

London Borough of Barnet

Proof of Evidence – Ecology - on behalf of Local Planning Authority

Nathan Nicholls (MSc, BSc, ACIEEM) – Senior Ecologist

Appeal By: Mr Patrick Casey

Proposed Development: “A material change of use for stationing of caravans for residential use with hardstanding and dayrooms ancillary to that use”.

Appeal Site: Land On The North West Side Of Mays Lane, Arkley,
Barnet. EN5 2AH

Appeal Reference: APP/N5090/W/23/3330577

LPA Reference: 23/3816/FUL

Public Inquiry: 21 January 2025

Appeal under Section 78 of the Town and Country Planning Act (As Amended) 1990

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1.0 INTRODUCTION

- 1.1. I am Nathan Nicholls, Senior Ecologist within the planning department at London Borough of Barnet who was the statutory consultee on the appeal. I obtained my MSc in Conservation Biology at the University of Kent, my research thesis was on the implication of bottle trap design in population assessment of great crested newt. I received a 1st in my BSc Wildlife Conservation with Zoo Biology at the University of Salford. I am an associate member of the Chartered Institute of Ecology and Environmental Management (CIEEM) who since August 2016 has worked both freelance and then full time as an ecological consultant working on protected species surveys and small to large scale GCN mitigation projects. I hold a Great Crested Newt Survey Class License Level 1 CL08 (2023-55073-CLS-CLS), CSCS card holder.
- 1.2. I have held my current position at The London of Borough of Barnet since May 9th, 2022, where I discharge the Local Planning Authority's statutory duty of care for biodiversity under section 40 of the Natural Environment and Rural Communities Act 2006, and routinely make determinations on planning applications as to whether they would likely meet the "Three Tests" as per Regulation 55(9) of the Conservation of Habitats and Species Regulation 2017 necessary to grant planning permission in relation to the works likely to impact on European Protected Species (EPS) and its resting/sheltering/breeding place.
- 1.3. I was the senior ecologist responsible who was the statutory consultee on the application. I confirm that the opinions expressed in my evidence are based on my professional expertise in line with CIEEM's Code of Conduct and are my true and honest assessment.

2.0 SUMMARY - SCOPE OF EVIDENCE

- 2.1 In terms of my scope, I am providing evidence focused on the relevant ecology planning policy framework, wildlife law implications, and planning matters that apply to the proposed development, in particular the planning balance. I am an ecologist, not a lawyer, however, and legal submissions are for the Council's advocate at the inquiry.
- 2.2 Sections 3 and 4 of this proof set out the application description, site context and a summary of the proposed development. Section 5 summarizes the key wildlife protection legislation, planning policies and guidance applicable from the relevant planning framework before considering the main planning issues having regard to the Development Plan and other material considerations in Section 6.
- 2.3 Since my initial drafting of this proof of evidence, the Appellant has submitted at a very late stage a Precautionary Working Method (Ecology) report (ACJ Ecology Ltd, November 2024) **[CD2 2.5]** hereafter referred to as PWM which attempts to negate the requirement for further surveys and claims that the proposed works would be beneficial to the Favorable Conservation Status of Great Crested Newts (GCN) through unspecified habitat enhancements and that the proposed works could be undertaken by means of a precautionary working method statement without explicitly stating that such measure could be secured by condition. The Appellant's new position runs contrary to the previous position of the Appellant which was that further survey work is required. The new evidence is covered in the other material considerations in Section 6.
- 2.4 I conclude in Section 7 that planning permission should continue to be refused for the proposed development as it would be principally unlawful for the planning inspector to permit a development in the full knowledge that Natural England (NE) as the statutory conservation body has stated that the works, if granted planning permission, would likely result in an offence under Section 43 of the Conservation of Habitats and Species Regulation 2017. NE have rejected the Appellant's assertion that Policy 4 would apply in granting of

European Protected Species (EPS) licence, were the applicant to apply for one with only eDNA survey information. In addition, the Local Planning Authority (LPA) holds that the development is contrary to the Development Plan overall.

- 2.5 In my professional opinion, the submitted documents to date remain insufficient to alleviate the risk of likely offences under UK and international wildlife protection legislation, and that further survey data must be submitted prior to determination of the planning application to identify whether the proposed works and precautionary mitigation measures would negatively impact the Favourable Conservation Status of GCN. In the absence of such information, it is impossible to form a view as to whether the proposed scheme meets the 'Three Tests' of derogation and thus, adopting a precautionary approach, it must be assumed that NE would be unlikely to grant a licence. In my view, planning permission is incapable of being granted on account of the lack of survey data, irrespective of any of the other planning merits.

3.0 APPLICATION SITE AND SURROUNDING CONTEXT

- 3.1 The application subject of this appeal was validated by the Local Planning Authority on 6th September 2023, and relates to Land on The Northwest Side Of Mays Lane, Arkley (the Site), which is located within the Underhill Ward some 200 metres south west of Shelford Road, which defines the main settlement boundary of Arkley with Ducks Island and Dollis Valley.
- 3.2 Measuring approximately 0.81 hectares it is a parcel of undeveloped agricultural land currently in use for the keeping and grazing of horses. A total of seven ponds are located within 500m of the site including one adjacent to the site that is connected to the site by suitable terrestrial habitats for GCN.

Planning History

- 3.3 None relevant to the appeal site.
- 3.4 The neighboring site to the east of the appeal site known as 'The Brethren's Meeting Room' 310 Mays Lane Barnet EN5 2AH is currently seeking a 'Single

storey side extension. Single storey front extension plus porch/canopy. New porch/canopy to side elevation. Alterations to roof including raising the height of the eaves with associated cycle parking and landscaping' (24/2557/FUL). The modification to the existing community facility will provide additional space to accommodate private separate areas for men and women, community programs, as well as both intrafaith and interfaith activities. The existing volume of the site is 5,645m³ and the proposed volume is 1132m³, totaling to a volume of 6,777m³, which is a 16% increase in volume.

3.5 As the proposed development will be entirely restricted to the extant hard standing/sealed surfaced present on site, and therefore will not require the alteration to a suitable habitat in, around or near the Pond 1 present within its red line boundary, it was determined by the LPA under section 40 of the Natural Environment and Rural Communities Act 2006 that no likely offence under section 43 of the Conservation of Habitats and Species Regulation 2017 or Section 9 of the Wildlife and Countryside Act 1981 (as amended) would occur to GCN. The proposed development was granted planning permission subject to a condition for a Precautionary Working Method Statement to be submitted to the LPA and approved prior to commencement of works.

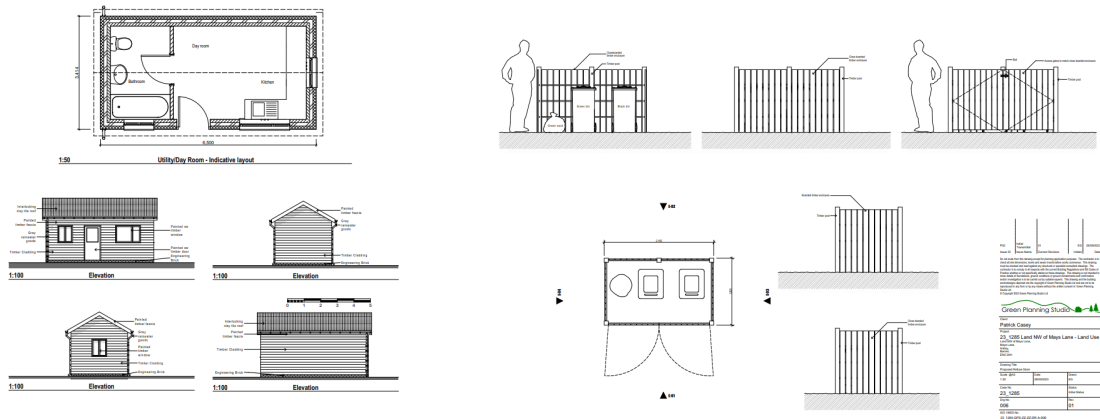
4.0 **APPEAL PROPOSAL**

4.1 Planning permission is sought for the material change of use of the land for the stationing of caravans for residential use, including hardstanding and dayrooms ancillary to that use. The application is supported by a proposed block plan depicting 2no. pitches comprising 2no. mobile homes, 2no. touring caravans and 2no. utility / day rooms located in the north east corner of the application site. Built under a clay tile roof the utility timber structures proposed measure 22.1sqm.

