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## HAVANT BOROUGH COUNCIL

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### OPERATIONS AND PLACE SHAPING BOARD

28 OCTOBER 2019

### THE NEED FOR NUTRIENT NEUTRAL DEVELOPMENT IN HAVANT BOROUGH

DAVID HAYWARD (PLANNING POLICY MANAGER)

#### INFORMATION

**Cabinet Lead (HBC): Cabinet Lead for Planning, Regeneration and  
Communities**

**Key Decision: N/A**

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#### 1.0 Purpose of Report

- 1.1 To set out the ongoing work regarding the need for development in the Borough to be nutrient neutral in order to comply with regulations.

#### 2.0 Recommendations

- 2.1 That the Operations and Place Shaping Scrutiny Board:
- a) Notes the Council's responsibilities under the Habitats Regulations<sup>1</sup>, particularly in light of recent case law;
  - b) Notes the impact that the current situation is having on the development industry, including small and medium sized housebuilders;
  - c) Notes the potential impact on the progression of the Havant Borough Local Plan 2036;
  - d) Notes the potential implications in terms of the Borough's five year housing land supply and the housing delivery test;
  - e) Notes the positions of Natural England and the Environment Agency regarding the issue;
  - f) Notes the work currently underway to address the issue at a local level; and

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<sup>1</sup> References to 'the Habitats Regulations' or 'The Regulations' in this report should be read as referring to the Conservation of Habitats and Species Regulations (2017 as amended), available at [www.legislation.gov.uk/uksi/2017/1012/contents/made](http://www.legislation.gov.uk/uksi/2017/1012/contents/made).

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- g) Makes representation to the Cabinet if any further consideration of the matter takes place.

### 3.0 Summary

- 3.1 The Council has a significant development and regeneration agenda. This has been already subject to debate and the unanimous approvals at Full Council of both the Havant Borough Regeneration Strategy and the Havant Borough Local Plan 2036.
- 3.2 The Council takes its responsibility to provide for sustainable development in Havant Borough seriously. Sustainable development is that which respects equally the three pillars of sustainability: economy, environment and social. This is a key element of the National Planning Policy Framework.
- 3.3 Achieving these strategies is only possible if development complies with the Council's legal responsibilities under the Conservation of Habitats and Species Regulations (2017 as amended)<sup>2</sup> (hereafter referred to as The Regulations).
- 3.4 The Council is committed to new development only taking place if it is sustainable development that includes the relevant environmental protections and would create a net gain for biodiversity through the Havant Borough Local Plan 2036. Part of the consideration of this is whether there would be a detrimental impact on the water quality of the nearby European designated nature conservation sites in the Solent.

#### Context and legal framework

- 3.1 Under The Habitats Regulations, there are significant responsibilities conferred on the Council as a 'competent authority'. Chiefly, it requires the Council to only approve plans or projects (such as planning applications or a Local Plan) if there is no likelihood of a significant effect on the internationally protected ecological sites along the Solent coast.
- 3.2 A significant effect could be caused by a number of potential impacts including direct or indirect habitat loss, air pollution, water pollution, increase in recreation, light pollution, and tall buildings.
- 3.3 A Habitats Regulations Assessment (HRA) is carried out in order to assess whether there is a 'likely significant effect'. This generally includes an Appropriate Assessment (AA), which is the second more detailed stage<sup>3</sup> of an HRA. The two terms are often used interchangeably and essentially refer to the same process. Natural England must be consulted on the findings of an HRA and there is a duty to consider their response. An established principle under law is that appropriate assessments must use the 'precautionary principle' in undertaking appropriate assessments. This means that evidence must demonstrably show that there *would not* be a likely significant effect on the protected sites before planning permission can be granted or a local plan approved. If there is uncertainty or a lack of information, the planning application or plan should be refused. It is also necessary to consider not only the impact of a single plan or project in isolation but where there is a likelihood of a significant effect in combination with other plans and projects as well.

