



ASHFORD
BOROUGH COUNCIL

Update Note on Mechanisms for Securing Nutrient Neutrality Mitigation

In respect of:

Land north of Possingham Farmhouse, Ashford Road, Great Chart, Kent.

Appeal by:

Hodson Developments Ltd

Appeal Reference: APP/E2205/W/24/3345454

Planning Application Reference: 22/00571/AS

14 October 2024

1.0 Introduction

- 1.1 This note provides an update to the Local Planning Authority's (LPA) position in respect of nutrient neutrality and the Possingham Farm appeal, as the means of mitigation (an 'offsite' Wastewater Treatment Plant) has been allowed (appeal reference APP/E2205/W/24/3345453), and in particular deals with how the mitigation should be secured on any grant of planning permission for the appeal scheme.
- 1.2 This issue relates to the eighth reason for refusal on the LPA's decision notice dated 14 December 2023, which states: "8. The Applicant has failed to demonstrate that the development would not add to the deterioration of the water quality at the Stodmarsh European designated site, thereby harming internationally-protected habitats".
- 1.3 The note has been prepared by Mr Carter, acting in the same capacity as expressed in the LPA's Nutrient Neutrality Proof of Evidence (CD1/28).

2.0 Overview of the position

- 2.1 On 19 September 2024, planning permission was granted for the "proposed construction of a Wastewater Treatment Plant, associated landscaping, and proposed vehicular access from Chilmington Green Road" (appeal reference: APP/E2205/W/24/3345453).
- 2.2 The appellant's evidence to the Inquiry makes it clear that this Wastewater Treatment Plant is to be the primary mitigation measure to be relied upon to supply nutrient mitigation, pursuant to the Possingham Farm proposal.
- 2.3 For clarity, the LPA is satisfied that the granting of the 'offsite' Wastewater Treatment Plant means that, in Appropriate Assessment terms, the form of mitigation to be relied upon has been sufficiently 'elevated' in status (in terms of the principle and technical details) to suggest that this would pass the Appropriate Assessment test, if the LPA were to remain the competent authority, i.e. the solution has the sufficient 'certainty' as a solution in principle.
- 2.4 However, the mitigation must also be secured, and the LPA still consider that certain elements of securing the mitigation require a combination of planning obligations and conditions (see section 3.0 below).
- 2.5 Throughout the inquiry, the Council has been liaising with the appellant on these matters. This note provides the latest position on nutrient neutrality and sets out why the LPA considers that certain matters need to be secured in planning obligations, based on its prior experience as competent authority.

2.6 The LPA are inviting the Inspector to reach the same conclusion when undertaking the Appropriate Assessment (noting that the merits of the approach now sit within the remit of the Inspector in their capacity as the competent authority on this matter under Regulation 63 of the Habitats Regulations).

3.0 The case for a combination of planning obligations and conditions

3.1 Experience of dealing with the wider 'nutrient neutrality' issue within the borough has shown that there may be a variety of different technical solutions which can deliver mitigation that achieves 'neutrality'.

3.2 However, the main difficulties associated with the ability to pass the Appropriate Assessment process surrounds how mitigation is secured. The competent authority must be 'certain' that the mitigation will be delivered and that it can be secured in 'perpetuity'. Both aspects essentially set a 'high bar' for mitigation proposals to demonstrate compliance. This is further reinforced by the 'precautionary principle' which underpins the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"), meaning that the project (e.g. the development to which the planning application relates) must adequately confirm 'beyond reasonable scientific doubt' that the mitigation will be delivered, secured, managed, monitored and maintained for the lifetime of the homes at Possingham Farm.

3.3 To this effect, the LPA has drafted a S106 schedule (Schedule 21) that requires matters such as the connection of wastewater into the off-site Wastewater Treatment Plant, any management and maintenance of the Wastewater Treatment Plant prior to the transfer of the Wastewater Treatment Plant to a NAV-appointed company¹, and the details of this transfer of responsibilities.

3.4 All obligations in the S106 schedule, with the exception of clauses 3.3, 3.4 & 3.5 have been agreed by the appellant. The three clauses which are not agreed have been included in blue-pencil.

3.5 Planning conditions 23 and 24 have also been drafted to address issues relating to the submission of foul water drainage strategies.

3.6 For clarity for the Inspector, the following section of this note sets out the key components of the S106 schedule and the LPA's justification for including these matters as obligations. The note covers both clauses agreed and not agreed by the appellant.

