

**PARTIALLY EXEMPT**

## **HAVANT BOROUGH COUNCIL**

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**Cabinet**

**3 June 2020**

### **PROPOSED LAND TRANSACTION TO FACILITATE A MITIGATION PLAN TO ENSURE FUTURE DEVELOPMENT CAN BE NUTRIENT NEUTRAL**

**K Martyn Fenwick BSc MRICS  
Estates Consultant**

**FOR DECISION**

**Portfolio: Cabinet Lead for Planning, Regeneration and Communities**

**Head of Service: Director of Regeneration and Place**

**Key Decision: Yes**

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#### **1.0 Purpose of Report**

- 1.1. The purpose of the report is to outline and recommend a cost effective and expeditious Estates solution, to achieve the mitigation plan<sup>1</sup> for nutrient neutrality, as is the Council's legal responsibilities under The Conservation of Habitats and Species Regulations 2017 (hereafter referred to as The Regulations following the outcome of the 'Dutch Case').

#### **2.0 Recommendation**

- 2.1. Cabinet is recommended to:
  - i. Authorise the surrender/ re gear of the existing lease dated 28<sup>th</sup> May 1985 vested between Havant Borough Council and [REDACTED] [REDACTED] as set out in the terms included in Appendix A.
  - ii. Note the cash flow analysis of the scheme shows the scheme would be financially sustainable (Appendix B)
  - iii. Note the need to reflect the recommendations above through the Pre-Submission Local Plan and its supporting studies

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<sup>1</sup> There is delegated authority to publish an updated Position Statement and Implementation Plan for Nutrient Neutral Development following Cabinet decision on 26<sup>th</sup> July 2019.

### **3.0 Executive Summary**

- 3.1. The Council has a significant development and regeneration agenda. This is only possible to deliver however if development complies with the Council's legal responsibilities under The Conservation of Habitats and Species Regulations 2017 (hereafter referred to as The Regulations).
- 3.2. Heads of terms have been agreed in respect of a cost-effective Estates solution for nitrogen mitigation purposes within the Borough of Havant. [See Appendix A]
- 3.3. The Estates solution involves the surrender and re gear of the existing lease relating to [REDACTED], the details of which are set in Appendix A.

#### **Planning context and legal framework**

- 3.4. Under The 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.
- 3.5. It must be shown that there would not be no likelihood of a 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.

#### **The Dutch Case**

- 3.6. The European Court of Justice determined a case related to considering water quality in Appropriate Assessments in late 2018. This is generally referred to as The Dutch Case<sup>2</sup>.
- 3.7. The judgement in this case refines 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.
- 3.8. As a result, the only way that a new housing scheme could prevent this likely significant effect is for there to be no increase in nutrients into the harbour, i.e. for it to be 'nutrient neutral'. This requires mitigation to be put in place.

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<sup>2</sup>Full reference is Cooperatie Mobilisation 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>

## **The impact on the determination of planning applications and the Local Plan**

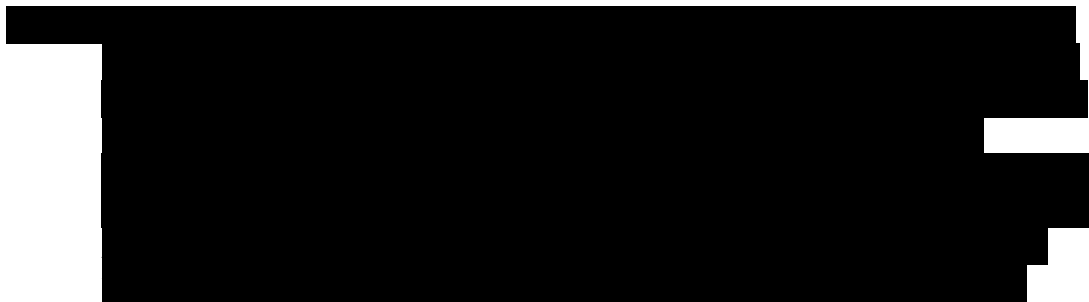
- 3.9. The impact principally comes from population increase as a result of development. However, as well as new housing, there are other developments which could be considered to increase population such as hotels and care homes.
- 3.10. This has been the case since April 2019. During that time, the Council has been able to consider some development schemes, these have all been nutrient neutral. Whilst these have been major development schemes, there remain a large number of smaller planning applications, particularly those on brownfield sites, which we are not able to grant planning permission for.
- 3.11. Without a way forward on this issue, it would also not be possible to submit the Local Plan for examination or implement our Regeneration Strategy.