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<sup>2</sup> Available at <http://www.legislation.gov.uk/ukxi/2017/1012/contents/made>

<sup>3</sup> This is set out in Regulation 63 of The Regulations.

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- 3.4 It is also important to note that this is a legal requirement as opposed to a material planning consideration. Material planning considerations form part of a planning balance and permission can potentially be granted for something which has adverse impacts if the benefits outweigh those adverse impacts. This is not the case here. It must be shown that there would not be a likely significant effect in order for the Council to lawfully grant planning permission or approve a local plan. If the Council chose to grant planning permission contrary to advice on the matter from Natural England, there would be a significant risk of judicial review.
- 3.5 The need for HRA and AA has existed since 2004. It has been known for many years that new development does lead to an increase in recreation at the coast and that this has a disturbance impact on the birds as they use the coastal mud flats to feed and roost (this is a 'likely significant effect'). As a result, mitigation is required from all new development which is then used to fund the Bird Aware Partnership, of which the Council is a member. The Partnership implements the mitigation scheme, largely consisting of a ranger patrols along the coast.
- 3.6 Appendix A contains a number of examples of HRAs that have taken place on planning applications including a particularly recent complex and recent example, a simple conversion that did not lead to an impact due to nutrient neutrality and one that used a Grampian condition (see below).
- 3.7 Mitigation to address increased recreation has been in place since 2014 and works well, is fully accepted by the development industry and is a strategic solution that has been implemented across the Solent so is one of our key planks in the 'duty to cooperate' under the NPPF.
- 3.8 The Regulations transpose two EU Directives: The Habitats Directive and The Birds Directive. As such, the processes and legal requirements effectively cannot be changed at this time. Government have proposed that once the UK exits the EU, the regulations would remain effectively as they are now<sup>4</sup> though that is not yet UK law of course. So no change in approach is envisaged as a result of the UK's exit from the European Union.

### Recent case law

- 3.9 The European Court of Justice determined a case in 2018 related to considering water quality in Appropriate Assessments<sup>5</sup>. This is generally referred to as 'The Dutch Case'.
- 3.10 The judgement in this case clarifies the definition of plans and projects and effectively includes significantly more operations within the definition which have an impact on water quality, most notably runoff from agriculture.
- 3.11 As a result, using this changed approach, it can only be concluded that new development, particularly that of a residential nature, could increase nitrogen deposition into the protected harbours above consented levels. This results in increased nutrients in the harbour which cause a dense growth in certain plants. This in turn leads to harm to the species which use them. This is the likely significant effect.

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<sup>4</sup> This is set out through The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019, which is a draft item of legislation.

<sup>5</sup> Full reference is *Coöperatie Mobilisatie for the Environment UA and College van gedeputeerde staten van Noord-Brabant* (Case C-293/17 and C294/17) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CA0293>

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- 3.12 As a result, the only way to prevent a new housing scheme having this likely significant effect is for there to be no increase in nutrients into the harbour, ie for it to be 'nutrient neutral'.

### **Natural England's position**

- 3.13 Natural England is the Government's statutory advisor on nature conservation. Under the Habitats Regulations, it is necessary to consult Natural England when undertaking an HRA.
- 3.14 The case law has resulted in a change of advice from Natural England regarding new development and whether there would be a likely significant effect on a European site due to water quality. The change in advice was that any development which could result in a decrease in water quality would cause a likely significant effect on the Solent's European sites.
- 3.15 Natural England highlight that the impact comes from population increase and the resultant increase in effluent. As a result, any development which increases population could be affected by this issue. Proposed developments for new housing are principally what will be affected by the issue as a result. However there are other development which could be considered to increases population such as hotels, camp sites and care homes.
- 3.16 The first such consultation response was received on 9 April 2019 at 16:38 and set out:

FAO –

Your ref – APP/19/00060 - 71 Forestside Avenue, Havant, PO9 5SJ

Our ref – 277372

Dear \_\_\_\_\_,

*Thank you for consulting Natural England on the above Habitats Regulations Assessment and Appropriate Assessment.*