4.2 Proposed Site Plan (003 PO3 - Proposed site plan) **[CD1 1.4]**



4.3 Proposed dayroom and refuse store (005 PO2 & 006 PO1) [CD1 1.6]



Access & Car parking

4.4 The site is accessed directly off Mays Lane that runs parallel with the sites southern boundary. The lane provides direct access to Ducks Island and the Dollis Valley housing estate to the east and gives access to the A1 Barnet By Pass to the west. The proposed access track runs in a northerly direction within the centre of the application site before terminating in the north eastern corner of the site, where development is proposed. The proposed access and hardsurfacing area to accommodate the use is formed from loose bound permeable materials.

Landscaping

- 4.5 The application proposes native hedge planting surrounding the built-up area of the site. The proposed site plan depicts root protection areas to comply with BS 5837:2012. These surround mature trees and those protected by tree preservation orders (TRE-BA-49 & TRE-BA-53) located on the north and southern boundaries of the site.

Drainage / Treatment plant

- 4.6 A soakaway and treatment plant is located in an isolated position within the site, surrounded by native hedge planting and post and rail timber fencing.

Bin Storage

- 4.7 An enclosed bin storage area providing space for the stationing of 4 x wheelie bins is located at the proposed entrance to the site off Mays Lane.

4.8 Submitted Ecological information (Application stage)

- 4.9 The *Preliminary Ecological Appraisal* report (Arbtech, 14/11/2023) (PEA Report) **[CD1 1.8]** was submitted by the Applicant after the LPA requested supporting ecological information on 3/10/2024. The PEA report confirmed that the site supports such habitat for foraging and commuting bats along the priority hedgerows, wild mammals such as hedgehogs and potentially badgers, and location of seven ponds within 500m of the site, and one being adjacent to the southeast corner. eDNA testing of the ponds would need to be undertaken during the correct survey season April 15th to July 15th to determine the presence or likely absence of GCN within these ponds. Whilst Arbtech are correct that eDNA testing is a way of determining likely presence or absence of GCN in ponds, if the result is positive, the eDNA testing alone cannot then go on to provide information on the population size class, structure or evidence of breeding within the pond. This level of survey detail can only be obtained by means of further traditional surveys (four to six site visits and use of torch light searches, netting, bottle trapping, and egg search per ponds between Mid-March and Mid June¹). In other words, eDNA testing can rule in or out the

¹ Great Crested Newt Conservation Handbook (Langton et al., 2001) **[CD10 10.6]**.

presence of GCN, but eDNA testing cannot determine the nature of the population if GCN are ruled in.

4.10 *Appendix 3b Pond location Plan (Preliminary Ecological Appraisal report (Arbtech, 14/11/2023) [CD1 1.8]*



4.11 Arbtech determined that, given the presence of continuous habitats which could support commuting and foraging GCN (if present), and given the loss of 0.09 ha of suitable habitat within 100m of the pond, this would potentially constitute an 'Amber' (likely) offence under section 43 the Conservation of Habitats and Species Regulation 2017 (injuring or disturbing a EPS or damaging or disturbing its breeding/sheltering or resting habitat). This risk was calculated using Natural England Rapid Risk Assessment tool (see table 4.1 below).

4.12 Table 5: Evaluation of the site and any ecological constraints (*Preliminary Ecological Appraisal report (Arbtech, 14/11/2023) [CD1 1.8]*

<p>Amphibians</p>	<p>Seven ponds were identified with 500m of the site. One pond was located adjacent to the site.</p> <p>The majority of the site, in the form of horse grazed modified grassland, provide sub-optimal terrestrial habitat for great crested newts. However, the hedgerows and scattered scrub provide suitable habitat for sheltering newts.</p>	<p>If great crested newts are present within the pond adjacent to the site, this will constitute the potential loss of c. 0.09ha of habitat within 100m of a potential breeding pond. Thus, an offence is likely based on a Natural England Rapid Risk Assessment Tool.</p> <p><i>Table 5a: Natural England Rapid Risk Assessment.</i></p> <table border="1" data-bbox="587 450 877 1003"> <thead> <tr> <th>Component</th> <th>Likely effect (select one for each component; select the most harmful option if more than one is likely; lists are in order of harm, top to bottom)</th> <th>Notional offence probability score</th> </tr> </thead> <tbody> <tr> <td>Great crested newt breeding pond(s)</td> <td>No effect</td> <td>0</td> </tr> <tr> <td>Land within 100m of any breeding pond(s)</td> <td>0.01 - 0.1 ha lost or damaged</td> <td>0.3</td> </tr> <tr> <td>Land 100-250m from any breeding pond(s)</td> <td>No effect</td> <td>0</td> </tr> </tbody> </table>	Component	Likely effect (select one for each component; select the most harmful option if more than one is likely; lists are in order of harm, top to bottom)	Notional offence probability score	Great crested newt breeding pond(s)	No effect	0	Land within 100m of any breeding pond(s)	0.01 - 0.1 ha lost or damaged	0.3	Land 100-250m from any breeding pond(s)	No effect	0	<p>Environmental DNA (eDNA) surveys will be required of any ponds within 250m/500m of the site (where accessible) to determine the presence or absence of great crested newts. This will comprise collecting water samples and sending them off for laboratory analysis and such surveys must be undertaken between mid-April and June, in accordance with current survey guidelines (Biggs et al, 2014).</p>	<p>To be confirmed upon completion of the surveys.</p>
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4.13 The PEA Report provided clear evidence that the proposed development would not have negative impact on other protected and notable species e.g. wild mammals, nesting birds, and commuting and foraging bats in manner which could not be readily mitigated through means of conditions and this is accepted by the LPA. Such conditions would include the submission and approval of a Construction and Environmental Management Plan - Biodiversity (CEMP), provision of exclusion fencing to safeguard the priority native hedgerows, and low impact lighting strategy for bats and biodiversity.

4.14 However, in relation to GCN, in the absence of the supporting further survey information (to establish the nature of the population) and any consequent supporting mitigation strategy, the LPA determined the risk of injuring or disturbing GCN and their sheltering/breeding/resting habitat would be too high (on the Appellant’s own evidence an amber (likely) offence)). NE would not be

likely to grant a license to permit the development without the information provided and, as such, the LPA determined that the application must be refused on the ground of insufficient protected species survey information to demonstrate how the development will lawfully mitigate the risk it poses to the GCN in line with NPPF Policy 193 **[CD4 4.1]**, London Plan Policy G6 **[CD4 4.7]**, Barnet Local Plan Policy DM16 and emerging Local Plan Policy HOU06 and EC006. The LPA did not consider that further surveys could be conditioned to occur after the grant of planning permission since, applying the tests in Morge **[CD6 6.22]**, it was not in a position to conclude that NE would not be 'unlikely to grant a licence' since the outcome of those surveys is wholly unknown. Furthermore, conditioning further surveys is contrary to Government guidance on 'Protected species and development: advice for local planning authorities' (25 Oct 2023) **[CD10 10.3]** and NE's Standing Advice on GCN **[CD10 10.2]**.

Revisions and additional information (Appeal stage)

- 4.15 Exactly six months after the applicant's planning application was refused by the LPA, Green Planning Studio ('GPS') submitted an s78 appeal on behalf of the Appellant, on 21st June 2024, which was accompanied by several new planning documents including a GCN eDNA report.
- 4.16 The following documents were submitted at appeal (not previously seen by the LPA ecologist) to overcome reasons for refusal relating to ecology matters. These matters are dealt with in the proof of evidence.
- Great crested Newt EDNA Report – June 2024 **[CD2 2.4]**
 - Appellants Statement of Case **[CD9 8.6]**
 - Appellants proof of Evidence – Ecology **[CD9 8.8]**
 - Precautionary Method Statement – Barnet – Ecology (PMS) (ACL Ecology Ltd, November 2024) **[CD2 2.5]**

5.0 RELEVANT PLANNING POLICES

Introduction

- 5.1 The Development Plan comprises The London Plan 2021 [CD4 4.2], Barnet Local Plan Core Strategy and Barnet Local Plan Development Management Policies, adopted in 2012.
- 5.2 Relevant ecology policies of the Development Plan are included as Core Documents and listed in the Statement of Common Ground [CD9 8.14] and the Council's Statement of Case [CD9 8.1]. A summary of the most relevant policies and guidance, having regards to the reasons for refusal are given below.

National Planning Policy Framework (NPPF) (2023) [CD4 4.1]

- 5.3 The NPPF was first published in March 2012 and most recently updated on the 12th December 2024. In the most recent version, no relevant changes have occurred to chapter 15 Conserving and Enhancing the Natural Environment.
- 5.4 The NPPF Policy 193 provides that that when determining planning applications, local planning authorities are required to apply set principles to address the development proposal on biodiversity. First and foremost, if significant harm to biodiversity which covers all protected and notable species cannot be avoided or adequately mitigated against or at a last resort compensated then the application should be refused.