### **What would happen without a solution?**

- 3.12. There is already a significant backlog of outstanding planning applications where nutrient neutrality is the only issue which needs to be addressed. More applications are moving through the planning system but it is not possible to grant planning permission for them at this point.
- 3.13. The Council's five year housing land supply position in the future already faces challenges. Without addressing this issue, housing supply would be increasingly affected. As a result, anything which slows down housing delivery would further threaten the housing supply position, potentially pushing the Council towards not having a five year housing land supply. This would have significant implications on the quality of development that can be negotiated, the infrastructure that could be offered by applicants and the threat to development on non-allocated sites.
- 3.14. Outside of the planning system, there is an inevitable impact in terms of our open for business reputation, our ability to attract inward investment, development and economic growth to the Borough.
- 3.15. In particular, the impact on SME builders, including their subcontractors, is key. These are the schemes most affected by this issue. Ultimately, once extant permissions as of April 2019 are built out, there will be no more schemes for this sector of the industry to move on to and their viability in the long term could well be threatened.

### **Current Position Statement**

- 3.16. On 26th June 2019, The Cabinet approved the Position Statement on Nutrient Neutral Development<sup>3</sup>. This sets out the significant effect that was likely as a result of new development of overnight accommodation (principally residential). The Position Statement acknowledged the issue caused by The Dutch Case, however no solution was offered at this point in time.
- 3.17. As part of this decision, a recommendation was approved to delegate authority to the Planning Policy Manager, in consultation with the Cabinet Lead for Planning, Regeneration and Communities, to prepare and publish a Nutrient Neutrality Implementation Plan which will specify the detail of the proposed short-term water quality mitigation solutions and the costs for new development.
- 3.18. As such, the publication of an Implementation Plan would be authorised through delegated approval and how this item is considered will have a bearing on the Implementation Plan.
- 3.19. However, the delegations did not cover any specific measures needed to deliver any implementation plan. Appendix A sets out the details of the recommended estates solution.



### **Analysis of the Budds Farm catchment**

- 3.21. There are two wastewater treatment works that serve Havant Borough: Emsworth drains to Thornham, the rest of the Borough drains to Budds Farm. Internal analysis showed that it was necessary to confirm the validity of the need for development draining to Budds Farm to be nutrient neutral. There is no doubt that development draining to Thornham Wastewater Treatment Works would lead to a likely significant effect.
- 3.22. On that basis, Ricardo Energy and Environment were commissioned by HBC, EHDC together with Portsmouth and Winchester City Councils to analyse the Budds Farm catchment and confirm the validity of Natural England's position that there is a likely significant effect.

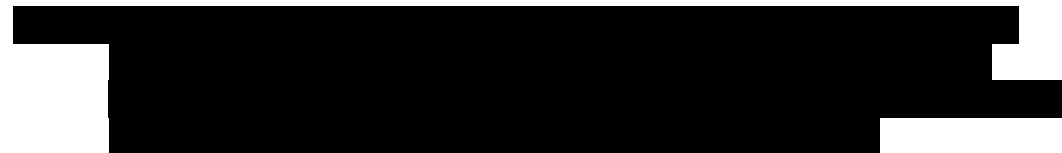
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<sup>3</sup> Available at: <https://www.havant.gov.uk/nitrogen>

- 3.23. Discussions with the consultant have confirmed that there would be a likely significant effect on a number of European Sites due to the precautionary nature of the regulations. Principally, due the cumulative development that will be taking place across the Solent and an already impacted baseline in some European Sites means that a significant effect is, in fact, likely.
- 3.24. As such, mitigation would be needed for any nutrient positive development in Havant Borough.

### **Moving towards a solution**

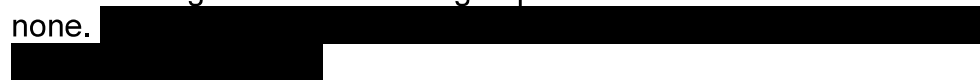
- 3.25. The best way to enable the Council to start issuing planning permissions for residential development again is to get a mitigation plan in place. This then allows the Council to permit residential development whilst we work collaboratively with neighbouring authorities on a larger strategic plan. This is essentially the approach that was taken towards the Solent Recreation Mitigation Strategy.