### ***Increased impact from recreational disturbance***

*Natural England agrees with the conclusions of the HRA and AA with respect to recreational disturbance on the Solent SPAs. Natural England requires the Bird Aware Solent contribution to be secured with any planning permission.*

### ***Hydrological changes - foul water***

*Natural England notes that your authority, as competent authority under the provisions of the Habitats Regulations, has screened the proposal to check for the likelihood of significant effects. Your assessment has not considered whether the increase in waste water from the new housing will have a likely significant effect on the European designated sites (SPA, SAC, pSPA).*

*As you know, there is existing evidence of high levels of nitrogen and phosphorus in the water environment with evidence of eutrophication at some designated sites. The PUSH water quality work has identified that there is uncertainty as to whether new housing development can be accommodated without having a detrimental impact on the designated sites within the Solent. The proposal comprises new housing development and it is Natural England's advice that the existing uncertainty about the deterioration of the water environment must be appropriately addressed in order for the assessment to be legally compliant.*

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*Natural England advises that there is a likely significant effect on the European designated sites (SPA, SAC, pSPA) due to the increase in waste water from the new housing. Natural England advises that the assessment currently does not provide enough information and/or certainty to justify the assessment conclusion and that your authority should not grant planning permission at this stage. Where there is a likelihood of significant effects (excluding any measures intended to avoid or reduce harmful effects on the European site), or there are uncertainties, a competent authority should fully assess the implications of the proposal in view of the conservation objectives for the European site(s) in question within the appropriate assessment.*

*Natural England therefore advises that this issue is examined within the appropriate assessment and we recommend that the proposals achieve nutrient neutrality. It is appreciated that this may be difficult for smaller developments. Therefore, we strongly advise that an interim approach is set up for the Borough that developments can contribute to thereby ensuring that this uncertainty is fully addressed by all applications. Natural England must be consulted on any appropriate assessment your Authority may decide to make.*

*Please note we advise that the competent authorities to whom Natural England gives its statutory advice on the environment will need to seek and rely upon their own legal advice on the interpretation of the Habitats Regulations and case law.*

*Please let me know if you have any queries or would like to discuss the above further.*

*Kind regards*

- 3.17 Natural England has revised the terminology regarding the position since that time. However the overall conclusion of the advice remains the same. Natural England helpfully worked with officers to provide updated advice to inform the Council's Position Statement (see below).
- 3.18 Natural England's current position and the recommended methodology for calculating the nitrogen budget of a planning application or local plan is available at [www.havant.gov.uk/nitrogen](http://www.havant.gov.uk/nitrogen).

### **The Environment Agency's position**

- 3.19 The Environment Agency has a key role in considering this issue that is complementary to, but different from Natural England's. The Agency play no formal part in the HRA process for a planning application. They are the body responsible for the marine environment, water quality and the licensing of wastewater. They also monitor nutrient (generally nitrogen) levels in Langstone Harbour and other locations.
- 3.20 The Environment Agency's public position is that as long as there is the capacity to take the extra wastewater flows from new development whilst still treating it to the same standard, then development would be acceptable.
- 3.21 It should be highlighted that both organisations agree that there would be a need to address this issue in the longer term.
- 3.22 The disagreement between two arms of DEFRA is extremely unhelpful in assessing this issue. It leaves the Council in the position whereby it is impossible to reach a position that addresses all viewpoints. As such, there is a risk of challenge from at least one set

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of stakeholders however we proceed. Thus, it is important to make sure that the issue is appropriately scrutinised, considered and any necessary legal advice sought.

- 3.23 The Environment Agency's current position is set out in a Technical Note available at [www.push.gov.uk/wp-content/uploads/2019/07/Environment-Agency-Technical-Guidance-Note-on-Wastewater-Treatment-Capacity-in-the-Solent.pdf](http://www.push.gov.uk/wp-content/uploads/2019/07/Environment-Agency-Technical-Guidance-Note-on-Wastewater-Treatment-Capacity-in-the-Solent.pdf).

