

**Application No:** 10/1323M

**Location:** LAND NORTH OF BOLLINGTON LANE AND WEST OF, CONGLETON ROAD, NETHER ALDERLEY, MACCLESFIELD

**Proposal:** RENEWAL OF PLANNING PERMISSION 03/3214P - (RELOCATION OF EXISTING GARDEN CENTRE AND LANDSCAPE CONTRACTORS BUSINESS - OUTLINE PLANNING PERMISSION)

**For** I & W URQUHART

**Registered** 06-Apr-2010

**Policy Item** Yes

**Grid Reference** 384248 374531

**SUMMARY RECOMMENDATION** - Refuse extension of time on grounds of change in circumstances, insufficient information and mitigation in respect protected species and the lack of a satisfactory S106 Agreement.

#### **MAIN ISSUES**

Whether there has been a significant change in circumstances or policy since the original grant of permission for 03/3214P.

Are there very special circumstances to justify the development?

Whether there is sufficient information submitted to enable an extension of time to the original outline permission 03/3214P to be granted.

#### **BACKGROUND**

Members will recall that this application was deferred at the Strategic Planning Board on 23 June until October to allow the completion of an Ecological Assessment. This additional information in the form of a Newt Presence Survey was received in October 2010.

This Committee report will therefore be updated in the light of that further information received since the last report in June. It will also address the issue of whether the relocation of the Matthews Garden centre to Somerford Booths is a significant material consideration which may now impact on the original permission.

Additionally, the further representations and further Parish Councils in the adjoining Parishes to Nether Alderley will be reported

#### **SCOPE OF THIS APPLICATION**

Extensions to the time limits for implementing existing planning permissions were brought into force on 1 October 2009. The new system was introduced

in order to make it easier for developers to keep planning permissions alive for longer periods during the economic downturn. It includes provisions for a reduced fee and simplified consultation and other procedures.

The Government's advice is for Local Planning Authorities to take a positive and constructive approach towards applications that improve the prospects of sustainable development being brought forward quickly. The development proposed will by definition have been judged acceptable in principle at an earlier date. It is the Government's advice for Local Planning Authorities to only look at issues that may have changed significantly since that planning permission was previously considered to be acceptable in principle.

In short, it is not intended for Local Planning Authorities to re-open debates about principles of any particular proposal except where material circumstances may have significantly changed, either in development plan policy terms or in terms of national policy or other material considerations.

The original planning permission (ref 03/3214P) granted outline planning permission for the relocation of an existing garden centre and landscape contractors business subject to the satisfactory completion of a S106 Agreement. The outline permission was granted on 9 March 2005.

Condition 3 attached to that outline permission required the development to commence before whichever is the later of the following dates:

- (a) within five years of the date of the permission or
- (b) within two years of approval of the last of the reserved matters to be approved.

The last reserved matter application submitted in respect of this site was 08/0486P. That last reserved matter was approved on 18 April 2008.

Accordingly, the current application (received on 6 April 2010) was received whilst the original application was an extant permission. Whilst the guidance advises Applicants not to leave their applications to the last minute, it remains clear that this application was submitted in time and therefore falls to be determined as a valid application.

The original report for the approved outline scheme is attached to this report as Appendix 1. The Decision notice, attached as Appendix 2, contains 23 conditions and states at condition 23 -

***'The approved garden centre shall not be brought into use/commence operations until the existing operations at Alderley park Nurseries (Matthews Garden Centre) have permanently ceased.  
Reason The proposal is for relocation of this business only'***

The reason for approving the application is stated on the decision notice as being:

***'The proposal does not comply with all relevant policies of the Development Plan. However, other material considerations have been taken into account, namely that the proposal is a relocation of an existing business sited opposite the proposed site and the application is considered to be acceptable'***

## **CONSULTATIONS (External to Planning)**

**Environment Agency:** The original application for this site (03/3214P) was submitted prior to Planning Policy Statement 25: Development and Flood Risk (PPS25) becoming a material consideration in December 2006. The Environment Agency has therefore not had sight of a Flood Risk Assessment.

