that the building’s bat roost potential was ‘low’ and further emergence surveys would be required before any planning permission could be granted.
- The PEA October 2019 includes references to a May 2019 building survey, but which contains no documentary evidence that justifies that a downgraded potential exists, in direct conflict with Bat Conservation Trust (BCT) guidance (details below).
- Building 7’s features that the applicant’s team identified that exist and warrant further investigation have not changed.
- The absence of external evidence is not sufficient justification to warrant the downgrading of the potential, according to the BCT guidance.
- No internal survey of the building has been recorded. As the building has been abandoned, there can be no certainty that bats are not roosting within the building.
- Sufficient connectivity exists between the building and wider foraging routes for common bat species, noting the presence of vegetation in the rear gardens of Hartington Road that links the northern and southern parts of the site and wider foraging areas.
- It is not possible to conclude that there is no bat activity on another part of the site from the data collected during the May 2019 surveys, as the ecologists were located in immediate proximity to Buildings 1 and 3, and at some distance from Building 7. Bats will be using the extremities of the site due to the unattractive surface level car park in the middle, as acknowledged by the Applicant’s team, and no evidence is supplied that would demonstrate the ecologists were surveying the eastern side of the site at the relevant times. In any event, the May 2019 survey results demonstrates that **bats are present** in the vicinity (I come to this again below with a PPG reference on how to deal with this).
- So, to draw that conclusion that bats are not active on the whole of the site, formal bat activity surveys of the entire site would be required and forms the outcomes of multiple surveys between April/May and September/October. No evidence of such surveys has been presented, and we suspect that these have not been carried out.
- In any event, you already have the evidence that two ecologists (from the same firm) who have formed differing opinions regarding the potential surveys that should be prepared, with the more qualified person stating that the building hosts ‘low’ potential and further surveys are required. You therefore must err on the side of caution and require such surveys before any application is determined, according to the PPG.
- In fact, with RPS’s report, you now have confirmation the two more qualified ecologists who have visited the building have confirmed in their view the building’s potential is ‘low’ and which bat emergence surveys are required before the Council can conclude that there is no likelihood of impact on protected species by the proposed development, in accordance with the NPPG and Circular 05/2006. This cannot be ignored or brushed aside.

Without such bat emergence surveys, the only conclusion you can draw is that the application should be **REFUSED** according to relevant guidance, which the applicant’s team appears to be asking you to deviate from without providing any good reason to do so.

I set this out in more detail, for your benefit. Following our objections in October 2019, the Council had received a revised PEA from the applicant’s team, and published this on the application website

on 23<sup>rd</sup> October 2019. It is referred to as the PEAOct19. This contains a number of changes, primarily focused around 'Building 7', a former toilet block building located in the south-eastern corner of the site, and to which our comments below primarily related. These can be summarised as follows:

- Added reference to a new surveyor (Rob Hutchinson, a Natural England Level 1 bat worker) in Para 2.6, who has supposed carried out a further survey of the toilet block on 29<sup>th</sup> May (no evidence or details of the survey are supplied within the report).
- A new paragraph was inserted for the description for Building 7 and its potential on Page 11, which indicates that upon the further May visit, the toilet block is no longer considered to host 'low' potential for a bat roost. Hence no surveys were required in May.

RPS holds strong reservations as to why this information was not provided at the outset with the July revision of the PEA following the May 2019 surveys carried out by the applicant's team (referred to as PEAJul19), on which our objections below have been submitted. The evidence would have clearly been available in July when the applicant prepared an update to the PEA, and indeed, the Figure was altered at that time, but without any accompanying text within the report to explain why it had changed. It appears to be a substantial omission. More to the point, RPS also notes that there is no evidence (e.g. survey notes or photographs) attached to the PEAOct19 that complements the primary changes to it. We come to this again below, but it does raise questions on why the Case Officer can be confident that what is reported is accurate and justified.