### **The development industry's position**

- 3.24 The development industry contain a variety of parties from large national housebuilders to small and medium sized builders operating only in the local area.
- 3.25 There has been reporting in the media of the concern that several housebuilders, planning agents and architects have regarding the issue. A deputation was also made to the Cabinet meeting on 26th June 2019 (see below) which sets out a number of concerns. [This is available on the Council's website.](#)

### **The Planning Inspectorate's Position**

- 3.26 When a planning application is determined by appeal, the Planning Inspectorate become the competent authority under the Habitats Regulations.
- 3.27 Once the issue came to light, and again following the approval of the Position Statement, the Council notified the Planning Inspectorate of this change in material circumstances surrounding the determination of planning applications in the Borough.
- 3.28 Since then, the Planning Inspectorate has, particularly in the absence of any information to the contrary, concluded that there would be a significant effect a European Site due to new development and dismissed the appeal. This is true in Havant but also other nearby local authorities.
- 3.29 In one appeal case (Land adjacent to Mandai PINS reference APP/X1735/W/18/3214079), the Planning Inspectorate commented on the use of Grampian conditions (see below re Position Statement). This suggested that they may not be the most appropriate way forward. The appeal was still dismissed.
- 3.30 It should be noted that since 9<sup>th</sup> April 2019, no applicant including national housebuilders (who dispute the issue), has sought to push through an application to determination. This would have the effect of taking a likely refusal of planning permission for determination by the Planning Inspectorate.
- 3.31 Examples of appeal decisions, including Land adjacent to Mandai, that have considered the matter are at Appendix B.

### **The impact of the case law at the local level**

- 3.32 Some developments are already nutrient neutral. Using land for agriculture emits nitrogen into the environment. As such, development on agricultural land can often be nutrient neutral in its own right. As an example, the Development Management Committee recently resolved to grant planning permission for the Forty Acres planning application (reference APP/18/00450) which is nitrogen positive (ie more nitrogen will be taken out of the system than will be put in). Moving forward, development on other urban extension sites considered by the local planning authority are likely to be nutrient neutral.

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These are generally developments that are lower in terms of their gross development<sup>6</sup> and/or are on land being used for higher nitrogen emitting forms of agriculture<sup>7</sup>.

- 3.33 However for development schemes on non-agricultural (particularly brownfield) land, it is generally not possible to provide mitigation as part of the proposed development. As a result, applicants are completely dependent on the Council to provide a strategic mitigation solution. This threatens the ability to provide development in the most sustainable places, including the sites identified in the Council's Regeneration Strategy.
- 3.34 This of course means that considering this issue makes development on the more sustainable sites in the Borough more difficult to permit and, once any mitigation cost is added, less viable.
- 3.35 At this point in time, there is no strategic mitigation solution in place. As such, the Council has been able to permit only a very small number of planning permission for new residential dwellings or other development representing an increase in overnight accommodation in exceptional circumstances since 9<sup>th</sup> April 2019.
- 3.36 This is an issue that affects all of Havant Borough. However it also extends far beyond the Borough Boundary. Other local authorities are also assessing the impacts to their area and what solutions can be put in place<sup>8</sup>. Further engagement and collaboration is needed, particularly through the Partnership for Urban South Hampshire (PfSH). Please note that an update is being provided to the Partnership for South Hampshire's Joint Committee on 14<sup>th</sup> October<sup>9</sup>.

### **The implications of not resolving the issue**

- 3.37 As such, left unresolved, this issue would have a significant impact at the local level. First and foremost, it makes the delivery of the Council's development and regeneration agendas impossible. Linked to this, Government have a national target of building 300,000 new homes per year<sup>10</sup>. The Council's ability to meaningfully contribute to this target, indeed the ability for the Solent area as a whole to do so is significantly inhibited by this issue.
- 3.38 If left unresolved, the issue would have far reaching economic consequences. A large number of small housebuilding firms rely on the continuous movement of small development sites through the planning system and operate on shorter turnaround times than larger development sites operated by the national housebuilders. These smaller schemes have been particularly affected by this issue and this begins to threaten the viability of such businesses and the income of builders in the area.
- 3.39 The Council prides itself on its open for business reputation and its approach towards development, economic growth and boosting the prosperity of residents. Being in a

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<sup>6</sup> As an example, the Forty Acres scheme included a Brent Goose refuge and extensive open space due to a larger proportion of the site being affected by a high pressure gas main and being in a flood zone. This meant a low density of development was proposed compared to the gross site area.