The site lies within Flood Zone 1 therefore in line with PPS25 all development proposals over one hectare should be accompanied by a Flood Risk Assessment (FRA). Following the applicants submission of a FRA shortly before the 23 June meeting of the Board, the EA's original objection was withdrawn.

**Cheshire East Nature Conservation Officer:** As a European protected species is known to be present and therefore affected by the proposed development the Council must have regard to the tests prescribed by the Habitat Regulations when determining this application. An objection is raised on the grounds that the Council does not have sufficient information to assess the potential impact of the proposed development upon the favourable conservation status of a European protected species (Great Crested Newt). In addition, if the Council was minded to approve the application there is also insufficient information to determine what level of mitigation/compensation would be required in order to comply with PPS9.

The survey that has been received confirms only the presence of the Great Crested Newt. A further habitat survey would be required to be undertaken from next April at the earliest to gauge the population scale.

Considering PPS9, the Habitat Regulations and the recent judicial review case, it is not acceptable to leave the submission of the required further survey and impact assessment to a planning condition.

**Strategic Manager Highways:** As there have been no material changes in highway terms since the previous application was approved, the same improvements agreed to the junction of Bollington Lane/ Congleton Road should be attached to this application.

**Nether Alderley Parish Council:** Object to the renewal on the grounds that the existing garden centre has relocated elsewhere and had been granted permission as a very special circumstance in terms of green belt policy. As these circumstances are no longer evident there is no justification for this application

## **OTHER REPRESENTATIONS**

**The Edge Association:** Object on the grounds that the existing garden centre has relocated to Somerford Booths and had been originally been granted permission as a very special circumstance in terms of green belt policy. As these circumstances no longer apply there is no justification for this application. Also consider the works to the Bollington Lane/A34 junction as part of the by-pass, currently underway, to mean that the original proposed junction to be incorrect

Thirteen individual letters/emails have been received from local people, one local amenity group and one local company which raise objections on the grounds that the very special circumstances that originally existed to granted the initial permission for SE Matthews to relocate from their original site in the grounds of Astra Zeneca over the road no longer exist given that SE Matthews have relocated to Somerford Booths. Other issues raised include the perception that the original permission is no longer valid and the relationship of this application to the Dobbies application (09/3109M) in which that Applicant's (Dobbies garden Centre) supporting information refers to the electricity pylon on this application site 'pose potential hazards during operation and construction. The Dobbies application is stand alone application which is yet to be determined and is submitted by a different Applicant which remains to be determined and increased traffic generation.

Since the deferral of the application in June, further objections have been received from Henbury and Marton Parish Councils which also very much raise the same concerns as above. Both Parishes consider that as neighbouring parishes to Nether Alderley, there areas will be adversely affected by virtue of the increased traffic in the wider area.

In addition, a further 30 letters of objection have been received since the deferral of the application. These raise the following concerns

- The changes to the Bollington lane /A34 junction will result in greater highway hazard.
- The proposal is car dependent and not sustainable
- The very special circumstances to be transferred from the Astra Zeneca Site which was put forward in support of the original application ceased to exist when Matthews relocated to Somerford Booths.

## **OFFICER APPRAISAL**

### **Material Changes in Circumstances Since Previous Application 03/3213P was Approved**

Legal advice has been taken which clarifies the position with regard to the determination of this application. The Board is entitled to review the decision to grant outline permission and can reach a different decision, although it should have good reason for doing so.

In considering whether there has been a material change since the previous decision was taken on application 03/3214P it is relevant to consider the information submitted by the Applicant in support of that original application; the most important being -

- (a) As at November 2003, SE Matthews had been trading on the original Astra Zeneca Site (opposite the application site) for 55 years
- (b) Astra Zeneca, had served a notice to quit on SE Matthews, stating that Astra Zeneca required possession of the site at the expiry of the lease at the end of September 2004
- (c) Astra Zeneca wanted to develop sports and recreational facilities for its employees and enhance open space. Planning permission was granted to Astra Zeneca on 25 September 2003.
- (d) As at November 2003, the Application Site was open grazing land, although it was adjacent to a gas compound and had electricity pylons traversing it.

