



Tenterden

Kent County Council Consultation Response

1. INTRODUCTION

- 1.1 This note responds to comments made by Helen Forster on behalf of Kent County Council (dated 17 February 2020; see **Appendix 1**) to the hybrid planning application 19/01788/AS on land between Woodchurch Road and Appledore Road, Tenterden, Ashford, Kent (herein referred to as the “Site”).

2. CONSULTATION RESPONSE COMMENTS

Survey Validity

- 2.1 The advice note produced by the Chartered Institute of Ecology and Environmental Management (CIEEM, April 2019) provides guidance of the validity of survey data. The CIEEM note recommends that for survey data between 18 months to 3 years old, an update walkover survey is undertaken to assess the need to carry out update survey work. Factors to consider include:
- Whether the site supports, or may support, a mobile species which could have moved on to site, or changed its distribution within a site;
 - Whether there have been significant changes to the habitats present (and/or the ecological conditions/functions/ecosystem functioning upon which they are dependent) since the surveys were undertaken, including through changes to site management; and
 - Whether the local distribution of a species in the wider area around a site has changed (or knowledge of it increased), increasing the likelihood of its presence.
- 2.2 Kent County Council (KCC) state in their response that the survey data is four years old. As detailed in Table 2.2 of the Ecological Impact Assessment report (EPR, 2019), only the breeding bird and Great Crested Newt pond presence/likely absence surveys are approaching 4 years since the surveys were undertaken (although an update Habitat Suitability Index survey was carried out on 12 March 2018). The remaining survey data is less than 3 years old.
- 2.3 Whilst an update walkover survey was carried out on 12 March 2018, the Site was subsequently visited on several occasions for survey work (as detailed in Table 2.2 of the EclA) and for on-site meetings with Kent Wildlife Trust (see paragraph 1.8 of the EclA). Furthermore, a recent site visit was undertaken by Dr David W. Smith and Andy Cross of EPR on 13 November 2019. During this site visit it was confirmed that no significant changes had occurred to the on-site habitats or their general management. Therefore, their ability to support populations of species remains as it was when the surveys were conducted. It is unlikely the habitats within the Zone of Influence support species populations of greater ecological importance than those described within the EclA.

- 2.4 Further to the above, and without prejudice, an additional walkover survey was completed on the 5th March 2020 by Dr David W. Smith and Daniel O’Sullivan. No material changes to habitats or management were recorded. A partially used Outlying Badger Sett was recorded and there were two Badger ‘dung pits’ also recorded. All were in the proposed Country Park area and in a location furthest from development. Badger is of ecological importance at the Zone of Influence level only and therefore would not be taken forward in the Ecological Impact Assessment. Badger is also a common and widespread species. Appropriate and proportionate mitigation will be detailed in the Construction and Environmental Management Plan (CEMP) and can be secured via planning condition as per paragraph 7.1 of the EclA.
- 2.5 Other non-material changes were noted, and included minor recreational damage to trees and grassland in a small area in the north-west corner, some minor damage to and loss of small tree branches - presumably as a result of recent storms and a shorter grass area in the south-east where the grass had been noticeably longer previously, indicating the area has been cut.
- 2.6 For survey data that is more than 3 years old, the CIEEM note states ‘*the report is unlikely to still be valid and most, if not all, of the surveys are likely to need to be updated (**subject to an assessment by a professional ecologist, as described above**)*’ [my emphasis]. As the habitats have not significantly changed, and because of their less than optimal condition – because of the lack of appropriate management - the habitat quality within the Site remain the same as during the initial surveys. Therefore, in our professional opinion, the populations of breeding birds and Great Crested Newt are unlikely to have become of greater ecological importance than that detailed in the EclA.
- 2.7 Furthermore, the revised and updated Planning Practice Guidance (PPG; MHCLG, 2014) states:
- “an ecological survey will be necessary in advance of a planning application if the type and location of development are such that the impact on biodiversity may be significant and existing information is lacking or inadequate”* [my emphasis] ...
- and it also states:
- “local planning authorities should only require ecological surveys where clearly justified, for example if they consider there is a reasonable likelihood of a protected species being present and affected by development.”* [my emphasis]
- 2.8 We have requested a meeting with KCC Ecology, via Ashford Borough Council, and we would (without prejudice) be happy to discuss the need or otherwise for additional Great Crested Newt and breeding bird surveys to inform the planning decision.
- 2.9 We would like to highlight that the KCC response does not indicate that in their view there will be a significant impact on biodiversity. In fact, it states:
- Protected/notable species have been recorded within the site and the submitted information has detailed that the country park and open spaces area will mitigate for the loss of the habitat as a result of the proposed development. In theory we do not disagree with this conclusion however as detailed above there is a need to ensure that the habitats proposed within the outline application area will be retained.* [My emphasis].