<sup>7</sup> The nitrogen load of different types of agriculture is set out in Natural England's methodology. In Havant Borough dairy farming and arable are more common higher nitrogen farming types.

<sup>8</sup> See report to Portsmouth City Council's Cabinet on 11<sup>th</sup> June 2019 at

<https://democracy.portsmouth.gov.uk/ieListDocuments.aspx?CIId=126&MIId=4256>.

<sup>9</sup> The agenda for the meeting is available at [www.push.gov.uk/work/our-meetings/joint-committee/](http://www.push.gov.uk/work/our-meetings/joint-committee/).

<sup>10</sup> See Autumn 2017 budget at [www.gov.uk/government/publications/autumn-budget-2017-documents](http://www.gov.uk/government/publications/autumn-budget-2017-documents)

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position where it is impossible to grant most residential planning applications will threaten that reputation.

- 3.40 The Council is also assessed on various measures related to its development management performance. If left unresolved, the fact that planning permissions for residential development generally cannot be granted and will threaten the ability to meet these targets. In time, this could result in the Council being placed in special measures. It would also render it impossible for the Borough to have a five year supply of housing land and to be able to meet the requirements of the Housing Delivery Test.
- 3.41 Finally and perhaps most significantly, a sharp downturn in new housebuilding, particularly if it takes place across the Solent region, would start to further hurt the affordability of housing in the area. There are currently 1,671 families on the Council's waiting list for affordable housing<sup>11</sup>, waiting between 10 months and 5.5 years for a suitable property to become available through Hampshire Home Choice<sup>12</sup>. A sharp decrease in new affordable housing products coming to market will only increase these measures, having a tangible impact on families across the Borough who are in housing need.
- 3.42 The Leader and Chief Executive have written to Government and other stakeholders to highlight the importance of the issue (Appendix C).

### **The Council's Position Statement on Nutrient Neutral Development**

- 3.43 The Council recognised the importance of this issue very quickly. It was concluded that during the inevitable period of uncertainty, it was necessary to be clear what the Council's position is. It was also considered necessary to provide housebuilders with as much flexibility as was possible whilst complying with the legal requirements of the Habitats Regulations.
- 3.44 As such, on 26<sup>th</sup> June 2019, the Council's Cabinet considered the Position Statement on Nutrient Neutral Development. This statement acknowledged the change in case law, the current advice from Natural England and that the Council would work to resolve the overall situation as swiftly as possible.
- 3.45 In the interim, the Position Statement also authorises the use of Grampian conditions until an implementation plan is in place. This ensures that the Council can continue to grant planning permissions. However they are subject to a requirement that the development cannot be occupied until an avoidance and mitigation strategy is provided to the Council and the strategy implemented.
- 3.46 It is envisaged that this would be similar to the Bird Aware Solent Strategy. A financial contribution to this strategy is provided by all new residential development in the vast majority of the Borough.
- 3.47 However it has always been known that the use of Grampian conditions only represent a potential route forward for some developments. It is unlikely that any lenders would allow borrowing against a planning permission that included the condition. This is due to the fact that it is not possible to cost the likely planning obligation. As a result, the impact on the viability of the scheme in question cannot be calculated.

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<sup>11</sup> As at 7 June 2019.