Before discussing the reasons that justify our position, I take the opportunity to set out the relevant guidance, as you may not be familiar with it. The Bat Conservation Trust's 'Bat Surveys for Professional Ecologists Good Practice Guidelines (3<sup>rd</sup> Edition)' (referred to as the 'BCT Guidance') is most pertinent (I note that the applicant's team has sponsored the document, so you would expect them to adhere to it). The key paragraph is Paragraph 5.2.9, which states:

*"Where the possibility that bats are present cannot be eliminated or evidence of bats is found during a preliminary roost assessment, then further surveys (such as winter hibernation (Section 5.3), presence/absence (Section 7.1) and/or roost characterisation (Section 7.2) surveys) are likely to be necessary if the impacts on the roosting habitat (or the bats using it) are predicted. The ecologist should consider the further surveys needed (if any), their logistics (resources, emergence survey locations, timings), and any potential health and safety hazards reported.*

*"If the structure has been classified as having low suitability for bats (see Table 4.1), and ecologist should make a professional judgement on how to proceed based on all of the evidence available.*

*"if sufficient areas (including voids cracks and crevices) of a structure have been inspected and no evidence found (and is unlikely to have been removed by weather or cleaning or be hidden) then further surveys may not be appropriate. **Information (photographs and detailed descriptions) should be presented in the survey report to justify this conclusion and the likelihood of bats being present at other times of the year estimated.** If there is a reasonable likelihood that bat roosts could be present, and **particularly if there are areas***

***that are inaccessible for survey, then further surveys may be needed and these should be proportionate to the circumstances (see Section 2.2.5).***

***“If not suitable habitat for bats is found, then further surveys are not necessary. In this scenario, it is necessary to document how this decision has been reached; photographs and details descriptions should be made available as evidence of a robust survey and assessment.”***

Our main concern is that the PEA Oct 19 alterations that indicate that Building 7 has ‘negligible’ potential for a roost is **NOT** supported by any documentary evidence within the report and which would normally be required with such a conclusion. The approach that has been adopted by the applicant’s team is without doubt contrary to the BCT Guidance regarding such a situation, as referred to above. This is especially pertinent when the original surveying ecologist is a Natural England Level 2 licenced bat worker (i.e. has more experience) and is licenced to use endoscopes as part of the preliminary roost survey, whilst the May 2019 survey was carried out by members who does not hold such advanced licences. It is also pertinent that the building’s relevant features have not been changed in any of the three versions of the PEA that would suggest a downgrade to the potential is warranted, and there is no evidence that the building was internally inspected to confirm the absence of bats, noting the building is abandoned so without regular disturbance, it could become an attractive place for bats to roost. Indeed, as you’ll see from our report, there are certainly reasons as to why the building was initially identified as hosting ‘low’ potential for a bat roost.

Some other points of relevance:

- There is a claim that the building is isolated with hardstanding located between it and any suitable bat foraging habitat. This clearly ignores the presence of suitable trees and other vegetation located at the rear of the properties that face onto Hartington Road, and which provides a reasonable link to wider foraging routes including northward along Queensway to the railway line, or along the Seaway Car Park trees to the church yard, where bats were recorded as foraging during the May 2019 site visit. The bats could have easily travelled along the rear of the gardens of Hartington Road and along the line of trees that fact the Queensway and Chancellors Road to get to the church yard, and would explain why they were recorded to have arrived at the church yard sometime after sunset (as we set out in our objection below).
- A lack of bat activity has been cited. It is unclear how the ecologists could have concluded this, as during the May visit, they were located adjacent to Buildings 1 and 3, so at some distance from Building 7, and with their devices facing the two buildings that they were surveying. It is likely that with vehicle movements and other noises may have intervened, and so there can be no conclusive evidence that bats are not active in the vicinity of Building 7 during the May 2019. Indeed, the evidence of the ecologists clearly demonstrates bats were active in the vicinity, so the opposite is true from the evidence provided to you by the applicant. Furthermore, no bat activity surveys of the whole of the site have been carried out.
- Also cited is the fact that no external evidence was found on the building. We are surprised that they are relying on this position because the BCT Guidance is clear on this point in Paragraph 5.2.4.1 (External Surveys), where it emphasises the point that: ***“Sometimes bats leave no visible sign of their presence on the outside of a building (and even when they do, wet weather can wash evidence away).”*** Indeed, the same guidance is repeated with the

equally high emphasis in Paragraph 5.2.4.2 (Internal Surveys). No justification has been provided that would enable the ecologist to rely on this against BCT Guidance.