Survey Validity in relation to LPA and NE responsibilities

- 2.10 We would also like to highlight that further surveys will be conducted to inform any Natural England licence submission associated with Great Crested Newts. Consequently, in EPR's view, further surveys are not needed to inform the planning decision. The ecological importance of the population is not likely to change, and the development proposals will maintain the 'Favourable Conservation Status' of the population. Even in the unlikely scenario that the population class shifted upwards, because of the substantial amount of space within the Country Park and other areas of the development scheme, it will be possible to provide sufficient areas of terrestrial and breeding habitat.
- 2.11 It is highly likely in our view that Natural England would approve a European Protected Species Licence (EPSL) for Great Crested Newts if one was submitted, based on the current development proposals. This is important because case law (e.g. *Morge (FC) v Hampshire County Council* [2011] UKSC 2); indicates that:
- The LPA should only refuse permission if (i) a breach of European Protected Species (EPS) offence is likely; and (ii) a licence is unlikely to be granted; and
 - Uncertainty is not likely to be grounds for refusal.
- 2.12 Since *Morge* there have been other cases of relevance, e.g. *R (Prideaux) V Buckingham County Council* and *FCC Environment UK Ltd* [2013] EWHC 1054 and *Cheshire East Council v Secretary of State for Communities and Local Government, Rowland Homes Ltd* [2014] EWHC 353). However, *Morge* is likely to be the preferable authority on the need for survey data (*Freeths Environmental Bulletin*, 2015)
- 2.13 Furthermore, *Morge* indicate that in relation to EPS the competent authority has the following options: -
- a) If an EPS offence is unlikely, then planning permission may be granted;
 - b) If an EPS offence is likely and a NE licence is also likely to be granted, then planning permission may be granted because EPS are not a grounds for refusal;
 - c) If an EPS offence is likely and a NE licence is unlikely, then planning permission should be refused;
 - d) If an EPS offence is likely and it is unclear/uncertain a NE licence will be granted, then planning may be granted because uncertainty is not grounds for refusal, and neither is the presence of an EPS grounds for refusal.
- 2.14 Based on the above, the proposed development meets the criteria detailed by bullet point b). That is an offence is likely without a licence because Great Crested Newt are present and suitable habitats will be impacted, but that the grant of an EPSL is also likely. Therefore, planning permission may be granted because EPS are not grounds for refusal.
- 2.15 To conclude, the proposed scheme is retaining the most important habitat for breeding birds and Great Crested Newt through impact avoidance. Furthermore, the mitigation and compensation measures detailed will adequately address impacts associated with the loss of

habitat. Finally, the development scheme will increase the quantum of high-quality habitat through restoration and creation to deliver a net enhancement.

- 2.16 Even if greater numbers of Great Crested Newt and bird species were recorded, it would not significantly or materially alter the avoidance, mitigation and compensation measures set out within the EclA to ensure the conservation status of these populations/assemblages is maintained.
- 2.17 The nature of the Site and the habitats within it also means that a significant impact on breeding birds is very unlikely. It supports relatively little suitable breeding habitat for birds of conservation concern, most of which is associated with the hedgerows that will be retained and improved via 'gapping up' and the introduction of sensitive habitat management.

Unimproved Grassland

- 2.18 It is worth noting that the presence of botanical indicators for a particular habitat does not mean that the habitat in question is present. In terms of field evidence alone, everything depends on the number of indicator species recorded **and** their abundance and distribution.
- 2.19 KCC note that '*11 species indicating unimproved grassland were recorded*'. However, the 11 indicator species were rare/scarce and recorded in different fields as per Table 3.4 and Appendix 4 of the EclA. If there was genuinely unimproved grassland present, then you would expect at least a good number of the indicators species to be well distributed through the sward, which was not the case.
- 2.20 Therefore, whilst 11 indicator species were recorded, as stated in paragraph 3.75 of the EclA the vegetation types in combination with the abundance and distribution of the unimproved grassland indicator species show that the grasslands on the Site are not unimproved grasslands (which would be herb-rich habitats) but instead are semi-improved.
- 2.21 Finally, the data in Appendix 4 also shows that the grasslands on Site also had indicators of agricultural improvement, for example Perennial Rye-grass *Lolium perenne*, Creeping Thistle *Cirsium arvense* and Creeping Buttercup *Ranunculus repens*.