The Applicant relied on three very special circumstances in order to justify the inappropriate development. These are:

- (a) The application was to replace an existing business in the Green Belt with a smaller business in the Green Belt;
- (b) As the application did not propose to relocate all the non-horticultural uses on the Previous Site, it would reduce inappropriate uses in the Green Belt;
- (c) As a result of the reduction in physical size of the business, increased screening on the Application Site and the use of the Previous Site as open recreational land, the application would increase the openness of the Green Belt.
- (d) The development would not result in any harm to the character of the Green Belt.

The Applicant, in response to the policy objection to the proposal further justified the 'very special circumstances' by letter dated 15 January 2004. The letter relied (inter alia) on the following:

- (a) The existing development (at Astra Zeneca) was a long established use in the Green Belt. It was imperative that the Applicants who make a considerable contribution to the local economy, can continue to trade in the locality'
- (b) 'It is also essential that the business is located within the immediate vicinity in order to maintain its existing client base. S E Matthews has considered a number of locations within the local area and there are no brownfield sites that are readily available. One of the primary uses at the

proposed site is for outdoor plant growing and horticulture and in order for the business to be effective, good quality land is essential.'

The Planning Committee of the former Macclesfield Borough Council resolved to grant permission on 2 February 2004 subject to a S106 Agreement. The report (attached as Appendix 1) concludes at paragraph 5 that there were very special circumstances may exist in this case to consider the application sympathetically. Outline permission was ultimately granted after the completion of the S106 Agreement on 9 March 2005

The Decision notice, attached as Appendix 2, contains 23 conditions and states at condition 23 -

***'The approved garden centre shall not be brought into use/commence operations until the existing operations at Alderley park Nurseries (Matthews Garden Centre) have permanently ceased.***

***Reason -The proposal is for relocation of this business only'***

The reason for approving the application is stated on the decision notice as being:

***'The proposal does not comply with all relevant policies of the Development Plan. However, other material considerations have been taken into account, namely that the proposal is a relocation of an existing business sited opposite the proposed site and the application is considered to be acceptable'***

A material change of circumstances since an earlier decision is capable of being a good reason for a change of mind in planning terms and reach a differing judgement to a previous decision.

A significant number of objections to this application have been received on the basis that the original rationale for the approval no longer exist now given the relocation of the Applicant to Somerford Booths in around 2006.

The Applicant still operates from Somerford Booths in what appears to be a landscape design and build business and does not appear to have a garden centre or plant growing use. There appears to be little advertisement of the activity other than the internet and the yard contains an implement store and portacabins. The new site is accessed via a shared private drive. No evidence is submitted by the Applicant to demonstrate why they did not implement the original permission in Nether Alderley, although it is a matter of public record that the Dobbies application (09/3109M yet to be determined) seeks to undertake via a Unilateral Undertaking not to implement the original Matthews permission (03/3214P) as a material consideration to that particular application.

### **Very special circumstances**

The original consideration of the very special circumstances and the reason for the permission being granted relied upon the submission put forward by

the Applicant that the application would not harm the openness of the Green Belt and that this scheme comprised the relocation of a long established business operating in the Green Belt simply moving to another site in the Green Belt. This is no longer considered to be a valid material consideration, Somerford Booths is not located within the Congleton Green Belt at all and the Applicant vacated the Astra Zeneca site (which now comprises cricket pavilion and pitch – development which is deemed appropriate in green belt policy terms).

The Applicant also argued that there were very special circumstances for the relocation because the original application was “essential that the business is located within the immediate vicinity in order to maintain its existing client base”.

It is not clear that this reason remains, given that the business has moved away from the vicinity and appears still to be trading successfully. The Applicant further stated in relation to the previous application that the application site was required because it was needed for “outdoor plant growing and horticulture and in order for the business to be effective, good quality land is essential”, so no brownfield sites were suitable. However, the business appears to have operated for some years without any outdoor plant growing and horticulture at Somerford Booths.