- RPS notes there is no evidence that the applicant's team has undertaken an internal survey of the building. BCT Guidance in Paragraph 5.2.1 states: *"A Preliminary Roost Assessment is a detailed inspection of the exterior and interior of a structure to look for features that bats could use for entry/exit and roosting and to search for signs of bats. The aim of this survey is to determine the actual or potential presence of bats and the need for further survey and/or mitigation. In many situations it is not possible to inspect all locations where bats may be present and **therefore an absence of bat evidence does not equate to evidence of bat absence.**"* It is clear from the BCT Guidance that if no internal inspections have been carried out, a precautionary approach is necessary and emergence surveys must be carried out. As noted above, bats are present in the area. It would be incorrect to conclude there are no bats at the building simply because no external evidence was found.

The Council is effectively being asked to deviate from standard guidance regarding bat emergence surveys by the Applicant's team without the latter supplying the Council with any evidence to do so. We are completely unclear why you would take their information as face value given the substantial omissions, unless you are looking at the commercial realities of a lease arrangement which falls outside of planning matters. The PPG section on Protected Species states: *"Use Natural England's guidance (known as 'standing advice') to help you decide whether **to reject or approve an application if a protected species could be affected.** You need to take standing advice into account when making your planning decision.*

***Use an expert, such as your local authority ecologist, to help you apply the standing advice to planning decisions if you're not a wildlife specialist.*** Unless you are a qualified expert, the PPG is clear that you will need to rely on one to determine whether the PEA submitted by the Applicant is valid and justified. I am not aware that SBC has obtained evidence from an independent qualified ecologist to verify the applicant's PEA, even though RPS has raised substantial concerns regarding the evidence presented through the application process (perhaps you could have asked Essex County Council's team, who are copied into this email, or Natural England for more advice). This puts DCC's decision at risk if it is anything but **REFUSAL**.

Regardless, the BCT Guidance is equally clear on this point at Paragraph 4.3.8, which states: ***"Where further surveys and mitigation are required, the preliminary ecological appraisal report in isolation will not be adequate for submission to the LPA in support of a planning application. The report will only be adequate for this purpose if there is need for further surveys and mitigation."*** It is clear that a further Phase 2 bat survey report is necessary before the Council can consider sufficient evidence has been supplied to enable the Council to deviate from BCT Guidance. This is repeated in the PPG, which states: *"You only need to ask an applicant to carry out a survey if it's likely that protected species are:*

- *present on or near the proposed site, such as protected bats at a proposed barn conversion*
- *affected by the development, such as the effect of a wind turbine proposal on protected birds"*

We already know that bats were found in the churchyard within the vicinity of the site, as I mentioned above. They are near to the site, and therefore the Council's position to not request additional surveys would be clearly against such guidance and which justification must then be supplied. Without such evidence, the Council must follow the PPG and BCT Guidance as otherwise it could render any decision invalid because DCC would not have considered all material considerations appropriately. This is particularly true when the Council employs no ecologists inhouse to carry out an independent verification of the evidence, and which the reliability of the applicant's evidence has been heavily questioned by others.

**The Council cannot impose a Condition to require the provision of Surveys after permission is granted.**

You may be tempted to suggest to DCC that a condition could address the matters. I want to make it clear that this would be against guidance. I also want to ensure the applicant's lobby team does not mis-represent the correct approach.

Our ecologist's letter is clear that it states that further surveys would be required as they would inform mitigation measures necessary. The Council cannot impose a condition to any permission that requires the submission of the surveys and the eventual submission of mitigation (which could require planning permission to implement), because 'exceptional circumstances' according to Circular 05/2006 Paragraph 99 do not exist (the applicant's team has not presented any evidence of such circumstances, and missing a survey season is not an 'exceptional circumstance'). Any condition imposed would fail the tests of the NPPF, as it would not be 'precise'. The Council also has a requirement that they be fully confident that Natural England would issue a licence in the future of a bat roost is found, noting any licence must comply with the 3 legal tests set out in the PPG. You have made no assessment of the 3 legal tests in your report, so DCC would be blindly making the decision without reference to the correct approach. In fact, the PPG clearly states: *"You'll need to agree any mitigation or compensatory measures as part of the proposal. To make sure that mitigation measures are effective when granting planning permission you may have to consider"* imposing a planning condition or planning obligation. However, you cannot ensure any mitigation could be effective if you are not able to ascertain whether bats are in fact on site or not, hence it would be inappropriate to secure such surveys by way of condition.