Parameter Plans

- 2.22 Parameter plans will be produced and provided to KCC to provide confidence of the open space and built environment areas. The scheme has been designed to retain and buffer important features including hedgerows, trees and ponds that will maintain ecological functionality and connectivity.

Breeding Birds

- 2.23 As mentioned above, based on the habitats present it is considered unlikely that additional survey work at earlier periods in the survey season would provide significantly different results than currently collected or alter the conclusions made in the EclA.
- 2.24 This is because any habitats that might be of importance to breeding birds are associated with the habitats being retained, and the extent of the existing habitat is relatively scarce at the scale that it might be of importance to breeding birds. Furthermore, no significant population of ground nesting birds is likely to be recorded as a result of earlier surveys.

Amphibians

- 2.25 As stated within paragraph 5.33 of the EclA, Smooth Newt, Palmate Newt and Common Frog are only afforded legal protection from sale. The Wildlife and Countryside Act 1981 (as amended) does not afford legal protection from killing or injury. The use of the word 'feasible' in our report only relates to the lack of legal requirement to carry out a full translocation of these species. However, the project has committed to a translocation process for Great Crested Newt and therefore this approach will allow for translocation of other amphibian species, as is normal good practice. The mitigation approach for Great Crested Newt can be tailored further in the Mitigation Strategy, which will form part of a Natural England Great Crested Newt mitigation licence and/or more detail can be secured via planning condition.
- 2.26 Furthermore, all the measures to benefit Great Crested Newt, such as the retention of all the ponds aside one, the restoration of existing ponds, the creation of four new ponds within the open space areas and the enhancement of terrestrial habitats will also be used by and benefit these common and widespread amphibian species. The provision wet attenuation basins will also benefit Smooth Newt, Palmate Newt and Common Frog.
- 2.27 It should be noted Krag raised no significant concerns with the proposals, and that EPR has a strong track record of success with amphibian mitigation projects. In one project at Abbotswood in Romsey the number of Great Crested Newts were tripled.

Bats and Invertebrates

- 2.28 While not specifically referred to in the EclA report, the Landscape and Visual Impact Assessment (LVIA) report states in paragraph 6.5.1 that the sports pitches would be unlit (the EclA was undertaken on the understanding they will not be lit). The EclA sets out the requirements of a Lighting Strategy in paragraphs 4.40 and 4.41 to adhere to the lighting requirements for zone E2 of the Dark Sky Zone that the proposed development falls within to avoid obtrusive light. Having regard to the planning policy ENV4 of Ashford Borough Council's Local Plan (adopted February 2019), the LVIA also explains that the proposed development will have a Negligible night time effect, as whilst LED lighting designed to comply with KCC requirements for adopted roads is proposed in places, lighting in private roads will be switched off after 23:00, and no lighting is proposed for the sports pitches or within the Country Park so as to respect its proximity of the High Weald AONB and the proposed dark sky reserve to the east around Woodchurch. Furthermore, the development includes 'buffers' around habitats that could be used by nocturnal wildlife along the site boundaries of the development proposals, as well as through the central green corridor.
- 2.29 The information above should provide sufficient confidence to KCC that the proposed development will minimise lighting levels to avoid impacts on ecology. Typically, a Lighting Strategy is secured as part of a planning condition at Reserved Matters for outline planning applications, enabling further detail on lighting to be worked up and provided as detailed designs emerge.

Habitat Creation

- 2.30 KCC state that '*neutral grassland will be lost to create acid grassland in the north of the site*'. This is incorrect. As shown on Map 4a of the EclA, there are only two areas of acid grassland within the Site, both of which are in the Country Park and are being retained and enhanced. Therefore, no new acid grassland is being created nor is any neutral grassland being lost.

- 2.31 We would be happy to provide a habitat creation and enhancement map, to sit alongside the Defra Biodiversity Metric 2.0 calculator, to clarify this.