<sup>12</sup> Average taken for the period 1 April 2018 to 31 March 2019

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### **The impact on the Havant Borough Local Plan 2036, the Council's five year supply and the housing delivery test**

- 3.48 The issue of nutrient neutrality has slowed preparation of the Havant Borough Local Plan 2036. The matter has obviously taken a great deal of officer time within the Planning Policy Team. In the absence of this issue, this resource would have been focused largely on progressing the Local Plan. As a result, there will be an inevitable slippage in the timetable to submit the plan to Government.
- 3.49 If left unresolved, the issue of nutrient neutrality could lead to an impact on the Borough's five year housing land supply and its ability to pass the requirements of the Housing Delivery Test.
- 3.50 A reasonable proportion of the sites proposed for allocation in the Havant Borough Local Plan 2036 are likely to be nutrient neutral. However a larger proportion are not.
- 3.51 The Borough's current housing land supply is 5.1 years. This does not result in a large surplus. As such, it is important to pursue a solution to this issue as soon as possible so that there is not an impact on the Borough's five year supply.
- 3.52 Equally, the Borough is now assessed on the delivery of housing on an annual basis. This is the Housing Delivery Test. If it is not possible to build and complete a large amount of new housing in the Borough over a prolonged period, this would start to impact on our ability to pass the Housing Delivery Test.

### **Proposed approach to mitigation**

- 3.53 An initial nitrogen budget for the Havant Borough Local Plan 2036 was prepared to support the Position Statement. This concludes that the impact arising from all development planned within the Borough to 2036 can be quantified as 2,924 kg/nitrogen/year. However this budget was prepared under version 1 of Natural England's methodology. Version 2 amended the calculations. However the addition of a 20% buffer on the amount of mitigation needed has increased the amount of mitigation needed to offset the impact of the Local Plan's proposed development.
- 3.54 The Position Statement sets out that it is suggested that the most appropriate solution to the situation would be for Government to intervene and address the issue holistically. This could be achieved through a national review of consents of wastewater treatment works to increase the standard for nitrogen emissions. Government could also provide 'mitigation banking' whilst a centrally considered review of the most appropriate mitigation takes place.
- 3.55 It should also be noted that the contribution of new development to wastewater in Chichester and Langstone Harbours SPA is incredibly small. The vast majority of nutrients in the harbours come from agriculture or general coastal background.
- 3.56 As such, the Leader of the Council and the Chief Executive wrote to Government on 28<sup>th</sup> May to request intervention to address the current issue strategically. A copy of the letter and replies is at Appendix B. It is recommended that the lobbying of Government and relevant agencies and other bodies continues in order to find the most sensible solution to enable development to take place across the Solent area without causing a decrease in water quality.

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- 3.57 To provide mitigation for this issue will require, in all likelihood, a number of measures to be enacted. These could include a mix of some of the following:
- Taking land out of agricultural production
  - Implementation of the Havant Thicket Reservoir
  - Implementation of the proposed Brent Goose and Wader refuges
  - Limits on the water efficiency of new developments
  - On-site measures, particularly through sustainable drainage systems
  - Improvements to the Budds Farm and Thornham Wastewater Treatment Works
  - Introduction of habitat management of river corridors
- 3.58 The impact of development is still being considered. A significant issue in Havant Borough is that land prices are comparatively lower than most nearby areas. To get a development off the ground, the income to a landowner has to be proportionally greater than the existing land use would provide them. As such, There has to be a reasonable return to a willing landowner in order for development to come forward. It is considered that the costs of some recreation based mitigation schemes elsewhere in more prosperous parts of the country would not be possible for new development in Havant Borough.
- 3.59 Any mitigation would need to be accommodated within development cash flows. In such scenarios, there are only two areas where it can effectively come from: affordable housing or the Community Infrastructure Levy. As such, the viability study that accompanies the Local Plan will need to be revisited when any mitigation costs are known. It should be highlighted that there cannot be changes to the current CIL charging schedule or the adopted Local Plan's policy towards affordable housing. However, the costs of the mitigation costs will need to be reflected in the Local Plan and CIL Viability Study to reaffirm that the Plan is deliverable as a whole. We will also need to ensure that the charging rates in the revised CIL charging schedule are set at a level which will not undermine the viability of development.
- 3.60 Further detail regarding the current approach towards short term mitigation could be provided in an exempt session.