London Plan 2021 [CD4 4.2]

- 5.5 The London Plan was published on the 3rd of March 2021 and sets out the Mayor's overarching strategic planning framework.
- 5.6 The policies relevant to the scope of my evidence principally are detailed below.
- Policy G6 (Biodiversity) [CD4 4.7]

"D) Development proposals should manage impacts on biodiversity and aim to secure net biodiversity gain. This should be informed by the best available ecological information and addressed from the start of the development process."

Barnet Local Plan The Core Strategy (September 2012) [CD4 4.11]

5.7 In regard to the appeal the following policies are relevant.

Policy CS5 – "Protecting and enhancing Barnet's character to create high quality places "ensuring that development protects existing site ecology and makes the fullest contributions to enhancing biodiversity, both through on-site measures and by contribution to local biodiversity improvements;"

5.8 Core strategy policy CS5 states that the Council will ensure that development make the fullest contribution to the safeguarding of existing habitats and biodiversity, while delivering appropriate enhancement onsite to the benefit of the borough.

5.9 Barnet Adopted Local Plan Development Management Policies DPD (September 2012) [CD4 4.18]

5.10 Development Management Policy DM16 protects Barnet's Biodiversity by ensuring that all development proposals are evaluated and determined on the basis of impact on the natural environment and biodiversity. Developments which present an unacceptable impact on biodiversity and protected species may be refused as part of the overall planning balance.

5.11 Development Management Plan Policy DM16 **[CD4 4.21]** – Biodiversity "a) *When considering development proposals the council will seek the retention and enhancement, or the creation of biodiversity."*

5.12 Development Management Plan Policy DM01 – Biodiversity "f. *Development proposals for lighting schemes should not have a demonstrably harmful impact on residential amenity or biodiversity."*

Emerging Policy [CD5]

- 5.13 Since the planning application was refused in December 2023 and the LPA's statement of case was submitted in September 2024 [CD9 8.1], the Council received the Planning Inspector's report on the Barnet Local Plan 2021-2036 on 6th November 2024.
- 5.14 The Inspector's report concludes that the duty to cooperate has been met, and that subject to the recommended Main Modifications, the Barnet Local Plan 2021 to 2036 is legally compliant, sound, and in general conformity with the London Plan. Adoption is anticipated in February 2025.
- 5.15 The main relevant emerging policy referred to in the decision notice dated 21 December 2023 is Policy HOU06 [CD5 5.8] (Gypsies, Travellers and Travelling Showpeople), in regards to ecology subsection C of the policy explicitly states that *"In the event that proposals for such accommodation do come forward the Council will consider planning applications on the basis of and attach weight to ensuring: ..The site does not have an unduly adverse impact on the local environment."*
- 5.16 The second main relevant emerging policy is Policy EC006 [CD5 5.13] referred to which further reinforces Barnet's statutory powers to determine applications on their impacts on biodiversity and that all efforts must be undertaken to reduce and mitigate any disturbance to wildlife and protected species.
- 5.17 While the 2012 Local Plan [CD4 4.1] remains the statutory development plan for Barnet, the Draft Local Plan is a relevant material consideration in the Council's decision making on planning applications. Decision-makers should take into account the policies and site proposals in the emerging Local Plan accordingly, and the advanced stage it has reached.

Relevant Statutory Considerations

- 5.18 The following wildlife protection legislation and guidance must also be taken into consideration:

5.19 **Conservation of Habitats and Species Regulation 2017**

5.20 Protection of certain wild animals: offences

43.—(1) A person who —

- (a) deliberately captures, injures or kills any wild animal of a European protected species,
- (b) deliberately disturbs wild animals of any such species,
- (c) deliberately takes or destroys the eggs of such an animal, or
- (d) damages or destroys a breeding site or resting place of such an animal, is guilty of an offence.

(2) For the purposes of paragraph (1)(b), disturbance of animals includes any disturbance which is likely—

(a) to impair their ability—

- (i) to survive, to breed or reproduce, or to rear or nurture their young; or
- (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or

(b) to affect significantly the local distribution or abundance of the species to which they belong.

5.21 **Wildlife and countryside Act 1981 (as ammended)**

5.22 9 Protection of certain wild animals

(1) Subject to the provisions of this Part, if any person intentionally kills, injures or takes any wild animal included in Schedule 5, he shall be guilty of an offence.

[(4) Subject to the provisions of this Part, a person is guilty of an offence if intentionally or recklessly—

(a) he damages or destroys any structure or place which any wild animal specified in Schedule 5 uses for shelter or protection;

(b) he disturbs any such animal while it is occupying a structure or place which it uses for shelter or protection; or

(c) he obstructs access to any structure or place which any such animal uses for shelter or protection.]

5.23 **Licences for certain activities relating to animals or plants**

5.24 55.— (1) Subject to the provisions of this regulation, the relevant licensing body may grant a licence for the purposes specified in paragraph (2).

(9) The relevant licensing body must not grant a licence under this regulation unless it is satisfied—

(a) that there is no satisfactory alternative; and

(b) that the action authorized will not be detrimental to the maintenance of the population of the species concerned at a favorable conservation status in their natural range.

5.25 **Natural Environment and Rural Communities Act 2006**

5.26 40 Biodiversity Duty

(1) A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.

5.27 **Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)**

5.28 Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

Relevant Statutory Guidance and best practice

5.29 BS42020:2013 Biodiversity – Code of practice for planning and development [CD10 10.1]

5.30 9.3.3 If the competent authority is satisfied that the three derogation tests from “strict protection” under the Habitats Directive [4] (see Commentary on 9.3) are met, it should impose a planning condition preventing the development from proceeding without first receiving a copy of the EPS license or correspondence from the relevant statutory body stating that such a license is not necessary (see D.6.2).

5.31 Government Circular (ODPM, August 2005): Biodiversity and Geological Conservation – Statutory obligations and their impact within planning system [CD10 10.4]

5.32 Section 98 and 99 of the government guidance states that for any development that has the potential to harm protected species, all relevant information relating the presence/likely absence of EPS must be obtained and submitted to local authority prior to the granting of planning permission as a material consideration and to prevent the risk of an offence being committed under the Habitats

Regulation. The local authority must consult the relevant statutory nature consultee and may impose appropriate conditions and obligations to ensure their protection.

5.33 The Government’s guidance on ‘Protected species and development: advice for local planning authorities’ (updated 25 October 2023)² [CD10

10.3] states: “You should not usually attach planning conditions that ask for surveys. This is because you need to consider the full impact of the proposal on protected species before you can grant planning permission. You can add an ‘informative’ note to the planning permission to make it clear that a licence is needed. In exceptional cases, you may need to attach a planning condition for additional surveys. For instance, to support detailed mitigation proposals or if there will be a delay between granting planning permission and the start of development. In these cases a planning condition should be used to provide additional or updated ecological surveys to make sure that the mitigation is still appropriate. This is important for outline applications or multi-phased developments.”

5.34 The guidance continues: “You can refuse planning permission if surveys: do not provide enough evidence to assess the likely negative effects on protected species.” Conversely, “if the proposal is likely to affect a protected species you can grant permission where: a qualified ecologist has carried out an appropriate survey (where needed) at the correct time of year, there’s enough information to assess the impact on protected species and a protected species licence is needed it is likely to be granted by Natural England.”

5.35 Natural England’s Standing Advice on GNC (last updated 26 July 2022)

[CD10 10.2]³ states that: “You should consider if the developer has taken appropriate measures to avoid, mitigate and, as a last resort, compensate for any negative effects on GCN”. “Survey work can include presence of absence surveys, which can include eDNA sampling, population size surveys of water bodies or terrestrial and aquatic habitat surveys”. “If there’s likely to be a negative effect

² <https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications>

³ <https://www.gov.uk/guidance/great-crested-newts-advice-for-making-planning-decisions>

on GCN, you should consider these factors to assess the site's importance: the number of GCN populations and their size, the nature of the population – for example, if the site includes a breeding water body or is connected to other important populations, how important the site is to the local and national GCN population..." "Before you can grant planning permission, you must make sure any mitigation or compensation conditions you impose do not conflict with the requirements of a GCN mitigation licence and be confident that Natural England will issue a licence".

6.0 MAIN ECOLOGY ISSUES

Ecology - disturbance of great crested newts (Reason for Refusal 4)

6.1 The Appellant still has not provided adequate survey information to demonstrate that the proposed development would mitigate against the disturbance of GCN and their foraging/sheltering habitats within 500 meters of the application site. In the absence of such information the proposal is contrary to the National Planning Policy Framework (2023), Policy G6 of the London Plan (2021), Policies DM01 and DM16 of the Local Plan Development Management Policies DPD (2012), Policy CS7 of the Local Plan Core Strategy DPD (2012) and emerging local plan policy ECO06 "*Where adverse impacts from development on biodiversity cannot be avoided measures must be taken to ensure that they are appropriately managed so as to reduce and /or mitigate any disturbance to wildlife as appropriate*".