Biodiversity Net Gain

- 2.32 EPR have used the DEFRA Biodiversity Metric 2.0 to demonstrate **a net gain for biodiversity is achievable** based on the submitted development Illustrative Masterplan. We would welcome a meeting with KCC Ecology to share our assessment and discuss the results.
- 2.33 We would also like to highlight that a limitation of the metric, as noted by DEFRA in their User Guide for the metric, is that it only considers the effects of the proposals on habitats and does not allow for the inclusions of beneficial measures that are species-specific such as the installation of bat and bird boxes on buildings and trees, which will be included as part of the proposals to provide further enhancements for biodiversity.
- 2.34 DEFRA also state within the User Guide that **'the metric is not a substitute for expert ecological advice.'** Therefore, it should be used as a tool to inform a decision of whether biodiversity net gain is achieved. The limitations of solely relying on such a tool is highlighted by a recent review of the latest version of the DEFRA Biodiversity Metric 2.0, where it has been demonstrated that the units forecasted post-development appear to be largely influenced by the temporal multiplier and difficulty multiplier, and the metric discounts ecological distinctiveness, functionality and importance. This means high distinctive habitats, such as species-rich grassland, score worse than habitats that are quick and easy to create even though in the medium to long-term they are much less likely to deliver as much biodiversity gain. Consequently, because of this anomaly, it means the metric output 'prioritises' habitats that are quick to deliver in our view will deliver significantly less biodiversity gain. Just because a habitat is quick and easy to create in the short-term, in the medium to long-term they will provide less biodiversity benefits compared to native woodland and floristically rich grasslands.
- 2.35 Therefore, judgements that are only based on the results of the existing (beta test version) metric are likely to fail to capture the full benefits of a proposed scheme and sadly biodiversity could benefit less rather than more. Therefore, it is essential ecological expert judgement is used alongside the metric, and why it is essential to consider all the other benefits that the metric does not capture. For example, the species-specific measures detailed in the submitted reports that will benefit the faunal assemblage within the Zone of Influence of the development.
- 2.36 The Site is not currently managed for biodiversity, whereas the proposals aim to introduce management that will result in habitats of greater ecological quality than currently present. The proposals also aim to create more habitat that is connected. This in turn, should benefit animal and plant populations and create populations that are more resilient to potential future environmental changes, such as climate change. The built environment will also contain permeable garden habitats that are likely to provide additional gains for biodiversity through residents incorporating sheltering and foraging resources for wildlife such as bird boxes and feeders and nectar-rich flowering plants for invertebrates.
- 2.37 Overall, EPR's view is that the proposals will provide a biodiversity net gain and are happy to share our calculations to support this view.

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Appendix 1
Kent County Council Consultation Comments



ECOLOGICAL ADVICE SERVICE

TO: *Mark Davies*

FROM: *Helen Forster*

DATE: *17 February 2020*

SUBJECT: *Land btw Woodchurch Road etc, Tenterden 19/01788/AS*

The following is provided by Kent County Council's Ecological Advice Service (EAS) for Local Planning Authorities. It is independent, professional advice and is not a comment/position on the application from the County Council. It is intended to advise the relevant planning officer(s) on the potential ecological impacts of the planning application; and whether sufficient and appropriate ecological information has been provided to assist in its determination. Any additional information, queries or comments on this advice that the applicant or other interested parties may have must be directed in every instance to the Planning Officer, who will seek input from the EAS where appropriate and necessary.

We advise that insufficient information has been provided to determine the planning application.

The following surveys have been carried out and, while the survey data is from four years old, it's likely that they provide a good understanding of the ecological interest of the site:

- Preliminary Ecological Appraisal
- Bat
- Botanical
- Breeding birds
- Amphibians
- Reptiles
- Invertebrates
- Dormouse

However the most recent walk over survey was carried out in March 2018 and therefore the conclusions may no longer be valid. The report was written in December 2019 therefore we question why an updated survey was not carried out at the same time. We advise that an updated walk over survey is carried out an information provided demonstrating why the applicant is satisfied that the survey results are still valid.

The surveys have recorded the following:

- Neutral and Acid Grassland (11 species indicating unimproved grassland were recorded).
- Hedgerows recording Ancient woodland Indicators
- Trees with potential to be used by roosting bats
- At least 9 species of foraging/commuting bats within the site
- 34 species of birds
- Breeding population of GCN
- Smooth Newt, Palmate Newt and Common Frog.
- 3 species of reptiles
- 161 species of invertebrates (including species of principle importance)

This is a hybrid application which consists of a full application for the country park and sports pitches and outline for the residential aspect of the site. With outline applications we understand that the layout is not fixed therefore there may be some changes made to the finalised layout (if planning permission is granted) but in order for us to fully assess submitted information is fully assessing the impact on protected species we would expect a parameter plan to be provided to enable us to fully understand the areas of open space and areas of built development. We acknowledge a plan has been submitted demonstrating the area of retained hedgerow/waterbodies but highlight that this is insufficient as (if granted) if there is development directly up to the areas of retained habitat, they will not provide ecological functionality.