### **Work going on at the Partnership for South Hampshire and national level**

- 3.61 The Council has been working with neighbouring authorities through the Partnership for South Hampshire (PfSH) on this issue. Through officer working groups (the Planning Officers Group and the Water Quality Working Group), the matter is discussed on a regular basis. The Partnership's Joint Committee has also had extensive discussion on the matter.
- 3.62 In the longer term, a review of the Integrated Water Management Strategy (IWMS) is needed. This is the evidence base document that sets out how the wastewater treatment system will be able to accommodate new development. An IWMS was adopted by the Partnership in 2018. However this contained uncertainty about the capacity of the wastewater treatment system to accommodate new development at some wastewater treatment works in the latter points in the Local Plan period.
- 3.63 However the IWMS approached this in terms of physical capacity of wastewater treatment works as opposed to looking at the ability of the environment to accommodate

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any increases in nutrients. It was also completed before the Dutch Case was issued. As such, it will need to be reviewed.

- 3.64 Nationally, the issue is of particular interest to the Ministry of Housing Communities and Local Government (MHCLG). A meeting took place with MHCLG officials together with representatives of the Local Government Association, Homes England and the two DEFRA agencies on 20<sup>th</sup> July. Particularly since then, MHCLG has been prioritising this issue. Further updates are expected in the coming weeks.
- 3.65 In the longer term, it is perfectly possible that the issue of nutrient neutrality will be addressed in exactly the same way as Bird Aware Solent currently is. That way, it could become a simple and straightforward part of the development process in the Solent. However it is considered that the implementation of such a strategy would be more complicated than the Bird Aware Solent strategy is.
- 3.66 In the short term however, every local authority in the Partnership is focused on being able to lawfully grant planning permissions. As such, most are having to look at the matter in a more insular nature rather than as a partnership. Some are using short term strategies to be able to continue to grant planning permissions.

### Ongoing work and analysis

- 3.67 The issue is also still evolving. As it has arisen due to case law, the interpretation of that case law is not fully formed and it could be subject to further case law before it is. As such, Counsel Opinion has been sought on the proposed approach which has confirmed its validity. Nonetheless, it is likely that advice, policy and best practice regarding the matter will emerge moving forwards. As such, it is necessary to maintain a flexible approach and so a recommendation was included to allow the Position Statement to be updated should there be a change in case law, policy, best practice or standing advice.
- 3.68 Officers will continue to look at all the available information in order to assess the scale and the scope of the issue as it affects the Borough. Further detail can be provided through the discussion at the Board meeting.

## 4.0 Conclusions

- 4.1 The issue regarding nutrient neutral development is complex and evolving. New information is coming to light on a regular basis. As a result, it is necessary to keep re-evaluating the conclusions of that evidence and the appropriate way forward.
- 4.2 In determining this, a number of factors need to be born in mind. First and foremost, it is the Council's decision as a competent authority. This ensures that all risk, legal and otherwise, of these decisions rests with the Council. Whilst other stakeholders play a significant part in this process, it is the Council that must make the ultimate decisions.

## 5.0 Implications

- 5.1 **Financial implications:** please see main body of the report. In addition, staff resources to address this issue have had to be made available at short notice from across various teams in the Council including Planning (Development Management), Planning (Planning Policy), Property and Legal. This has extended the timescales for the delivery of other projects and resulted in a strain on stretched officer resources. The Planning Policy Team do not undertake time recording.