6.2 The Environment DNA test (RSKBiocensus, 20th June 2024) **[CD2 2.4]** revealed that Ponds 1 and 6 possess a positive result for GCN. The report goes on to conclude that GCN are [likely] present in Ponds 1 and Pond 2 and so one of the two licensing options is available: European Protected Species Mitigation License which would need to be supported by further traditional surveys (six visits between Mid-March and Mid-June), or district level licensing whereby compensatory payments can be made by the applicant to create high quality GCN ponds elsewhere.

6.3 Map of Pond locations within Ponds 1 and 6 highlighted (Environment DNA test (RSKBiocensus, 20th June 2024) **[CD2 2.4]**)



6.4 The Appellant’s Appeal Statement **[CD9 8.6]** states that because the eDNA test has now been undertaken and that the presence of GCN has been confirmed in Ponds 1 and 6 and that the works could feasibly be undertaken by a NE EPS license or District Level Licensing that the reason for refusal can be removed and that the further GCN surveys required to support a NE license can be conditioned.

6.5 The LPA refutes the assertions made in the Appeal Statement **[CD9 8.6]** that “This is a matter that can be dealt with by condition, as such the LPA are requested to review this reason for refusal as a matter of priority and to confirm that subject to condition, they no longer pursue the fourth reason for refusal” as the presence and protection of EPS is a material consideration for planning, and the LPA and NE require that such information relevant to protected species must be present prior to determination and not by means of planning condition.

This is in accordance with the Government's guidance on 'Protected species and development: advice for local planning authorities' (updated 25 October 2023) **[CD10 10.3]** and the other guidance as set out above.

6.6 Barnet Council's Statement of Case (September 2024) **[CD9 8.1]** confirms that the LPA is not satisfied from the limited evidence submitted that the Favorable Conservation Status of GCN will not be negatively impacted by the development as there remains insufficient information as to the population size and dynamics of these two ponds, and adopting a precautionary approach, the Council considers that it would be unlikely that NE would grant a license with the survey information currently available as per section 55(9) of the Conservation of Habitats and Species Regulation 2017. The Council would not be exercising its statutory duty under Section 40 of the Natural Environment and Rural Communities Act 2006, nor be in line with 9.9.3 of BS42020.2013 **[CD10 10.1]** were it to remove its objection to the approval of this scheme on this ground. Furthermore, there is the serious risk that were the Secretary of State to approve the scheme as it stands, even with a condition requiring further survey work before any development commences, that non-compliance on the part of the applicant would result in activities that would amount to serious offence to a European Protected Species under section 43 of the Conservation of Habitats and Species Regulation 2017 and Section 9 of the Wildlife and Countryside Act 1981 (as amended).

6.7 NE wrote to the Council confirming they do not have sufficient information from a survey to advise if a licence is appropriate, or apply conditions for licensable activities, and they do not have an appropriate assessment (22.10.2024, refer to Appendix 1). The Council also received legal advice which was disclosed to the inquiry before the Case Management Conference which concluded that, on the basis of the eDNA surveys submitted **[CD2 2.4]**, it is clear that there is likely a breach of Art 12 of the Habitats Directive and NE would not, as matters currently stand and / or assuming a worst-case scenario based on the absence of proper survey data, grant a licence. It cannot be assumed that further survey work would result in a positive licensing decision. Government guidance also makes clear that conditioning further ecological surveys is not normally appropriate **[CD10 10.3]**.

- 6.8 At the Case Management Conference, the Appellant indicated that they would be submitting further ecological information in the form of a mitigation strategy based on a worst-case scenario.
- 6.9 A rather different document was subsequently produced in the form of the Precautionary Method of Work (Ecology) – Barnet (ACJ Ecology, November 2024) **[CD2 2.5]** received on 9 December 2024. The PWM attempts to invoke Natural England Policy 4 that states alternative sources of survey information can be used to grant if required to suggest, that the precautionary working measure can be undertaken in a manner that would not negatively impact on GCN or optimal terrestrial habitat. The PWM does not contain information which addresses the potentially significant impact of the development on terrestrial habitats on site in the event that their presence was established by future surveys. The document thereby attempts to negate the requirement for further surveys and a supporting EPS licence and implies that all precautionary mitigation measures can be secured by means of planning condition.
- 6.10 Upon receipt of the PWM **[CD2 2.5]**, I immediately sent the document to NE for their comments. NE responded to confirm that they do not believe that the measures outlined within the PWM **[CD2 2.5]** would mitigate of committing a likely offence under section 43 of the Conservation of Habitats and Species Regulation 2017, nor that a license would likely be granted under Policy 4 with only the submission of the eDNA survey report **[CD2 2.4]**. They conclude that should the works commence within considered GCN habitat, and impact the Favorable Conservation Status of the local population without a licence from NE, this would constitute a wildlife crime (17.12.2024, refer to Appendix 3). In light of NE response, the Council does not consider that the PWM **[CD2 2.5]** means that further traditional surveys are not required.
- 6.11 The continued reason for refusal of the development in relation to ecology can be divided to three sections; likely unacceptable impact on the Favorable Conservation Status of GCN; failure of the proposed scheme to meet the Three Tests necessary to grant a licence from NE, and the eDNA survey report is still insufficient survey information.

The eDNA survey report is insufficient for Natural England to lawfully grant an EPS licence

6.12 The Appellant had originally made the argument that the eDNA survey provides sufficient evidence of the presence of GCN and that further traditional surveys are not necessary prior to determination and can in fact be conditioned. As set out above, as of December 2024, the Appellant has now provided the Council a PWM **[CD2 2.5]** document which against the advice and recommendation of their previous eDNA survey report, indirectly states that such effort is not required after months of suggestion from the Appellant that further surveys can be conditioned. The PWM **[CD2 2.5]** fails explicitly to justify why despite the previous eDNA report **[CD2 2.4]** stating clearly that further traditional surveys (six in total) are required during the active breeding season (Mid-March to Mid-June) that further surveys are not required, only alluding to the Policy 4⁴ from NE which recommends alternative sources of evidence to reduce standard survey requirements. The negation of the need for the required survey effort to inform mitigation at this stage of the appeals process is directly contrary to Paragraph 99 ODPM Circular 06/2005, BS42020:2013 Biodiversity – Code of practice for planning and development **[CD10 10.1]**, 9.9.3, NPPF Policy 193 **[CD4 4.1]**, and London Plan Policy G6 **[CD4 4.7]** which requires “*Development proposals should manage impacts on biodiversity and aim to secure net biodiversity gain*”. This should be informed by the best available ecological information and addressed from the start of the development process”, and Barnet Local Development Plan DM16. Furthermore, the Conservation of Habitats and Species Regulations 2017 and relevant case law (e.g., *Morge v Hampshire County Council* [2011] UKSC 2) **[CD6 6.22]** requires comprehensive survey data to assess the impact on EPS. Were the Applicant to apply for NE EPS licence, eDNA surveys alone do not provide meaningful information on population size or detailed habitat use, which are critical for mitigation planning and establishing whether the Favourable Conservation Status of the species will be maintained. eDNA survey

⁴ [European protected species policies for mitigation licences - GOV.UK](https://www.gov.uk/government/policies/european-protected-species-policies-for-mitigation-licences) Policy 4 requires that ecological impacts of development can be predicted with sufficient certainty and that mitigation or compensation will ensure that the licensed activity does not detrimentally affect the conservation status of the local population of any EPS

results only demonstrate that GCN are likely to be present as DNA can persist in waterbodies and can begin to decay in the absence of the species being present after just two weeks in pond water⁵, so further surveys would need to be undertaken to accurately establish the population size and structure and evidence of breeding all of which can only be captured using traditional survey methods. NE must receive detailed population data to issue an EPS Mitigation Licence. Without traditional surveys, it is impossible to develop an adequate mitigation strategy that ensures no harm to the species. eDNA survey result data as demonstrated in the official response from NE (see Appendix 1) is only admissible for NE to accept the information as sufficient to grant an EPS licence with the required further traditional surveys (6 x site visit) and mitigation strategy. This has been further substantiated by NE in response to the PWM **[CD2 2.5]**, who have clearly stated that applicants are expected to survey as much of the surrounding area as possible, reasons why full survey effort could not be undertaken in support of any EPS licence application. NE have also stated "*licencing policies [LP4] can only be used in licencing applications and are issued at Natural England's discretion. Any action taken quoting a licencing policy without a licence and expressed permission from Natural England would constitute a wildlife crime.*" (see Appendix 3)

6.13 The failure of the application to provide the full required suite of GCN surveys and then attempt to circumvent the survey requirement with inappropriate mitigation measures prior to determination of the application is directly contrary to the London Plan (2021) which states the management of impact of development on biodiversity should "*be informed by the best available ecological information and addressed from the start of the development process.*" Planning conditions cannot be used to address fundamental deficiencies in survey data. In addition, the condition of securing appropriate mitigation measures post-permission increases the risk of non-

⁵ Biggs J, Ewald N, Valentini A, Gaboriaud C, Griffiths RA, Foster J, Wilkinson J, Arnett A, Williams P and Dunn F 2014. Analytical and methodological development for improved surveillance of the Great Crested Newt. Appendix 5. Technical advice note for field and laboratory sampling of great crested newt (*Triturus cristatus*) environmental DNA. Freshwater Habitats Trust, Oxford.

compliance and potential harm to the species. Ensuring all necessary information is available upfront is essential for the LPA to make an informed decision.