The submitted Ecological Impact Assessment has assessed the impacts of protected/notable species based on the submitted layout which is indicating that there will be good connectivity throughout the site. To ensure that the conclusion are correct we advise that there is a need for ABC to have confidence that the proposed habitat connectivity will be retained and created within the site and therefore advise that there is a need for a parameter plan to be submitted clearly setting out the footprint of the proposed housing and open spaces within the outline section of the proposed development.

Protected/notable species have been recorded within the site and the submitted information has detailed that the country park and open spaces area will mitigate for the loss of the habitat as a result of the proposed development. In theory we do not disagree with this conclusion however as detailed above there is a need to ensure that the habitats proposed within the outline application area will be retained.

We have the following comments to make on the submitted information:

Breeding birds

The surveys were only carried out in June and not throughout April, May and June therefore we highlight that there is a risk that some breeding birds may have been missed. The breeding bird surveys recorded 34 species and we highlight that if surveys had been carried out throughout the breeding bird season (rather than just June) additional information would have been provided about how birds are using the site – including numbers recorded, species

breeding and if ground nesting birds were present. We advise that there is a need for additional information to be submitted demonstrating why the ecologist is satisfied that the survey conclusions are valid.

Amphibians

Paragraph 5.33 details that smooth newt, palmate newt and common frog have been recorded within the site and will be translocated where feasible – this suggest that only GCN will be translocated. As they are present and (if planning permission granted) a translocation will be carried out there is a need for all species captured during the translocation to be translocated and the mitigation strategy demonstrate that there is sufficient capacity species recorded within the site.

Bats and invertebrates

At least 9 species of foraging/commuting bats have been recorded and 161 species of invertebrates have been recorded during the surveys. Bats and Invertebrates can be negatively impacted by artificial lighting and to enable ABC to fully consider the impact from lighting we advise that there is a need for a plan showing dark corridors demonstrating the maximum light spill from any proposed lighting on the proposed habitat corridors from the proposed development.

As water bodies will be created/retained throughout the site, we accept that there may be a need for some lighting due to health and safety but there is a need to ensure it is minimal to ensure that bats can continue to use the site.

Sports pitches are proposed for the development and they may include flood lighting. We require information to be submitted confirming if the sports pitches will have flood lighting and if so which ones. The submitted ecological information must assess the impact the proposed flood lighting will have on bats and invertebrates utilising the site.

We advise that due to the size of the proposed development and because there is currently minimal or no lighting within the site we advise that there is a need for the above information to be submitted prior to determination – it is not sufficient to make recommendations for the lighting scheme in the event planning permission is granted.

Habitat creation

The proposal will result in a loss of habitat – in particular grassland. A management plan has been submitted and it does demonstrate the intention is to manage habitats within the proposed country park for biodiversity.

A plan of the country park has been submitted and it does provide a brief overview of the habitats to be created on site but we have concerns about the proposed habitat creation. For example the management plan details that 12ha of Neutral Grassland will be enhanced and restored and 0.8ha of acid grassland will be created - however from looking at the submitted information it appears that neutral grassland will be lost to create acid grassland in the north of the site. As there are other areas of the site which has been recorded as semi improved grassland, we are concerned that areas of natural grassland is being lost to create acid grassland.

There is a need to ensure that where habitat creation/enhancement is proposed it is achievable and in the correct location to get the greatest benefit.

We advise that there is a need for a clear habitat creation plan is submitted which directly links to the habitats referred to in the outline management plan. The submitted plan will enable ABC to consider if the habitats detailed in the outline management plan can be created/retained.

Biodiversity Net Gain

The report has detailed that the proposal will result in biodiversity net gain but no net gain metric has been submitted to demonstrate this. We acknowledge that the outline management plan has detailed that the proposal is to actively manage and enhance the retained habitat therefore it is likely that the ecological interest of the retained habitat can be maintained.

However the biodiversity net gain metric is based on habitats and as the proposal will result in a loss of neutral grassland we question, regardless of the proposed management of the retained areas, if biodiversity net gain can be achieved as part of this development. We recommend that the current version of the Biodiversity Net Gain Metric to enable ABC to understand if the proposal will result in a biodiversity net gain.

If you have any queries regarding our comments, please do not hesitate to get in touch.

Helen Forster MCIEEM
Biodiversity Officer

This response was submitted following consideration of the following documents:
Ecological Management Plan; EPR; December 2019
Ecological Impact Assessment; EPR; December 2019