### **Impact upon protected species since the scheme was originally granted permission**

The EC Habitats Directive 1992 requires the UK to maintain a system of strict protection for protected species and their habitats. The Directive only allows disturbance, or deterioration or destruction of breeding sites or resting places, if there is

- no satisfactory alternative
- no detriment to the maintenance of the species population at favourable conservation status in their natural range
- a specified reason such as imperative, overriding public interest.

The UK implemented the EC Directive in The Conservation (Natural Habitats etc) Regulations 1994 which contain two layers of protection

- a licensing system administered by Natural England which repeats the above tests
- a requirement on Local Planning Authorities (“LPAs”) to have regard to the Directive’s requirements.

Circular 6/2005 (dated 16 August 2005) advises LPAs to give due weight to the presence of a European protected species on a development site to reflect. [EC] ...requirements ... and this may potentially justify a refusal of planning permission.”

In PPS9 (2005) the Government explains that LPAs “should adhere to the following key principles to ensure that the potential impacts of planning

decisions on biodiversity are fully considered..... In taking decisions, [LPAs] should ensure that appropriate weight is attached to .... protected species... ... Where granting planning permission would result in significant harm .... [LPAs] will need to be satisfied that the development cannot reasonably be located on any alternative site that would result in less or no harm..... If that significant harm cannot be prevented, adequately mitigated against, or compensated for, then planning permission should be refused.”

With particular regard to protected species, PPS9 encourages the use of planning conditions or obligations where appropriate and advises, “[LPAs] should refuse permission where harm to the species or their habitats would result unless the need for, and benefits of, the development clearly outweigh that harm.”

The converse of this advice is that if issues of species detriment, development alternatives and public interest seem likely to be satisfied, no impediment to planning permission arises under the Directive and Regulations.

Recent legal challenges and interpretation of the Habitat Regulations by the Courts are considered to result in a material change in circumstances in this case.

The site both supports and is close to a number of habitats where there is a likely presence of protected species. The proposal also involves the loss of a number of trees which could also potentially support protected species. The precautionary approach must be taken in terms of this issue. As no information is submitted it is not possible for the Council’s ecologist to reach a judgement and the recent changes in case law have clarified the matter to such an extent that this matter can not be dealt with by condition.

This is considered to be a significant change in circumstances since the proposal was originally considered, and a very important material consideration in the determination of this application.

Following deferral of the application, a presence/absence survey for the Great Crested Newt was undertaken.

The survey was undertaken by a suitably qualified expert and is accepted. The survey appears to have been undertaken to a high standard and in accordance with best practise.

The Great Crested Newt, *Triturus cristatus*, is protected under both the Wildlife and Countryside Act 1981 and also the Conservation of Habitats and Species Regulations 2010. In addition it is a local and UK Biodiversity Action Plan (BAP) priority species. As a consequence of its protected and BAP status the species is a material consideration for planning authorities under the terms of PPS9. It is therefore essential that the presence or otherwise of Great Crested Newts, 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. Legal circular 06/2005 states that planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions, and this may potentially justify a refusal of planning permission.

PPS9 States:

“The aim of planning decisions should be to prevent harm to biodiversity and geological conservation interests. Where granting planning permission would result in significant harm to those interests, local planning authorities will need to be satisfied that the development cannot reasonably be located on any alternative sites that would result in less or no harm. In the absence of any such alternatives, local planning authorities should ensure that, before planning permission is granted, adequate mitigation measures are put in place. Where a planning decision would result in significant harm to biodiversity and geological interests which cannot be prevented or adequately mitigated against, appropriate compensation measures should be sought. If that significant harm cannot be prevented, adequately mitigated against, or compensated for, then planning permission should be refused.”

The submitted survey has confirmed the presence of Great Crested Newts at the proposed development site.

The methodology implemented under the submitted survey is not designed to assess the size of the population of newts present or assess the importance of the site for the species, consequently, only the presence of Great Crested Newts is known. A further survey/assessment of all ponds within 500m of the proposed development, undertaken in accordance with the Natural England guidelines between March and June, is required before a full assessment of the status of great created newts at this site can be made. In the absence of this further assessment it is impossible to assess both the impacts of the proposed development or to determine what level or type of mitigation/compensation measures would be required to address any adverse impacts occurring, as required by PPS9. At this time no mitigation/compensation proposals have been received from the applicant.