Securing connection and capacity in the Wastewater Treatment Plant

3.7 The S106 schedule requires the wastewater from the Possingham Farm development to be treated at the new Wastewater Treatment Plant. This matter

¹ New appointments and variations (NAVs) are limited companies which provide a water and/or sewerage service to customers in an area which was previously provided by the incumbent monopoly provider.

is needed in a planning obligation to require the Wastewater Treatment Plant to mitigate impacts from the homes at Possingham Farm – i.e. some of the Wastewater Treatment Plant’s capacity needs to be ‘ringfenced’ for the homes at the point of making a decision to allow the Possingham Farm proposal (if the Inspector were minded to do so).

- 3.8 There is no imposed requirement on the planning permission for the offsite Wastewater Treatment Plant to operate in such a way that mitigates the Possingham Farm proposal, i.e. the planning permission for the Wastewater Treatment Plant does not set out where it needs to take wastewater from, and for which schemes it is needed for to provide mitigation to deliver new homes. Therefore, in the absence of this proposed obligation there is currently no specific legal requirement on the proposed Wastewater Treatment Plant to take wastewater from the Possingham Farm development.
- 3.9 As stated in Mr Guy Laister’s proof of evidence, on behalf of the Appellant (CD1/22), the offsite WwTP has a capacity to accommodate a maximum of 2,700 homes. Clearly, this is sufficient to meet the mitigation demands of the Possingham Farm proposal. However, without any ringfencing of capacity, there is nothing to stop other development parcels at Chilmington Green coming forward and connecting to the Wastewater Treatment Plant (accepting that they will need Appropriate Assessments as well) and thereby utilising capacity.
- 3.10 It is the LPA’s view that this ‘ringfencing’ is necessary to be ‘certain’ that the capacity is available and can be secured now and will be available for the lifetime of the proposal. A condition that merely restricted occupation of the Possingham Farm scheme until such time as demonstrating that there is capacity would not be sufficient because at the point in time of making the relevant decision (e.g. granting planning permission for Possingham Farm) there would not be the certainty required to clearly demonstrate that this capacity has been ringfenced and would not be used up by other schemes. This information and the mechanism to secure it needs to be known upfront, rather than leaving the matter to post construction.
- 3.11 An obligation that links Possingham Farm to the Wastewater Treatment Plant ensures and guarantees the capacity at the Wastewater Treatment Plant is ringfenced, and that this obligation is in existence at the point in time of the grant of any planning permission for Possingham Farm.
- 3.12 The proposed wording in the S106 on this matter is agreed between the appellant and the LPA.

Changes to the mitigation measures

- 3.13 The proposed S106 include requirements on the developers to submit revised mitigation information to the LPA for approval should the mitigation change.

- 3.14 This matter is considered necessary to ensure that there is a mechanism to accommodate variations to the mitigation and that these changes are suitably assessed through the Appropriate Assessment process to ensure that mitigation is always sufficiently provided to offset the development's harm.
- 3.15 Examples of changes to the mitigation may include the decommissioning of the Wastewater Treatment Plant in the future, as contemplated by the conditions attached to its planning permission. However, for the purposes of undertaking the Appropriate Assessment for this appeal, the Inspector must assess the proposed mitigation as permanent, as no information has been submitted to indicate that the Wastewater Treatment Plant will be temporary in nature or that alternative mitigation will be provided.
- 3.16 The proposed wording in the S106 on this matter is agreed between the appellant and the LPA.

Delivery and operation of the Wastewater Treatment Plant

- 3.17 Pre-occupation restrictions are also included in the S106 to ensure that the Wastewater Treatment Plant is fully operational. This is to ensure that at the point that the harm (e.g. from the new homes) is generated there will be no impact on the Stodmarsh Lakes as the mitigation is fully operational. In this instance, this will require the offsite Wastewater Treatment Plant to have obtained the necessary Environmental Permits, to be constructed and ready to treat wastewater.
- 3.18 The proposed wording in the S106 on this matter is agreed between the appellant and the LPA.

Transfer of the Wastewater Treatment Plant

- 3.19 Clauses 3.3 and 3.4 in the S106 refer to the transfer of the Wastewater Treatment Plant. This matter is not agreed with the appellant.
- 3.20 Within the S106, the transfer refers to either the physical transfer of land from the landowner to the NAV-approved company (e.g. Severn Trent Connect) under freehold or leasehold arrangements, or the granting of the sufficient rights, licences or easements as required to operate the Wastewater Treatment Plant. The term 'transfer' has been drafted by the LPA to include several options of landownership/management to accommodate the different mechanisms or options that the appellant may seek to deliver the Wastewater Treatment Plant. This includes ranging from selling of the land to the operator or retaining the land and providing the necessary permissions and consents to use the land for the Wastewater Treatment Plant. It is therefore considered a flexible approach has been taken by the LPA to define the 'transfer' of responsibilities for the Wastewater Treatment Plant.

