

## **Rebuttal Proof of Nathan Nicholls (Ecologist for the Council)**

### **In response to the Proof of Evidence of Matthew Green on Behalf of the Appellant**

**7 January 2025**

Re: section 94:

1.The Appellant has had sufficient time over the preceding year to produce the necessary great crested newt surveys data to inform a detailed great crested newt mitigation strategy necessary to support the application of Natural England EPS licence.

Re: section 95:

2.The claim that LBB have not consulted Natural England on the submitted Precautionary Method Statement is incorrect. The document was attached to the email sent to Natural England on December 13<sup>th</sup> 2024.

Re: section 96:

3.The Appellant has misrepresented Natural England's (NE) response issued to LBB on December 17<sup>th</sup> 2024 in a manner that makes it appear that the Appellant's approach regarding eDNA testing and use of a Precautionary Method Statement is acceptable. The NE response in context states:

*"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"*

4.The eDNA survey results are not sufficient in or of themselves to warrant the granting of an EPS licence under Natural England Policy LP4, in the circumstances, where the eDNA survey report explicitly stated that further surveys are required to support the application of an EPS licence, and the surveys could have been feasibly undertaken during the active great crested newt breeding seasons preceding the determination of the application (Mid- March to Mid-June).

Re: section 97:

5.To the Appellant's claim about not being approached for requested ecologist information it should be noted that the council engaged the Appellant for the required ecological information. The Preliminary Ecological Appraisal dated 14 November 2023 was submitted after the Council's request in October 2023, when no supporting ecology report was initially submitted in support of the application. The Council then informed the Appellant of the need for the

recommended eDNA testing (and subsequent surveys if positive eDNA results were recorded) as per the explicit recommendations of the PEA report.

*Re: section 99:*

6. The Council refute the allegation that it failed to consider its duty in relation to the Appellant and their application by not having regard to the public sector equality duty under S149 of the Equalities Act 2010 (PSED). This issue was addressed as part of the overall planning balance and more specifically in the Planning Officer's report under the section entitled "Equality and Diversity Issues" which set out the PSED duty considerations and the specific protected characteristics of the Appellant. The Appellant has been treated fairly and not in less favourable or disadvantageous way in comparison to any other applicant for planning permission. The development proposals have adverse impacts on suitable terrestrial habitat next to a pond with the confirmed presence of great crested newts eDNA which are significant material considerations that must be and were appropriately weighed into the overall planning balance along with the PSED duty to the Appellant and other policy and relevant material considerations. Any development which proposes the loss of degradation of habitats, and which could support European Protected Species must be supported with the pre-requisite survey information and mitigation.

*Re: section 100:*

7. The Council continues to refute that pre-commencement conditions can be imposed to ensure that harm to ecology does not occur, as insufficient survey information has been submitted to inform any determination as to whether the proposed works have a negative impact on the favourable conservation status of the species. The presence and protection of European Protected Species is a material consideration for planning determinations, and the LPA and NE require that such information relevant to protected species must be present prior to determination of an application and not by means of a planning conditions (pre-commencement or otherwise).

#### **Rebuttal to Proof of Evidence (ACJ Ecology, December 2024)**

8. There has been no substantive change to the stance of the Appellant's ecologist since Barnet Council has issued the Proof of Evidence (Ecology) beyond sections 3.9 and 3.13 (see below). The Appellant's Proof of Evidence (Ecology) and the precautionary method of working (PWM) doubles down on their stance to contradict all the recommendations of the previous ecology reports which stated that further traditional surveys would be required to inform the submission of Natural England EPS licence.

9. The Ecology proof of evidence does not explicitly state that no further surveys are required, and regarding Natural England EPS licencing they have only stated that "*In the worst-case scenario, the developer can apply for a mitigation licence from Natural England*". The executive summary of the Proof of Evidence refers to Natural England Policy 4 being a possible route to obtaining a licence. However, NE in their own response dated December 17<sup>th</sup> 2024 preclude this option when there is a high risk of committing an offence under Conservation of Habitats and Species Regulation 2017. eDNA surveys are not a substitute for sufficient survey effort to support a licence with a confirmed risk of offence being possible.

*Re section 3.9:*

10. The Appellant's ecologist has misrepresented NE's response on December 17<sup>th</sup> 2024 to imply that NE are dismissive of the suitability of the terrestrial habitat for great crested newts when the preceding sentence clearly states "*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).*" NE stated their concerns of likely risk of an offence being committed against great crested newts by a development of this scale and nature so close to a pond with confirmed great crested newt DNA.

*Re section 3.13:*

11. The Appellant's ecologist has failed to take into consideration that the proposed precautionary method statement fails to address the potential movement of GCN onto the proposed works during the active GCN breeding season even if vegetation clearance occurs outside the active breeding period. Further, no consideration has been given to inclusion of an effective newt exclusion barrier fencing as the installation of such fencing would in and of itself require a licence from NE, a fact that has been avoided under the submitted proof.

12. I maintain that the Appellant's proof of evidence is insufficient to overcome the concerns relating to great crested newts and grant planning permission, and that given the positive eDNA surveys in Pond 1 and 6 the measures outlined within the PWM itself are inappropriate and would constitute a likely criminal offence were they to be permitted. The submission of PWM at this late stage is, in my opinion, an attempt to distract from and avoid the fact that the proposed development as it stands would not pass the three tests under regulation 55(9) of the Conservation of Habitats and Species regulation 2017 and would not be granted the requisite licence.