- 6.14 Section 9.3.3 of the BS 42020:2012 Code of practice for planning and development **[CD10 10.1]**. *“If the competent authority is satisfied that the three derogation tests from “strict protection” under the Habitats Directive [4] (see Commentary on 9.3) are met, it should impose a planning condition preventing the development from proceeding without first receiving a copy of the EPS licence or correspondence from the relevant statutory body stating that such a licence is not necessary (see D.6.2)”*. However, as demonstrated within the Proof of Evidence Barnet Council as the local authority are not in possession of sufficient survey information and details pertaining to appropriate levels of mitigation which would satisfy the Council that the three derogation test have been met under the Habitats Directive in order for NE to grant a licence and as such the LPA cannot support the granting of planning permission subject to a condition for a submission of a copy of an EPS license (see Appendix 1 and 2).
- 6.15 Furthermore, D.5.1 **[CD10 10.1]** Government advice “With reference to protected species surveys, government advice 14) states that: a) *the presence or absence of protected species, and the extent to which they could be affected by the proposed development, should be established before planning permission is granted, since otherwise all material considerations might not have been considered in making the decision; and b) use of planning conditions to secure ecological surveys after planning permission has been granted should only be applied in exceptional circumstances.*” Under Paragraph 99 ODPM Circular 06/2005 it states “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". The LPA holds that the Applicant had sufficient time during the Spring/Summer of 2024 to obtain all necessary GCN survey and mitigation details to support their appeal; such information would typically have been submitted as part of the application stage. The Applicant did not do so. The imposition of a planning condition requiring surveys after permission or the imposition of planning conditions to secure adherence to an inappropriate precautionary working method would be contrary to guidance and, in any event, it has been confirmed that NE would not grant a licence with only eDNA survey information were the applicant to apply for a EPS licence under LP4 as we do not know to what extent the development would affect the Favourable Conservation Status of the species.

Likely unacceptable impacts on the Favorable Conservation Status of great crested newts were the development to be granted permission

- 6.16 The most imminent concern is that, in the absence of the further surveys and appropriate mitigation strategy to address the issue of GCN (assuming worst case scenario that the further surveys revealed that both ponds have a high population (100 breeding adults)) that the proposed precautionary mitigation measures are deemed inappropriate in relation to the likely moderate risk. The precautionary methods of working are effectively generic (including the provision of a toolbox talk, erection of tree root protection fencing, and two stage vegetation clearance of the site) given that the stated amber (moderate) risk of encountering GCN within 50m of Pond 1 and does not go into any specific details relating to the traveller site development under consideration rather deferring the finer details of the projects work schedule to a Construction and Environmental Management Plan. The issues of the proposed unmitigated habitat loss, disturbance and long-term impacts associated within the proposed caravan site would likely result in the following issues below.

Construction phase

- 6.17 Injury and/or death of individual/individuals of GCN during the terrestrial (non-breeding) phase of the year (August – October inclusive) through the direct loss and derogation of the grazing fields and topsoil removal by heavy machinery/diggers along the access route and site of care. The Precautionary

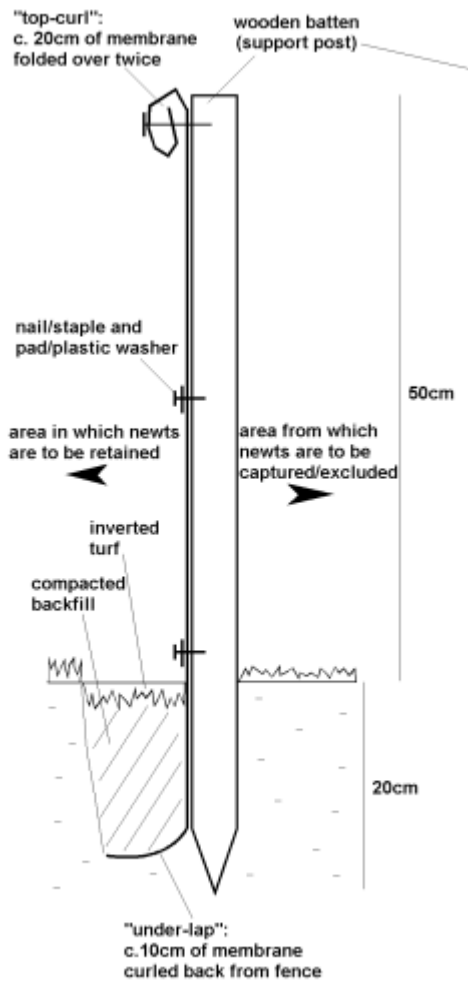
Method of Works (Ecology) **[CD2 2.5]** has stated a supervised two-phase vegetation clearance would be undertaken during the hibernation season when GCN are not likely to be active (November to March) while any stump or refuge removal would be undertaken during the active GCN season (April to October). However, this approach has failed to consider the following:

- (i) No measures have been put forward to prevent the movement of GCN onto the construction site from respective ponds 1 and 6 by means of herptile exclusion fencing for the principal reason that such action would necessitate the granting of an EPS licence from NE;
- (ii) No consideration has been given the potential for GCN to emerge from hibernation from any nearby refugia on wet or damp, with air temperatures above 4 - 5°C, following several days when the temperature has been below this level and;
- (iii) No explicit contingency measures have been provided as to what would need to be done in the event a GCN is discovered during the works.

6.18 These precautionary mitigation measures are proposed only on the assertion made that the terrestrial habitat of the horse grazing field is suboptimal and forms the basis for their negation of the need for further surveys and mitigation. The was assessed as low but not negligible suitability to provide resting places or areas suitable for shelter or protection but includes areas refugia where necessary. GCN are more likely to stay within 250m of their breeding pond with surrounding suitable habitat⁶. However suboptimal habitat may still be used for commuting and foraging around especially within proximity of a breeding pond (<50m) and the Natural England's Rapid Risk Assessment (2011) takes this into account weighting risk. There is a serious risk that without a valid mitigation strategy that included the installation of herptile exclusion fencing (secured only under licence from NE (see image

⁶ Cresswell, W., and Whitworht, Rhiannon. (2004) English Nature Research Reports Number 576 An assessment of the efficiency of capture techniques and the value of different habitats for the great crested newt *Triturus cristatus* **[CD10 10.7]**

below) then individual GCN present in the pond of nearby sheltering/hibernating habitat will simply be permitted to migrate directly onto the works site thereby completely negating the rationale behind the PWM and works would need to halt while an appropriate EPS licence supported by further surveys would need to be obtained. The omission of this and contingency measures associated with finding individual GCN during the works speaks to the attempts made by the Applicant to negate the likely moderate risk and requirements for sufficiently robust survey effort to inform an appropriate mitigation strategy. The fact that the proposed PWM **[CD2 2.5]** states that there is moderate risk of disturbing GCN onsite but fails to adequately address the risk of movement of GCN onto the site from the nearby Pond 1 means that such disturbance of the species and their suitable habitat would directly contravene section 43(1)(a) of the Conservation of Habitats and Species Regulation 2017 (transposes from Council Directive 92/43/EEC of 21st May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora ('Habitats [and Species] Directive'), and section 9(1) of the Wildlife and Countryside Act 1981 (as amended).