It states under 'Making a Decision' that you can grant planning permission if:

- an appropriate survey was carried out by a qualified ecologist at the time of year specified in the standing advice – **Further survey not completed.**
- a wildlife licence is likely to be granted by Natural England – **unknown, as an assessment against the 3 legal tests cannot be carried out without further surveys.**
- Mitigation plans are acceptable – **none submitted as species surveys not carried out across whole of site.**
- Compensation plans are acceptable when mitigation isn't possible – **same, no mitigation plans presented because species surveys were not carried out.**
- review and monitoring plans are in place, where appropriate – **no plans to review.**
- all wider planning considerations are met – **approach completely contrary to PPG and BCT Guidance and the recommendations that further survey of the building is necessary according to the applicant's original submission and RPS's recent report.**



We look forward to receiving confirmation that you have submitted a change to the recommendation in the report and you now recommend that the application is **REFUSED**.

I would be grateful if you would kindly confirm receipt of this email, noting the 'missing emails' point. Of course, I would be happy to discuss with you the evidence presented in the above email on in the attached as required.

Kind regards,

Nayan

**Nayan Gandhi**

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**From:** Nayan Gandhi

**Sent:** 10 October 2019 00:33

**To:** Charlotte White <>

**Cc:** Nick Laister <[nick.laister](mailto:nick.laister)>; [Sue.Hooton](mailto:Sue.Hooton); [Neil.Harvey](mailto:Neil.Harvey); [consultations@naturalengland](mailto:consultations@naturalengland); [petergeraghty](mailto:petergeraghty); andrewlewis

**Subject:** RE: Application Ref: 18/02302/BC4M - Objections on behalf of The Stockvale Group

FAO: Charlotte White

CC: Clare Foster, Natural England

Neil Harvey and Sue Horton, Essex County Council Ecology

Dear Charlotte,

Straight to the point, it is come to light that the Applicant has failed to complete all relevant bat emergence surveys, and therefore the application cannot be determined before this information is submitted. The information can only be collected between May and August, and therefore it can only be provided next summer. Any decision before this is provided is likely to result in a successful legal challenge because the Council cannot be certain to have discharged its statutory duties. I set out the reasons for this below.

As set out in the email below, you may recall that we objected to the Applicant's proposals on the basis that there was a lack of ecology information (bat emergence surveys), and which are required in order for the Council to discharge its responsibilities regarding protected species (I come to this again below). We were clear that the Council should have invalidated the application due to a lack of ecology information, given it would take many months before the information could be provided. We were disappointed that you did not do this, even though it was clearly contrary to your own Local Validation List. That said, we are where we are now, which brings me to the current point.

The original Preliminary Ecological Appraisal (PEA) Report (November 2019) indicated that they surveyed the site on 19 October 2018 by Polly Lockyer. At Paragraphs 3.22 and Paragraph 4.10, it

was identified that Buildings 1 (29 Herbert Grove), 3 (1&3 Herbert Grove), and 7 (public toilet block) had LOW value for roosting bats, and thus should be surveyed (see attached extracts). We indicated in our objection letter (see Page 8 of our Cover Letter dated 7<sup>th</sup> February 2019) that further bat emergence surveys will be required. Figure 3.1 indicates the Building 7 was of 'low' potential, along with Buildings 1 and 3 and therefore a survey should be carried out within the recognised period of 'May-August' according to the relevant guidance.

The Applicant has now submitted a revised PEA, dated 26<sup>th</sup> July 2019. A number of key points:

- Paragraph 2.12 confirms that a bat roost emergence survey was carried out on the evening of 29<sup>th</sup> May 2019 on Buildings 1 and 3 (1-3 and 29 Herbert Grove). No record was noted of any survey or examination of Building 7.
- Paragraph 3.22 confirms that the same Buildings 1, 3 and 7 are still assigned LOW value to roosting bats.
- Paragraph 5.8 indicates that *"The site was of limited overall value to protected species, with interest relating predominantly to the potential value of Buildings 1 and 3 (see Figure 3.3) to building – roosting bats, all of which were assessed as being of **Low** potentially according to current best practice guidelines for assessing building for their bat roost potential. Follow-up bat activity survey has been completed that confirms bat roost absence from both buildings."*

Again, there is no mention of a survey for Building No 7, the toilet block. The absence of emergence survey information is a substantial omission and which means the Council cannot be confident of discharging its responsibilities related to protected species until this survey is completed. I come to this again below.