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- 5.2 Moving forward, the matter will continue to require extensive staff resources to address as the Council continues to re-evaluate the position. Significant resource will be needed to pull together an Implementation Plan and put it into action. This will require input from all the officer teams noted above and a particular necessity to engage with the Council's Finance Team. Any emerging budgetary implications will be brought back to Members in due course if necessary.
- 5.3 The level of resource input that is necessary is considered to constitute a 'new burden', for which Government can, and should, provide additional funding to cover the costs of<sup>13</sup>. This has been done in the past for work required as a result of the Habitats Regulations.
- 5.4 There are also direct costs that are unbudgeted that the Council is having to bear at least in the short term. This includes the cost of legal advice and consultancy support regarding an implementation plan, particularly around impact on development viability. Most of these costs can be passed on to developers through the Implementation Plan. However legal advice in particular cannot.
- 5.5 **Legal:** please see main body of the report.
- 5.6 **Strategy:** The Council has an ambitious regeneration and development agenda moving forward. Ensuring that these can be implemented in a nutrient neutral manner is essential to their delivery.
- 5.7 **Risks:** please see main body of the report.
- 5.8 **Communications:** please see the main body of the report.
- 5.9 **For the Community:** please see the main body of the report.
- 5.10 **Consultation:** no public consultation has taken place. Extensive engagement with Natural England, nearby local authorities and other stakeholders has taken place and should continue to do.

### **Appendix A:** Examples of Appropriate Assessments:

- APP/18/00450 - Forty Acres – a complex HRA involving multiple issues
- APP/19/00041 – a simple HRA addressing only nutrients and recreation – one of the few the Council was able to progress since approving the Position Statement as there was no net increase in population
- APP/19/00341 – an application which is choosing to use the Grampian condition route

### **Appendix B:** Examples of Planning Inspectorate decisions:

- APP/X1735/W/19/3222417 – 1 Northney Cottages – water quality not considered as appeal being dismissed on other grounds
- APP/X1735/W/18/3202960 – 50 Silvester Road – water quality considered in detail
- APP/X1735/W/18/3214079 – Land adjacent to Mandai – criticism of the potential to use a Grampian condition
- APP/Z1775/W/18/3217420 – 32 Norman Road Southsea (Portsmouth City LPA) – water quality considered in detail
- **Appendix C:** Correspondence

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<sup>13</sup> See HM Land Registry for more information at [www.gov.uk/government/publications/hm-land-registry-local-land-charges-programme/new-burdens-information#local-authority-funding](http://www.gov.uk/government/publications/hm-land-registry-local-land-charges-programme/new-burdens-information#local-authority-funding).

## NON EXEMPT

- Letter to Government from the Leader and Chief Executive
- Replies from Kit Malthouse MP.

**Background Papers:** There are a number of background papers which set out various parties positions and background information (in no particular order):

- [Position Statement on Nutrient Neutral Development \(Havant Borough Council\)](#)
- [Advice on achieving nutrient neutrality for new development in the Solent Region – for Local Planning Authorities \(Natural England\)](#)
- [Deputation on behalf of the South Coast Development Consortium on the Position Statement on Nutrient Neutral Development \(South Coast Development Consortium\)<sup>14</sup>](#)
- [Technical Note – Solent and South Downs – Wastewater treatment capacity for new development in the Solent Area \(Environment Agency\)](#)
- [Report to the Partnership for South Hampshire’s Joint Committee – PFSH nutrient neutrality update \(Partnership for South Hampshire\)](#)
- [Paper considered by the Partnership for South Hampshire’s Joint Committee on 14<sup>th</sup> October](#)

**Agreed and signed off by:**

Monitoring Officer: David Brown – 10 October 2019

For S151 Officer: Janette Gill – 8 October 2019

For Head of Legal: Razana Begum – 1 October 2019

Head of Service: Simon Jenkins – 4 October 2019

Cabinet Lead: Cllr Tim Pike – 1 October 2019

**Contact Officer:** David Hayward

**Job Title:** Planning Policy Manager

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<sup>14</sup> The Consortium comprises a number of local, regional and national house builders in the region including: Bargate Homes, Barratt David Wilson Homes, Bellway Homes, Bryan Jezeph Consultancy, CBRS Estates Limited, Foreman Homes, Hampshire Homes, Homes England, Paul Airy Planning Associates Limited, Persimmon Homes, Reside Developments and Taylor Wimpey