CROSS-SECTION

6.19

6.20 Example of GCN exclusion fence design (refer to English Nature 2001)⁷
[CD10 10.5]

6.21 The PWM **[CD2 2.5]** has recommended standard pollution prevention measures such as provision of footwell, and wheel washing station, and dust control prevention measures. These measures are required to limit the consequence top/subsoil clearance required to facilitate the construction of the access route and caravan site foundation so close to Pond 1. However, the proposed "Standard dust prevention measures will be implemented" are inappropriate as they do not state what this entails. Furthermore, there is insufficient details on the proposed biosecurity measures within a Risk Assessment Management Statement (RAMS) would entail. In the absence of

⁷ Great crested newt mitigation guidelines. (2001) English Nature, Version: August 2001.
[CD10 10.5]

the above information the LPA holds the assumption that such soil movement and mitigation activities even if they were to occur outside of the aquatic breeding season (mid-March to mid-June respective) could be insufficient to mitigate the pollution risk result in top soil and pollutants being permitted to enter Pond 1 which would result in eutrophication with excessive nutrient and pollutant building up in the water causing algae blooms and thereby depleting oxygen and availability for sunlight for aquatic plants on which GCN rely on to lay their eggs. Eutrophication resulting from pollutants entering Pond 1 would result in the damage to a breeding site (if confirmed to be a breeding pond) and thereby impede the ability of the species in the pond to reproduce. This seeming secondary effect of the development in the absence of all necessary survey information would directly contravene section 43 (1)(d) and (2)(a)(i) and Section 9(4)(a) of the Wildlife and Countryside Act 1981 (as amended) and is contrary to NPPF 193 **[CD4 4.1]**, and Barnet Local Plan Core Strategy Policy CS7 **[CD4 4.15]** to protect onsite ecology.

6.22 The clearance of the horse fields and area of dense scrub, and section of hedgerow nearest to the site entrance to facilitate the development would result in the permanent loss of terrestrial foraging habitat individual/individuals of GCN nearest to Pond 1. As mentioned, the assumption of horse grazing field being suboptimal habitats is not a valid reason to assume that an offence would not likely occur as GCN are more likely to stay within 250m of their breeding pond⁸ **[CD10 10.7]**, for which the eDNA surveys have confirmed the likely presence of the species in Ponds 1 and 6. Although restricted in scale the location and loss of foraging habitat contravening section 43(1)(d) of the Conservation of Habitats and Species Regulation 2017 and section 9(4)(iii) of the Wildlife and Countryside Act 1981 (as amended), and NPPF Policy 193 **[CD4 4.1]** Barnet Local Plan Core Strategy Policy CS7 **[CD4 4.15]** and Barnet Local Plan Policy DM16 **[CD4 4.21]**.

6.23 There are concerns that insufficient containment of the site to prevent the movement of any emerging GCN from any extant log piles of debris piles

⁸ Cresswell, W., and Whitworht, Rhiannon. (2004) English Nature Research Reports Number 576 An assessment of the efficiency of capture techniques and the value of different habitats for the great crested newt *Triturus cristatus* **[CD10 10.7]**

that maybe present near the mature hedgerows adjacent to the red line boundary of the caravan site may potentially result in the disturbance GCN during the winter period (November – February inclusive) or alternatively sheltering GCN that may enter the unsecured works site during the active GCN season (April – October inclusion) (subject to the findings of the further surveys). Either direct disturbance or removal of any such sheltering or hibernating places because of any consented development would directly contravene section 43(2)(a) of the Conservation of Habitats and Species Regulation 2017 and section 9(4)(a) of the Wildlife and Countryside Act 1981 (as amended)

Operational/Post development phase

6.24 The current location, orientation and extent of the proposed works, were they to be permitted in current form, would result in the direct loss of ideal terrestrial habitat (grassland, scrub and potentially hedgerow) directly between the two respective ponds (1 and 6). The ponds are approximately 160m northwest-southeast as the crow flies, but in are 172.26m apart by way of suitable habitat to the adjacent property – Chesterfields Farm). This distance is within the average GCN dispersal range of 250m (maximum 1km from a breeding pond). The PWM **[CD2 2.5]** makes the assertion that the horse grazing fields are not considered suitable habitats of rough grassland but rather modified grassland which is suboptimal and that GCN would most likely use the boundary hedgerow rather than crossing the field. The assertion made by ACJ Ecology Ltd within the PWM **[CD2 2.5]** that the horse grazing field is suboptimal terrestrial habitat and could not feasibly be used for commuting route between ponds 1 and 6 as the grazed nature of the fields is not a sufficient rationale in it of itself to impede the movement of any GCN between the ponds. Terrestrial habitat was assessed as low but not negligible suitability to provide resting places or areas suitable for shelter or protection but includes areas refugia where necessary. As previously stated, as there is presence of terrestrial habitat, GCN are more likely to stay within 250m of their breeding pond⁹

⁹ Cresswell, W., and Whitworth, Rhiannon. (2004) English Nature Research Reports Number 576 An assessment of the efficiency of capture techniques and the value of different habitats for the great crested newt *Triturus cristatus* **[CD10 10.7]**

(Cresswell & Whitworth, 2004) **[CD10 10.7]**. However, even suboptimal habitat may still be used for commuting and foraging around especially within proximity of a breeding pond (<50m) and the Natural England's Rapid Risk Assessment (2011) takes this into account weighting risk. This loss of the horse grazing field for the development will directly impede the likely migration route of the GCN metapopulation (subject to the findings of the further survey works) between Pond 1 and 6 as currently there is not development on the appeal site we can take the reasonable assumption that if these ponds are revealed to be breeding ponds then adult GCN would likely migrate to the ponds in a staggered pattern over different breeding seasons. Typically, between February and April after the hibernation period and during damp nights with consistent weather conditions and temperatures 4.5 – 5°C newts will migrate to the pond while conversely young which have spent the winter within ponds would emigrate to forage within suitable terrestrial habitat¹⁰ (refer to Langton 2009) **[CD10 10.6]**. Due to the staggered nature of the GCN migration over the spring and summer there is generally a consistent movement of individuals to and between different ponds. The location and extent of a development between these ponds would sever the migration route across the site for the GCN metapopulation (subject to further surveys) and negatively impact the local distribution of the GCN which would contravene section 43(2)(a)(ii) and (b) the Conservation of Habitats and Species Regulation 2017 and section 9(4)(c) of the Wildlife and Countryside Act 1981 (as amended) and is contrary to NPPF 193 **[CD4 4.1]**, and Barnet Local Plan Core Strategy Policy CS7 **[CD4 4.15]** to protect onsite ecology.

6.25 Were the development to be granted, it would have a low level but long term impact including the indirect impact of unmitigated artificial external lighting spill which would discourage the movement of GCN within areas of suitable terrestrial habitat or within Pond 1 itself (dependent on location, specification and orientation of external lighting)¹¹. The PWM **[CD2 2.5]** has acknowledged the concern raised by the LPA in regards to artificial lighting but has not

¹⁰ Great crested newt mitigation guidelines. (2001) English Nature, Version: August 2001. **[CD10 10.5]**

¹¹ Great crested newt mitigation guidelines. (2001) English Nature, Version: August 2001.

- provided any recommendations to how artificial lighting for the scheme could limit the impact on biodiversity and the pond in particular. The long-term low-level disturbance of GCN during the active GCN season by unmitigated artificial lighting would also contravene section 43(1)(b) of the Conservation of Habitats and Species Regulation 2017 and section 9(4)(b) of the Wildlife and Countryside Act 1981 (as amended), and Barnet Local Development Plan Policy DM01.
- 6.26 No consideration has been given to the foul water drainage that would be required as part of the development and its potential implications for the GCN population in Pond 1. The PWM **[CD2 2.5]** does not address the concerns raised regarding foul water drainage on the ponds post-development. Were there to be a development with an inappropriately planned or incorrectly installed drainage solution, it would lead to a direct foul water sewage into the pond which depending on the rate of flow and concentration of water water/pollutant may either cause eutrophication impeding the ability of the species to survive, or potential decimate the extant population. Such an event would directly contravene section 43 (1)(d) and (2)(a)(i) and Section 9(4)(a) of the Wildlife and Countryside Act 1981 (as amended), and NPPF Policy 193 **[CD4 4.1]**.
- 6.27 There is low level risk that post-completion of the development that introduction of domestic dogs or cats onto the site would result in either direct predation of any individual GCN found to be present within the wider site/pond or alternatively any pet dogs that enter Pond 1 may result in the transmission of either chemical treatments or amphibian pathogens such as Ranavirus and Chytridiomycosis which has the potential result in a stochastic population crash. The PWM **[CD2 2.5]** has acknowledged the concern raised by the LPA in regard to domestic pets but has not provided any recommendations to how the issue could be remediated post-development. Were such stochastic events to happen then such effects would contravene section 43(2)(a) of the Conservation of Habitats and Species Regulation 2017 and section 9(4)(b) of the Wildlife and Countryside Act 1981 (as amended), and NPPF Policy 193 **[CD4 4.1]**, and Barnet Local Plan Core Strategy Policy CS7 **[CD4 4.15]**.

