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**OPINION**

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**Introduction**

1. I am asked to advise the London Borough of Barnet ('the Council') in respect of the correct approach to addressing potential harm to Greater Crested Newts ('GCN') as a result of the proposed development of a residential caravan site with hardstanding and ancillary dayrooms at land northwest of Mays Lane, Arkley, Barnet.

**Factual Background**

2. The application site lies within 500m of seven ponds. The application was submitted with no ecological information as to the impact of the proposed development on these ponds or their potential species populations (the accompanying Arbtech Preliminary Ecological Appraisal report dated 14 November 2023 revealed the presence of seven ponds but due to the timing the recommended eDNA testing could not be undertaken.) The application was refused (in part) due to the absence of eDNA testing (and potentially further traditional GCN surveys), such that it had not been demonstrated that the proposed development would mitigate against the disturbance of GCN and their foraging / sheltering habitats within 500m of the application site.
3. Following refusal, the now Appellant submitted an appeal statement and accompanying eDNA test results (the RSKBiocensus report dated 20 June 2024) which confirmed the presence of GCN DNA (likely presence) in Ponds 1 and 6 and concluded that GCN are likely present in Ponds 1 and 2. The report states that further GCN surveys will be required to obtain a European Protected Species licence, or a district

level license will be required whereby compensatory payments can be made by the applicant to create high quality GCN ponds elsewhere.

4. The appeal statement stated that, since the eDNA test has now been undertaken and the presence of GCN has been confirmed in Ponds 1 and 6, the works can feasibly be undertaken with a Natural England EPS licence or District level license and that the relevant reason for refusal can be removed and the further GCN surveys required to support a NE licence can be conditioned.
5. Natural England have been contacted by the Council and they have stated (by email dated 22 October 2024) that it would not be possible to grant a licence in the absence of appropriate survey information. Impact assessments to help determine whether proposals meet licensing requirements must be clear and unambiguous at the time the licence application is submitted. If the development relates to a population size class assessment, it would not be possible to issue a licence to include the conditioning of further surveys.
6. The Council's ecologist is of the view that it has not been demonstrated that there is no satisfactory alternative to the development, since the proposed layout severs the potential migration route between Ponds 1 and 6. The Appellant could give consideration to alternatives. For example, were the layout and orientation of the proposed site rearranged so that the development were situated in the southwest corner as opposed to the northeast corner, then that would remove the risk of severing a commuting route for GCN directly over the area of suitable terrestrial GCN habitat rough grassland.
7. Further, given the lack of adequate survey data to establish population size and whether, for example, the GCN populations are breeding ones, the worst-case scenario must be assumed i.e. the likelihood that both ponds support breeding adult GCN. Assuming this worst-case scenario, 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 impact the species' ability to survive within its local meta-population. As a result, the population will not be favourably maintained across its natural range.

8. On the basis of the information currently available, the ecologist's conclusion is that NE would be unlikely to grant a licence.
9. In light of the above, I am asked to advise whether the Appellant's proposed conditioning of further GCN surveys to take place after permission is granted but before the application for an NE licence is appropriate.

### **Legal Framework**

10. The Habitats Directive is given effect by the domestic regulations, the Conservation of Habitats and Species Regulations 2017. These remain in force post-Brexit, as does the requirement to secure compliance with the Habitats Directive (Reg 9(1)).
11. Under Reg 43 a number of criminal offences are set out for the protection of certain wild animals, including GCN, including deliberate injury, killing and disturbance, unless they are conducted pursuant to a licence made under Reg 55. This transposes Art 12(1) of the Directive which requires Member States to establish a strict system of protection for EPS by prohibiting, amongst other things, deterioration or destruction of their breeding sites and resting places. Reg 55(1) provides that "the relevant licensing body may grant a licence for the purposes specified in paragraph (2)". These purposes include, in paragraph (2)(e), "preserving public health or public safety or other imperative reasons of overriding public interest ('IROPI') including those of a social or economic nature and beneficial consequences of primary importance for the environment."

12. Licensing on the grounds of IROPI is delegated from the Secretary of State to Natural England. Such licenses may be granted under Reg 55, provided that three statutory tests are met. These statutory tests are set out in paragraphs (2)(e), (9)(a) and (9)(b) and may be summarised as:

- (1) IROPI
- (2) No satisfactory alternative; and
- (3) The action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range ('FCS').