- Indeed, the update PEA's Figure 3.3 sets out which building locations have value to roosting bats, and which require further surveys. The record on this drawing has been changed to refer to 'negligible' although the description in revised PEA Paragraph 3.22 remains the same as it was recorded in the original PEA (see attached extracts). It is wholly misleading change therefore, and its LOW value requires the requisite emergence surveys.
- We note that Polly Lockyer was the same ecologist who undertook both the 19<sup>th</sup> October 2018 survey and the 29<sup>th</sup> May 2019 surveys, and is a Natural England Level 2 licenced bat worker, so capable of identifying relevant roosts.
- Importantly, the PEA was substantially updated in July 2019 without any change to Building 7's description and features, so this would strongly indicate that the potential for bat roosts remains.
- **A survey of the building is therefore required to be conducted between May and August (optimal) or April/September (sub-optimal) 2020 before the Council can determine the application.**
- RPS notes that in Paragraph 2.16 that the surveys recorded 2 bats foraging in the church yard and back gardens of Herbert Grove, and 30 minutes after sunset (which suggests they may have come from elsewhere). Indeed, as these did not emerge from Buildings 1 & 3 which were being surveyed at the time, their roosts are likely elsewhere. Noting the identified potential of Building 7, it is not unreasonable to conclude that these bats possibly came from the toilet block (which if the ecologist had surveyed it, they would have known for certain, but in the absence, it cannot be excluded given it has features that would

support bat roosts). Approving its demolition of these buildings as part of this application without relevant emergence surveys would be an unreasonable risk to take.

Indeed, on the above basis, a precautionary approach regarding the presence of a bat roost in the toilet block is required. Indeed, this is set out clearly in 'Circular 06/05: BIODIVERSITY AND GEOLOGICAL CONSERVATION – STATUTORY OBLIGATIONS AND THEIR IMPACT WITHIN THE PLANNING SYSTEM'. It states at Paragraph 99:

**"It is essential that the presence or otherwise of protected species, and the extent that they may be affected by the proposed development, is established before the planning permission is granted, otherwise all relevant material considerations may not have been addressed in making the decision.** *The need to ensure ecological surveys are carried out should therefore only be left to coverage under planning conditions in exceptional circumstances, with the result that the surveys are carried out after planning permission has been granted. However, bearing in mind the delay and cost that may be involved, developers should not be required to undertake surveys for protected species unless there is a reasonable likelihood of the species being present and affected by the development. **Where this is the case, the survey should be completed and any necessary measures to protect the species should be in place, through conditions and/or planning obligations, before the permission is granted.** In appropriate circumstances the permission may also impose a condition preventing the development from proceeding without the prior acquisition of a licence under the procedure set out in section C below."*

There are no exceptional circumstances in this scenario. There was clear evidence that a survey was required for Building 7, as identified in the original PEA (Paragraph 4.10). The building's description was not changed between the original PEA and revised PEA, despite there being numerous other changes between the two reports. The same ecologist, who is bat licenced, identified the potential. The omission of the survey by the Applicant's team is not an exceptional circumstance. The Council must therefore conclude that there remains a need for this survey, and the change to Figure 3.3 in the revised PEA must be treated as a substantial error. On the above basis, the Council cannot categorically state that they would be able to discharge its statutory obligations with respect to protected species and enable them to grant planning permission for the development **until they have evidence of the bat emergence survey for Building 7. The survey cannot be undertaken until next May at the earliest.**

The error arising from Figure 3.3 raises substantial questions regarding the PEA's accuracy and evidence as the change is not substantiated by the written evidence (so the reason for the change is unclear).

In this circumstance, the Council has no professional ecologists that can verify either PEA's data and has not sought consultation from Essex County Council's ecologists. It would be wholly prudent and appropriate of the Council to independently engage a certified ecologist to verify the whole of the evidence within the PEA given this substantial oversight between the two versions of the PEA (in the same way as the Council has now engaged a landscape architect following RPS's concerns). Any other action (i.e. granting of planning permission without the additional survey) would likely result in

a legal challenge given the Council would have failed to comply with Circular 06/05, and which the Council would not be able to professionally defend.