In addition to being a material consideration regulation 9(5) the 2010 Habitats Regulations places an obligation upon planning authorities to give consideration to Great Crested Newts (and other European protected species) in the exercise of their functions. The recent ‘Whooley’ judicial review has clarified the position of planning authorities in respect of this legislation.

The Habitat Regulations 2010 require Local Authorities to have regard to three tests when considering applications that affect a European Protected Species. In broad terms the tests are:

- that the proposed development is in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment
- that there is no satisfactory alternative and
- that there is no detriment to the maintenance of the species population at favourable conservation status in its natural range.

Committee will need to take a view in terms of the three tests, however, whilst this is a stand alone planning application, which needs to be considered on its own merits, the information submitted in support of application 09/3109m (the Dobbies Application) refers to the Matthew permission (03/3214p) being off-set as a land use swap.

With regard to the first test of the Habitat Regulations, this permission would be of nothing other than private benefit to the applicant. Given the length of time the Applicant has not been trading in Nether Alderley as a nursery/garden centre, any economic benefit to the area which the original permission sought to safeguard has long since gone, it is therefore considered that there are no overriding reasons of public interest that would outweigh the favoured conservation status of the protected species.

With regard to the second test, no evidence is submitted at all in support of this application.

Additionally and with regard to the third test, the Council does not have sufficient information to assess the potential impact of the proposed development upon the favourable conservation status of a European protected species (Great Crested Newt). In addition, if the Council was minded to approve the application there is insufficient information to determine what level of mitigation/compensation would be required in order to comply with PPS9. Considering PPS9, the Habitat Regulations and the recent judicial review case, it is not acceptable to leave the submission of the required further survey and impact assessment to a planning condition.

### **Scale parameters**

Circular 01/06 introduced changes to the Planning System which included changes to information submitted in support of outline planning applications. For the first time scale parameters (i.e. maximum and minimum heights/widths/lengths of building) were required to be submitted to define the scope of built form in any outline scheme.

Condition 1 attached to 03/3214P reserved all matters pertaining to design, external appearance, siting, means of access and landscaping for future consideration. In this respect, whilst no specific scale parameters are submitted here, there was sufficient supporting information within the original application which would allow conditions which would address this particular change in circumstances. On this basis, no issue is raised.

### **The impact of the proposal in the light of the lack of any Heads of Terms for a s106 agreement being submitted**

Permission was originally granted for the application under consideration subject to a S106 Agreement that amongst other things required landscaping to be provided and maintained in perpetuity and specifically controlled the types of goods to be sold from the garden centre.