13. Reg 7(1) defines "competent authorities" and this includes the Inspector acting on behalf of the Secretary of State on appeal (and LPAs at the application stage). Under Reg 9(3), "a competent authority, exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions".

14. The Supreme Court held in R (Morge) v. Hampshire CC [2011] UKSC 2 that:

- (a) The duty of the LPA under Reg 9(3) (and the SoS on appeal) is to have regard to the requirements of the Directive so far as they may be affected by the exercise of those functions;
- (b) There is no need for the decision-maker to carry out its own shadow assessment as to whether there would be a breach of the Directive, or whether derogation would be permitted or a licence granted;
- (c) Instead, planning permission should ordinarily be granted save only in cases where the decision-maker concludes that the proposed development would both (a) be likely to offend Art 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers;
- (d) The views of Natural England, as 'appropriate nature conservation body', will be given great weight.

15. The Government’s guidance on ‘Protected species and development: advice for local planning authorities’ (updated 25 October 2023)<sup>1</sup> 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.”
16. 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.”
17. Natural England’s Standing Advice on GNC (last updated 26 July 2022)<sup>2</sup> 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 is likely to be a negative effect 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

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<sup>1</sup> <https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications>

<sup>2</sup> <https://www.gov.uk/guidance/great-crested-newts-advice-for-making-planning-decisions>

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.

### Analysis

18. The eDNA surveys carried out make clear that GCN are present in Ponds 1 and 6. However, those surveys are unable to establish the population size of GCN within those ponds (or within other ponds) and whether they are a breeding population. It is therefore impossible to know how significant the GCN population is at present and what the level of likely impact from the development would be on the population. NE have confirmed this in their letter dated 22 October 2024 and that they would not be in a position to issue a GCN licence on the basis of the survey information provided to date.

19. The question which then arises is whether the necessary further surveys can be conditioned as part of any grant of planning permission. In my opinion, they cannot as this would fall foul of the Supreme Court's judgment in Morge and also Government guidance. In terms of Morge, it is clear that the proposed development would be likely to offend Art 12(1) of the Habitats Directive since the eDNA surveys have confirmed the presence of GCN which are at risk of deliberate killing / injury / disturbance as a result of the development (hence the need for NE licensing). However, it is impossible to know for certain whether NE would be likely to grant an EPS species licence or not without surveys of population size and the nature of the population. It cannot be assumed that they will in the absence of appropriate survey data and, assuming a worst-case scenario due to the absence of data, it is clear, as the Council's ecologist has stated, that they would not because, not only would the FCS of the species not be maintained, but there are satisfactory alternatives which would cause less harm to GCN by re-arranging the site layout.

20. In terms of the Government and NE guidance, whilst eDNA surveys may be sufficient in some cases to rule out likely effects on GCN, in this case, given the positive eDNA results, it is necessary to obtain further survey information before being in a position to make an informed decision on whether to grant planning permission. The Guidance makes clear that conditions should not usually be used to ask for further surveys. This is not a case where further surveys would simply provide an 'update' to the ecological picture in the case of a development with a long delivery timeframe. Rather, population size and type surveys are an integral part of the necessary information required in order to determine the acceptability of the scheme on GCN.
21. I understand that the survey season is mid-March to mid-June. It is therefore impossible to carry out the necessary surveys before the inquiry is due to sit in January 2025. I also note that the Appellant would have been in a position to carry out the necessary surveys at the same time as the eDNA surveys were carried out had they chosen to do so.

### **Conclusion**

22. In my opinion, the Secretary of State is not in a position to grant any planning permission in this case subject to a condition that further GCN surveys are carried out and a GCN licence is obtained. On the basis of the eDNA surveys submitted, 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. The full 'traditional' GCN surveys carried out between mid-March and mid-June should have been submitted either at application stage or at the very least during 2024 at the time of appeal. The Council informed the Applicant at the application stage that the full 'traditional' GCN surveys should have been carried out during the appropriate season. Since this matter cannot now be rectified until mid-March to mid-June 2025, the only options are (a) for the Appellant to withdraw the appeal; (b) that the inquiry into the

appeal and therefore any decision should be postponed to allow the full 'traditional' GCN surveys to be carried between mid-March and mid-June or (c) that the permission be refused.

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**8 November 2024**