Indeed, I have copied in both Natural England consultations and Essex County Council ecologists, who I am sure would agree with RPS that there is a precautionary need to delay any decision until the Applicant has completed the relevant emergence in the correct period and verified its PEA data on the whole. Since Southend has no in-house ecologists, Essex County Council is the closest relevant statutory consultee.

Returning to my point that the application has insufficient information to determine it on ecology grounds, the Council must either refuse the application ***now*** due to a lack of information on ecology, or deem that the application is invalid and take action to force the application's withdrawal. It would be wholly unreasonable to hold an application in abeyance (although we'd argue there are many other reasons to refuse permission until this survey can be completed) given the blight that will occur to residents and land owners of the surrounding properties whilst the application remains on hold for what is another 7-8 months until the next survey season.

There are also question marks regarding ecology matters in EIA terms noting the outstanding risk to habitats.

I formally request that you provide me with a response as to what action the Council will take with regards to this substantial error, prior to making any decision on the application.

I will write you again shortly with our other objections to the EIA Screening Opinion Request and planning applications. However, as you'll see from those errors, and others we have already identified, it is becoming increasingly clear that the Council may want to fully re-think its relationship with Turnstone Southend Ltd at the earliest opportunity, since such basic errors are being committed.

I would be willing to discuss this further as required.

Kind regards,

Nayan

**Nayan Gandhi**

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**From:** Nayan Gandhi

**Sent:** 28 February 2019 10:56

**To:** 'CharlotteWhite@southend.gov.uk' <>

**Cc:** Nick Laister <[nick.laister](mailto:nick.laister)>

**Subject:** Application Ref: 18/02302/BC4M - Objections on behalf of The Stockvale Group

**Importance:** High

Dear Ms White,

Simply following up on the email below and our ecology objections to the above. According to the application website, the above application is still under consideration. I am very surprised by that this noting the lack of ecology information makes it invalid.

As we wrote in our ecology objection, the application should be withdrawn, as it fails to provide necessary ecology information (bat emergence surveys, as acknowledged in the submitted Preliminary Ecological Appraisal's Paragraph 4.10) in accordance with Item L10 of your adopted Local Validation List. The applicant is unable to provide this information before the statutory determination date, which is 16<sup>th</sup> April 2019, but emergence surveys can only be taken in May 2019 (and since two surveys are required, and must be taken at least two weeks apart, the information will not be ready until late May at the earliest). This is confirmed in the Planning Practice Guidance Page: <https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications>, under the Table: 'When to carry out a survey' and look for 'Bats (Summer Roosts): May to mid-September.

It is such a fundamental error in the application, so if you have not yet made this request to invalidate the application, please would you kindly explain why you have not done so. Indeed, there is even a statutory process that enables you to take such action. It is set out in the Town and Country Planning (Development Management Procedure) Order 2015 (DMPO, as amended) Section 11(5), which states: *"Where, after sending an acknowledgement as required by paragraph (2), the local planning authority consider that the application is invalid, they must **as soon as reasonably practicable notify the applicant that the application is invalid.**"*

We strongly believe that any action other than a request to have the application withdrawn as invalid (e.g. allowing the applicant to extend the period to determination) renders any decision likely to be legally challengeable. This is for two reasons:

- Your local validation list is clear that such surveys are required before an application can be considered valid. It is obvious from the above dates that the applicant has no way of providing this information within the statutory determination date. The Planning Practice Guidance is clear on this:

*"The local list is prepared by the local planning authority to clarify what information is usually required for applications of a particular type, scale or location. In addition to being specified on an up-to-date local list published on the local planning authority's website, information requested with a particular planning application must be:*

- *reasonable having regard, in particular, to the nature and scale of the proposed development; and*
- *about a matter which it is reasonable to think will be **a material consideration** in the determination of the application.*

*These statutory tests are set out in [section 62 \(4A\) of the Town and Country Planning Act 1990](#) (inserted by the Growth and Infrastructure Act) and [article 11\(3\)\(c\) of the Town and Country Planning \(Development Management Procedure\) \(England\) \(Order\) 2015](#).*

*Paragraph: 040 Reference ID: 14-040-20140306"*

Impact on protected species is always a material consideration (there is a legal requirement of the authority in this regard). Indeed, if you follow the Government's Protected Species Checklist for planning applications (see attached), you'll see that you have to answer 'No' to Question 3. Your options are to ask for the surveys, which would take you beyond the determination time period (which you can't do, obviously), or refuse the application. I take this opportunity to remind you that the damage or destruction of breeding or resting places for bats is a criminal offence that is subject to either a prison sentence or unlimited fine (<https://www.gov.uk/guidance/bats-protection-surveys-and-licences>), hence we are seeking formal evidence that there are no bats within the buildings to be demolished before the application has been determined.