- 3.21 Irrespective of the type/mechanism of the ‘transfer’, it is important for a NAV-approved company to operate the Wastewater Treatment Plant to adhere to the relevant Water Act and Water Industries Act requirements.
- 3.22 Clause 3.3 refers to restricting occupations of the dwellings at Possingham Farm until such time as the ‘transfer’ has taken place and Clause 3.4 requires the Council to be notified of the ‘transfer’.
- 3.23 This matter is not agreed between the appellant and the LPA and has been included in blue pencil in the S106.
- 3.24 The LPA considers it necessary to secure the details of the transfer in the S106, including the occupation restrictions, for the competent authority to have sufficient certainty under the precautionary principle that the mitigation will operate correctly, including management of the Wastewater Treatment Plant by the NAV-approved operator. It is important for the competent authority to have the certainty that the correct measures (and restrictions) are in place for the mitigation at the point of granting planning permission, rather than as a matter of fact after the decision has been made.
- 3.25 The obligations therefore provide the competent authority with the relevant restrictions and submission of information from the landowner to demonstrate clearly that the mitigation has been delivered correctly and that the long-term maintenance and running of the Wastewater Treatment Plant will happen in accordance with statutory requirements, planning permissions and environmental permits.
- 3.26 The restrictions on occupations also ensure that the mitigation is functional and operational (in the correct manner) prior to the harm being generated from the development site.

Management and maintenance of the Wastewater Treatment Plant

- 3.27 Clause 3.5 in Schedule 21 of the S106 deals with the management of the Wastewater Treatment Plant prior to the ‘transfer’ having taken place. The clause places a requirement for the Wastewater Treatment Plant to be managed correctly until such time as the ‘transfer’ takes place.
- 3.28 This matter is not agreed between the appellant and the LPA and is subject to blue pencil.
- 3.29 It is considered necessary to secure these requirements to ensure that prior to (or in the absence of) the transfer that the mitigation is delivered correctly. Once the ‘transfer’ takes place, a NAV-approved company will take on the management of the Wastewater Treatment Plant and the management, maintenance and monitoring will thereafter be required in accordance with the various legislative processes, such as the Water Industries Act.

4.0 How has mitigation been secured elsewhere?

- 4.1 The broad approach outlined above is what the LPA has been adopting consistently for other schemes. The LPA requires planning obligations when other sources of mitigation are provided.
- 4.2 For example, where an applicant provides nutrient mitigation through the offsetting by taking land out of agricultural use, the land parcels required are secured via Section 106 agreements which seek to restrict the usage of the land to within specified definitions, such as 'greenspace'. A Section 106 agreement is used to ensure that even if the land parcels change ownership that the obligations are maintained to keep the land in such a use. This would not be controllable or enforceable via planning conditions once the ownership of the mitigation land changes.
- 4.3 Another example of mitigation includes the provision of wetlands. For these schemes, planning obligations secure the use of the land as wetlands, to serve the specific housing development, in perpetuity. The planning obligations create the link between the development proposal and the wetland, which could be located offsite. The obligations also place the requirements on the landowner of the wetland to maintain and manage the wetland to provide the required mitigation.
- 4.4 In the case of a Wastewater Treatment Plant, the closest example is at Kingsnorth Green (appeal reference: APP/E2205/W/23/3320146) (CD8/1). For this development, the mitigation was secured through a combination of planning obligations and conditions. However, that example was an on-site Wastewater Treatment Plant that was 'scaled to fit' the mitigation needed, i.e. it was not serving any other developments. In addition, the Wastewater Treatment Plant would not be built or be operational without the development being built. This is not directly comparable to Possingham Farm / Chilmington Green whereby the Wastewater Treatment Plant can be delivered irrespective of whether the Possingham Farm appeal is allowed or not and other schemes can utilise any capacity created.
- 4.5 A recent appeal decision also provides helpful guidance (CD8/4 Appeal Ref: APP/J0405/W/24/3342894 Land north of Brandon Close, Aston Clinton, Buckinghamshire). It found that Grampian conditions on a proposed development preventing development until mitigation had been approved to avoid impacts on European sites were insufficient to satisfy the Habitats Regulations requirements. Although such a condition might satisfy the conditions for a planning condition under the PPG, such an approach was insufficient when there were impacts on European sites. Greater certainty was required (para 44 – 57).

4.6 Therefore, it is the LPA's view that securing the mitigation is necessary, achievable and sufficiently precautionary through the combination of planning obligations and conditions, as proposed. The planning obligations have been prepared in combination with the conditions to provide a hybrid approach which simplifies the requirements on the landowners to deliver the mitigation solution and occupy the housing to ensure that the obligations are not onerous and meet the required tests on planning conditions and obligations as set out in paragraphs 55 - 57 of the National Planning Policy Framework (NPPF) (2023) and Regulation 122 of the Community Infrastructure Regulations 2010.