- 6.28 The PWM **[CD2 2.5]** has explicitly stated that *“The proposal shows that it benefits the local EPS population. This can be done by increasing the distribution of suitable habitats, improving the quality of occupied habitats, improving connectivity between habitats and enhancing the long-term maintenance and security of the habitat to improve future populations.”* However, this is unsubstantiated and, in my opinion, objectively false claim in light of the stated risks in section 6 of the proof of evidence. No details relating to the enhancement of GCN habitat has been put forward, and thus there is no justification as to how such activities would result in the benefit to the Favourable Conservation Status of the species. I do not consider that this unsubstantiated statement should be given any weight as a possible reason for granting planning permission.
- 6.29 The stated risk above to the Favourable Conservation Status of GCN through the injury of disturbance of individuals, permanent loss of suitable foraging and commuting habitat, and disturbance of potential breeding habitat would be likely to constitute an offence and would, without further surveys and a properly informed mitigation strategy, be unlikely to be licenced by NE. To that end, inappropriately mitigated development supported by insufficient GCN survey information would also be contrary to NPPF Policy 193 **[CD4 4.1]** in that it fails to sufficiently avoid, mitigate or compensate loss of biodiversity and has to be refused on those grounds (see Appendix 2).
- 6.30 The likely significant harm to GCN in the absence of the complete survey data, and inappropriate mitigation is a clear example of an *‘undue adverse impact on the natural environment’* with the context of the proposed traveller site which is contrary to emerging local plan Policy HOU06 **[CD5 5.8]** (Gypsies, Travellers and Travelling Showpeople) which forms the principal reason of refusal. Furthermore, the significant harm to biodiversity if granted with the insufficient survey effort and lack of details of ecological mitigation would be directly contrary to emerging local plan EC006 **[CD5 5.15]** which states that *“Where adverse impacts from development on biodiversity cannot be avoided measures must be taken to ensure that they are appropriately managed so as to reduce and /or mitigate any disturbance to wildlife as appropriate. These measures should be included as part of a planning application”*. The LPA has

received insufficient detail during the application and appeal stage on how such effort avoid, reduce or appropriately mitigate disturbance to GCN can be achieved.

The proposed scheme fails to meet the 'Three Tests' of derogation

6.31 A legal requirement for the LPA is to determine whether an application which involves a EPS if granted planning permission would be likely to be granted an appropriate mitigation licence from NE. Under section 55(9) of the Conservation of Habitats and Species Regulation 2017 NE must satisfied that the development meets the 'three test' (see below):

- (i) *Imperative Reasons of Overriding Public Interest (IROPI) [Habitat Directive]*
- (ii) No Satisfactory Alternative
- (iii) Favourable Conservation Status

6.32 The second point of "*No Satisfactory Alternative*" can be challenged as per section 6.24 above which states that the current location and orientation of the scheme in relation to the pond would server the potential migration route between Pond 1 and 6. Were the layout and orientation of the proposed site to have been rearranged to be situated in the southwest corner and as opposed to the north east corner than that would have removed the risk of severing a commuting route directly over the area of suitable terrestrial GCN habitat (grassland) and in doing so would have met the second test of 'No satisfactory alternative'.

6.33 In relation to the third point, Favourable Conservation Status is defined as "*securing the underlying inherent diversity (genetic and phenotypic) of a species by maintaining thriving populations across its natural range, as far as possible by the restoration of natural ecosystem function.*" Without sufficient survey data and accompanying appropriate mitigation that adequately considers and addresses the populations of GCN in Ponds 1 and 6, the LPA must assume that the risk of an offence under section 43 of the Conservation of Habitat and Species Regulation 2017 cannot be reasonably mitigated

against, unless further surveys and a licence from NE indicate otherwise. This includes the likelihood that both ponds are revealed by further surveys to support breeding adult GCN. Consequently, the construction phase poses a serious risk of injuring, killing, and disturbing these newts within suitable terrestrial habitats, damaging foraging and sheltering habitats, and indirectly polluting Pond 1. Long-term impacts could disrupt migration routes by segregating the pond from the remaining grassland. Post-development, the possible risk of increased light spill, interaction with domestic pets, and potential foul water pollution could further disturb the newts. These combined impacts would likely result in wildlife offences and impair the species' ability to survive within its local metapopulation.

- 6.34 NE have confirmed in writing on two occasions that they are unable to consider conditions without satisfactory survey effort. NE have stated that full effort must be made to obtain complete survey data and evidence when applying for a License, licencing policies can only be used in licencing applications and are issued at NE discretion, and that given the location and nature of the works in relation to ponds near the site, the development if implemented under a precautionary method statement without a licence would constitute a wildlife crime (see Appendix 1 and 3). In *R. (on the application of Morge) v Hampshire CC* [CD6 6.22], the Court held that the decision maker must have regard to the derogation tests. It is for NE to decide if a licence is likely to be granted, and planning permission would not prevent a criminal sanction unless the decision maker is satisfied that it would not be a criminal offence and derogation would be permitted. Without adequate survey information, it is simply impossible to form a view as to whether NE would be likely to grant a licence or not and, considering the worst-case scenario, in my view they would be unlikely to do so.

7.0 OTHER MATERIAL CONSIDERATIONS

- 7.1 It is the council's position that the scheme in the absence of further GCN survey and an appropriately detailed supporting GCN mitigation strategy would result in a significant harmful effect on the

Favorable Conservation Status of EPS. The scheme is deemed thus to be harmful to GCN and conflicts with NPPF Policy 193 **[CD4 4.1]** , London Plan (2021) policy G6 **[CD4 4.7]**. The proposal is in conflict with policy CS7 **[CD4 4.5]** and DM16 **[CD4 4.21]** and DM01 of the Barnet Local Plan Core Strategy and Development Management Policies (2012) **[CD4 4.21]**, and emerging local plan policies EC006, and HOU06. I therefore consider the appeal scheme in conflict with the Development Plan overall.

- 7.2 Following review of the submitted PWM **[CD2 2.5]**; supported by consultation with NE, I am of the view on behalf of the Council that we cannot accept the precautionary mitigation measures as being adequate to negate the need for full surveys, considering the stated moderate risk of causing an offence to GCN and their terrestrial habitat onsite. The document fails to adequately address the risk of encountering GCN within and around the site and, it appears to me, has been produced at this late stage principally to negate the explicitly recommended further traditional GCN surveys necessary to obtain an appropriate licence from NE. The PWM **[CD2 2.5]** has only stated regarding NE EPS licensing that "In the worst-case scenario, the developer can apply for a mitigation licence from Natural England". The executive summary refers to NE Licensing Policy 4 which states that alternative sources of evidence can be used for EPS licence but has not explicitly stated that the eDNA surveys from RSK Biocensus **[CD2 2.4]** would likely be sufficient in and of themselves to obtain a licence. NE neither hold the view that eDNA survey would be sufficient to grant an EPS licence, nor do they hold the view that an offence under the Conservation of Habitats and Species Regulation 2017 is unlikely.
- 7.3 It is respectfully submitted that planning permission cannot lawfully be granted with insufficient survey information and an inappropriate mitigation protocol relating to GCN and neither the necessary surveys nor adherence to this unacceptable precautionary working method statement should be conditioned. Notwithstanding the Council's case on this, the Council and the Appellant will seek to agree a list of proposed conditions for discussion at the Inquiry, including conditions relating to GCN, in the event that the Inspector disagrees with the Council and planning permission is granted.

7.4 **Conclusion**

7.5 Based on the incomplete level of survey information and thus the serious ambiguity relating to the population size and significance within Pond 1 and 6, and given the concerns of a likely offence being committed under Conservation of Habitats and Species Regulation 2017 with the inappropriate mitigation measures outlined within the PWM [CD2 2.5] there is a risk that the development if granted would have a significant impact on the Favorable Conservation Status of a EPS. The PWM [CD2 2.5] appears to have been submitted to attempt to circumvent the requirement for further surveys. NE has stated they would not grant a licence under Licensing Policy 4 were one applied for in the circumstance that a GCN were to be discovered under a precautionary method of works. The necessary 'traditional' GCN surveys to inform a proper mitigation strategy cannot be conditioned to take place after the grant of planning permission since (a) this is contrary to guidance and (b) more importantly, granting permission without such information means that the decision-maker is not engaging properly with the requirements of the Directive, as is required by Morge [CD6 6.22]. Therefore, in my view the Planning Inspector must dismiss the appeal irrespective of the planning merits on other matters. For the Planning Inspectorate allow such a scheme to be granted planning permission would be unlawful, given outstanding survey data required and the full knowledge that NE would not grant a EPS mitigation license for development with insufficient data on the populations of the species in these ponds. The proposed development as stands would not pass the three tests under regulation 55(9) of the Conservation of Habitats and Species regulation 2017 and could not be granted a licence. The proposed development would likely significantly impact the Favorable Conservation Status (assuming a worst-case scenario) in the absence of appropriate survey effort and mitigation strategy and thus runs the risk of committing a serious offence under the above-mentioned legislation.