The application as it stands cannot be seen to fall within the spirit of the Town and Country Planning Act 1990 Section 62 or the DMPO. To continue to process the application without such evidence before you seems to disregard the purpose of adopting validation lists, unless you can kindly explain why an exception should be granted in this case to simply allow an extension. It would also make a complete mockery of the consultation period that has just recently closed as the Council willingly engages in this knowing there is key information missing. Otherwise the actions of the Council are highly questionable and possibly subject to a legal challenge.

- The Council is the landowner, has strong financial interest in the outcome of the application, and thus has a strong responsibility to ensure that there is no actual or perceived favouritism with regards to the processing of the planning application. From my own experience, it is extremely rare for Councils to continue processing such applications without requisite ecology information, particularly that which cannot be provided within the statutory determination period for the application, and this follows legal authorities on the matter. As such, if you do not take action, I think that it is extremely imperative that you explain in writing why this application warrants special treatment not in accordance with standard practices and your own validation list. We note that Council's own failings with regards to biodiversity surveys for the same site (see below).

There are already question marks regarding validation. Here, I draw your attention to the fact that the application was submitted on 7<sup>th</sup> December 2018 and only validated on 15<sup>th</sup> January 2019. It is usual that an application has been held for validation for such a long period of time, noting that there are still obvious mistakes with validation. Can you explain the delay?

As a separate, but not completely unrelated issue, the submitted Preliminary Ecological Appraisal with the Seaway Car Park application indicates that there is a potential for bats at 29 Herbert Grove. We are quite concerned that the Council has failed in its own duties to ensure that there was no harm caused to protected species with the removal of the immediate adjacent former Rossi Ice Cream Factory, which used to site within the application site and was removed to facilitate the development subject to the above application (the link between the demolition and this application has been confirmed by the Council in writing). We have reviewed the information with the application Ref: 17/00902/DEM, and following a Freedom of Information Request, we understand that no ecology information has been prepared prior to the demolition taking place. Indeed, the officer's report for that application makes no reference to Biodiversity. As removal took place

between August and November 2018, and the PEA for the Seaway Car Park development was undertaken around the same time and clear notes that there is potential for bats on the adjacent site, we are unclear how the Council could be 100% certain that they have complied with the Wildlife and Countryside Act 1981 as well as The Conservation of Habitats and Species Regs 2012 without evidence of a protected species survey taken place during the correct time. As such, we urgently request that you investigate the omission of biodiversity information with the demolition of the former Rossi Ice Cream factory, and halt any processing of the Seaway Car Park planning application (notwithstanding our point that it is invalid) until the Council can confirm it has not taken actions to facilitate that development without due care to protected species. We will be contacting the relevant authorities to alert them to the potential offence under the Countryside and Wildlife Act and Habitats Regulations.

I look forward to receiving notification that the Seaway Car Park application has been made invalid. In the meantime, I would be more than happy to discuss anything set out in the above, or our objection letters, including at a meeting.

Kind regards,  
Nayan

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**From:** Nayan Gandhi  
**Sent:** 07 February 2019 23:58  
**To:** 'CharlotteWhite@southend.gov.uk' <>  
**Cc:** 'planningregistrationteam@southend.gov.uk' <[planningregistrationteam@southend.gov.uk](mailto:planningregistrationteam@southend.gov.uk)>; 'council@southend.gov.uk' <[council@southend.gov.uk](mailto:council@southend.gov.uk)>; Nick Laister <>  
**Subject:** Application Ref: 18/02302/BC4M - Objections on behalf of The Stockvale Group

Dear Ms White,

Please find attached our objection regarding ecology in relation to the above application.

I would be grateful if you would kindly confirm receipt.

Regards,  
Nayan

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