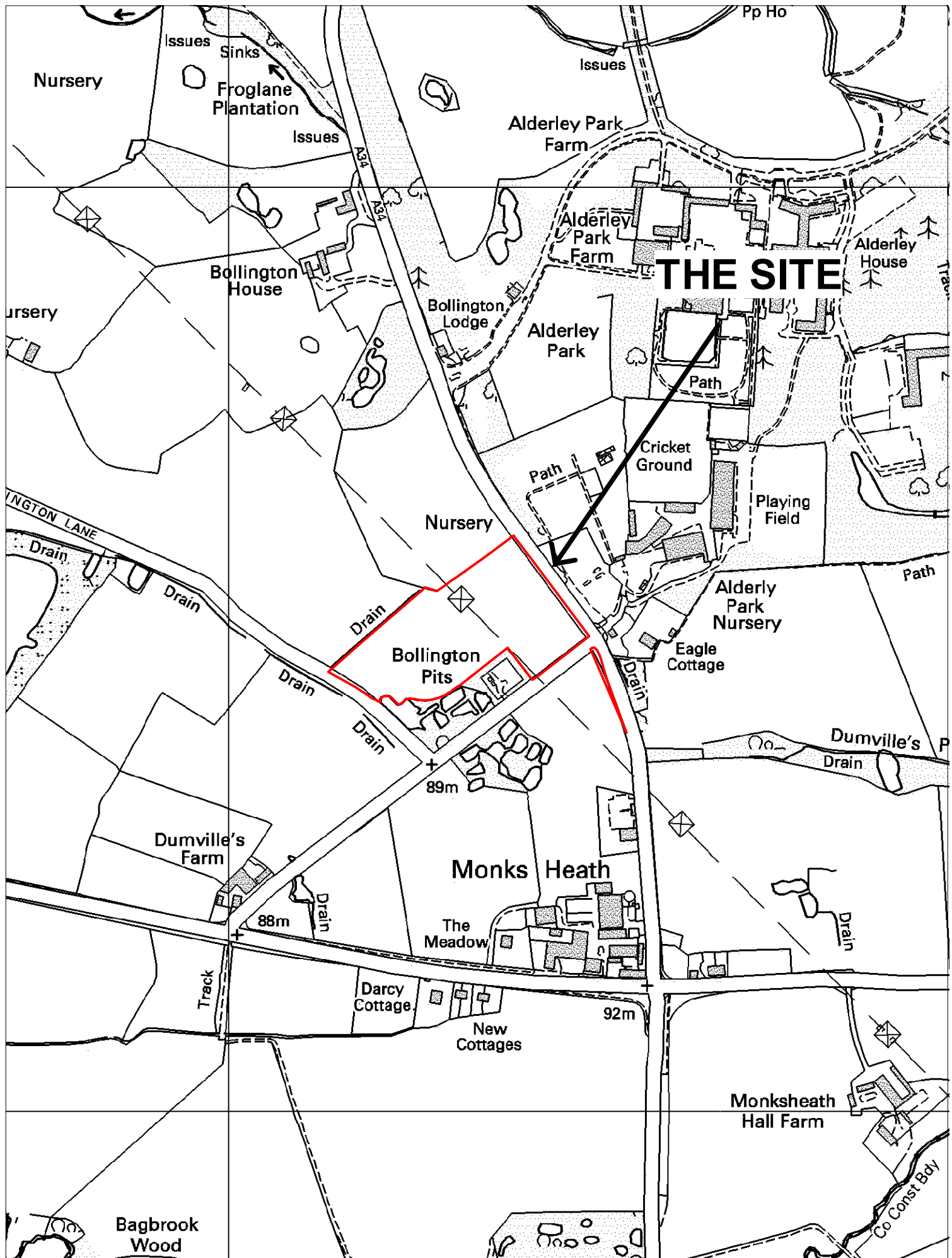
This is a stand alone application which requires a stand alone Legal Agreement. As no such undertaking has been submitted with this application, issues that were only previously considered to make the Matthews scheme acceptable on the basis of the relevant clauses in the Legal Agreement have not been adequately addressed in this renewal application.

### **CONCLUSIONS AND REASON(S) FOR THE DECISION**

It is recognised that there are situations where flexibility and responsiveness to the challenging circumstances faced by the development community can easily be accommodated by the Local Planning Authority. It is, however, considered that such support for time extensions to development schemes that have a planning permission can only be accommodated where there are no material changes in policy either at development plan level or at national government level.

In this case there are fundamental changes to the planning policy framework that require Habitat Surveys for both the Great Crested Newts and other European protected species such as Bats. Surveys have revealed the presence of Great Crested Newts but there is a lack of information for their mitigation that needs to be addressed.

It is also considered that there has been a change in the circumstances that made the application acceptable previously – namely the weight to be attached to the very special circumstances. These reasons together with the lack of any legal obligation or Heads of Terms for the s106 mean that the application to extend the time fails and on this basis it should be refused permission.



10/1323M - LAND NORTH OF BOLLINGTON LANE AND WEST OF CONGLETON ROAD NETHER ALDERLEY

N.G.R.; - 384.248 - 374.514

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Application for **Extension to Time Limit**

**RECOMMENDATION : Refuse for the following reasons**

1. Inappropriate development in Green Belt due to change in very special circumstances
2. Insufficient information to mitigate for harm to Protected Species
3. Impact of retail use and inability to secure future maintenance of landscaping due to lack of legal agreement