8.0 DECLARATION

- 8.1 The evidence I have prepared and provided for this appeal is true and has been prepared in accordance with the guidance of the appropriate professional institutions. I confirm that the opinions expressed are my true and professional opinions.

9.0 APPENDICES

APPENDIX 1: Response from Natural England (dated 22.10.2024)

Dear Nathan,

Thank you for your enquiry.

It would not be possible for the Natural England Wildlife Licensing Service (NEWLS) to issue a European Protected Species licence for great crested newts under the Conservation of Habitats and Species Regulations 2017 (as amended) and Wildlife and Countryside Act 1981 (as amended) in the absence of appropriate survey information to accurately reflect the status of the site at the time the licence application is submitted.

The table below details the survey requirements for schemes with differing impact types and locations.

Survey guidance table

Impact type and location	Potential terrestrial habitat - loss or damage (ha)	Presence/likely absence survey	Population size class assessment	HSI	Maximum age of survey data (# breeding seasons)
Permanent habitat loss or damage					
Pond(s) lost or damaged, with or without other habitat loss or damage	≥0	YES	YES	YES	2
No ponds lost or damaged, development within 50m of nearest pond	≤0.01	YES	NO	YES	3
	>0.01	YES	YES	YES	2
No ponds lost or damaged, development 50-100m from nearest pond	≤0.2	YES	NO	NO	3
	>0.2	YES	YES	YES	2

No ponds lost or damaged, development 100-250m from nearest pond	≤0.5	YES	NO	NO	4
	>0.5	YES	YES	YES	3
No ponds lost or damaged, development >250m from nearest pond (NB see notes)	≤5	YES	NO	NO	4
	>5	YES	NO	YES	3
Temporary habitat loss or damage					
Pond(s) lost or damaged, with or without other habitat loss or damage	≥0	YES	YES	YES	2
No ponds lost or damaged, development within 50m of nearest pond	≤0.05	YES	NO	YES	3
	>0.05	YES	YES	YES	3
No ponds lost or damaged, development 50-100m from nearest pond	≤0.5	YES	NO	NO	4
	>0.5	YES	YES	YES	3
No ponds lost or damaged, development >100m from nearest pond	≤5	YES	NO	NO	4
	>5	YES	NO	YES	4

If the development to which the enquiry relates requires a population size class assessment (in accordance with the table above), it would not be possible to issue a licence to include the conditioning of further surveys. Impact assessments to help determine whether proposals meet licensing requirements must be clear and unambiguous at the time the application is submitted.

I hope this helps. Please do not hesitate to contact me should you wish to discuss anything further

Kind regards,

Dylan Poole

Higher Wildlife Licensing Officer

Natural England Wildlife Licensing Service – Operations Delivery

Tel: 02080 266426

Natural England

Foss House, Kings Pool

1-2 Peasholme Green

York YO1 7PX

www.gov.uk/natural-england



APPENDIX 2: NATURAL ENGLAND EXPLANATORY NOTE FOR LOCAL PLANNING AUTHORITIES ON CLAUSE 9.3 and ANNEX D6.1 OF BS42020:2013

PLANNING CONDITIONS AND EUROPEAN PROTECTED SPECIES LICENCES. FEBRUARY 2020

This note applies to European Protected Species and England only

1. Before granting planning permission, the local planning authority should satisfy itself that the impacts of the proposed development on European protected species (EPS) have been addressed and that if a protected species derogation licence is required, the licensing tests can be met and a licence is likely to be granted by Natural England.
2. In addition, under Section 17 of the Crime and Disorder Act 1998, local authorities are required to do everything they reasonably can to prevent crime, including wildlife crime. With regard to preventing offences involving European protected species, this is likely to be most effectively achieved by ensuring that – where relevant – an applicant for planning permission has applied for and, where necessary, obtained a derogation licence from Natural England.
3. Section 9.3.3 of BS42020:2013 therefore states that if the competent authority is satisfied that the three tests can be met, it should impose a planning condition preventing the development from proceeding without first receiving a copy of the EPS licence or correspondence from the relevant statutory body (Natural England) stating that such a licence is not necessary.
4. This approach ensures compliance with the Conservation of Habitats and Species Regulations 2017(as amended) and enables a local planning authority to discharge its obligations under the Crime and Disorder Act and its wider duties under Section 40 of the Natural Environment and Rural Communities Act 2006 in relation to protected species. Where an applicant fails to obtain an EPS licence, but nonetheless proceeds with the development and kills or injures a protected species or damages or destroys its breeding site or resting place, an offence may occur. Enforcement in these cases is normally a matter for the police and the courts. However, the planning authority also has powers to take planning enforcement action (e.g. through a Stop Notice) should development commence where European protected species are present and where no licence has yet been obtained, which could prevent the potential offence from otherwise occurring.
5. Local planning authorities should only use such a planning condition where European protected species have clearly been identified as a material consideration during the determination process and are at risk of harm if development proceeds. Such a condition should not be used where, either: a European protected species is present but the planning authority is satisfied that the works can proceed without committing any offence; or where the LPA is unsure whether or not European protected species may be present and/or harmed (in this case further information should be required before granting the planning permission).
6. It is not necessary or appropriate for a local planning authority to consult Natural England over the imposition or discharge of such a planning condition and Natural England is unable to provide advice on this. This would impose a further administrative burden on both bodies and is unnecessary where EPS are a material consideration. Where an EPS licence has been granted by Natural England, applicants should send a copy of the EPS licence to the local planning authority. Where advice on a licence has been sought but Natural England has confirmed that a licence is not needed, this advice should also be sent to the local planning authority with the planning

application. Natural England provides advice to applicants on protected species licences under its [Discretionary Advice Service](#).

APPENDIX 3: Response from Natural England (dated 17.12.2024)

Dear Mr Nicholls,

Thank you for the query and apologies with the delay getting back to you. I've provided some clarification on some of your points below.

As mentioned by Dylan, you are correct that further survey work should be undertaken in and around the site before a decision is made as to whether or not a licence is required for the works. High HSI scores and positive eDNA results are a fairly conclusive indicator that GCN may be present and that a population size class assessment survey would be required. In some applications, we permit the use of Licencing Policy 4 (LP4) when surveys cannot be completed or are limited. However, LP4 is not a substitute for survey, but rather a way to facilitate a reduced effort. We would expect applicants to survey as much of the surrounding area as possible and provide justification as to why certain ponds could not be monitored before granting the use of LP4. In addition to this, licencing policies can only be used in licencing applications and are issued at Natural England's discretion. Any action taken quoting a licencing policy without a licence and expressed permission from Natural England would constitute a wildlife crime.

With regards to the plan to complete works under a precautionary method statement, whilst I cannot provide advice on a specific document, I would say that given the location of the site and the number of ponds in the immediate vicinity, this would be extremely high risk in the absence of a survey confirming the absence of a GCN population on site (or the presence of an extremely small one). Should the development area be considered GCN habitat, and the favourable conservation status of the local population be impacted by the works under a precautionary method statement without a licence from Natural England, then this would again constitute a wildlife crime. If you believe this has occurred, then you should contact your local wildlife crime officer.

As mentioned, I cannot provide comment on a specific document such as this in the absence of a licence application. However, if the ecologist or the applicant are seeking advice on any plans or proposals, they should look to contact us through our DAS and PSS schemes. This service will allow them to speak to one of our officers who will be able to directly advise them on the suitable course of action. If they wish to make an enquiry, you can direct them to this mailbox: PSSEnquiries@naturalengland.org.uk

I hope that addresses most of your questions, and apologies again for the delay. If you wish to discuss this further, you can reply directly to this email or give me a call on the number in the email signature below.

Thank you,

Kind regards,

Owen Turner
Senior Wildlife Licensing Officer
Natural England Wildlife Licensing Service
Apex Court, City Link, Nottingham, NG2 4LA
Tel: 07442881992

www.gov.uk/natural-england



To help people consider the environment Natural England offers two chargeable services
- the [Discretionary Advice Service \(DAS\)](#), which can provide advice on planning/licensing proposals
- the [Pre-submission Screening Service \(PSS\)](#) for European Protected Species mitigation licence applications.