- 3.27. The Council's Regeneration Agenda and Local Plan are dependent on extensive infrastructure investment. This is already challenging in an area where sales values limit the planning gain that is available. This is sufficient to already render some regeneration schemes unviable even with no affordable housing provision. As such, the more cost effective a mitigation solution, the less it will challenge the deliverability of the Borough's most challenging development sites. It will also minimise the impact on the Council's ability to fund much needed infrastructure through CIL. The greater the cost of mitigation, the greater reduction in CIL rate needed. This would mean less CIL funding available to fund infrastructure required to support new development including roads, schools, green spaces and community facilities depending on the cost of the mitigation.

### **Alternative mitigation solutions**

- 3.28. Third parties are also progressing potential mitigation plans which means there is a competitive market for mitigation. An artificial and inflated land market is already beginning to appear. This is because the need for mitigation is introducing hope value where before there was none.



- 3.29. The most advanced third-party scheme is being put together by the Hampshire and Isle of Wight Wildlife Trust (HIWWT). It is understood that this would cost circa £2,000 per kilo of nitrogen, equivalent to circa

£1,680 per dwelling<sup>4</sup>. Legal fees would also apply, which could be significant as the mitigation is located in a different local planning authority area.

- 3.30. Natural England has confirmed that they consider that the Trust's mitigation would be acceptable for development draining to Budds Farm<sup>5</sup>, due to that wastewater treatment works being served by a long shore outfall.
- 3.31. It should however be noted that this scheme would not serve Emsworth (which is served by Thornham Wastewater Treatment Works).

### **[REDACTED] nutrient mitigation plan**

- 3.32. As well as assessing the principle of whether mitigation is needed from new development, work has also been progressed on a mitigation plan for this issue as well.
- 3.33. As the competent authority, the Council commissioned Ricardo to confirm that the mitigation [REDACTED] would be suitable under the regulations. Discussions with the consultant have confirmed there is a scientific link between the likely significant effect from the development and the proposed mitigation. Importantly it confirms that this mitigation would be acceptable for development draining to Budds Farm and Thornham Wastewater Treatment Works. This would include any development in Havant Borough or the southern parishes of East Hampshire (which could buy into the scheme if desired).
- 3.34. The Council was awarded Growth Deal funding from the Solent Local Enterprise Partnership (LEP) towards bringing forward the proposed Hayling Island Brent Goose and Wader refuge. The Solent LEP Board met on 22 May 2020 and considered whether this funding could be reallocated to [REDACTED]. The publication of the outcome of that decision by the LEP Board is expected imminently.

[REDACTED] The mitigation plan itself would principally involve [REDACTED]. However, there are additional potential benefits to the scheme which are outlined below. Projections have been established for the costs and fees associated with [REDACTED]

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<sup>4</sup> Based on of 0.84 kilogram of nitrogen load per dwelling draining to Budds Farm.

<sup>5</sup> Persimmon Homes are, at this point, looking to use the Wildlife Trust scheme to mitigate the 'East of Castle Avenue' scheme. This has also led to the Ricardo commission to ensure the scientific link between the East of Castle Avenue development and the proposed mitigation.

- 3.36. The lower cost means that [REDACTED] represents a competitive mitigation scheme when compared to the HIWWT proposal. It would also have a relatively limited impact on the Council's CIL charging rates (see below) thus minimising the impact on funding for infrastructure and the Council's regeneration agenda.
- 3.37. Extensive analysis of the cash flow of the scheme (Appendix B) shows that it would be financially sustainable in order to ensure the financial sustainability to the Council.

#### **Implications for the Regeneration Strategy and Local Plan**

- 3.38. If this issue is not solved it will not be possible to implement either the emerging Havant Borough Local Plan nor the adopted Regeneration Strategy. As such, addressing this issue is key to the delivery of the Corporate Plan and the Council's place-making agenda.
- 3.39. Analysis has been undertaken of the impact on the viability of development schemes. If mitigation costs are too high, this would lead to a need to revisit the emerging CIL Charging Schedule. In extreme cases, it could threaten the deliverability of development, particularly brownfield, regeneration schemes. Less CIL would in turn threaten the ability of the Council to ensure that sufficient infrastructure is in place to support new development.
- 3.40. The proposed mitigation scheme would not threaten the deliverability of development, nor would it necessitate a reduction in CIL. Nonetheless, if the cost of the scheme (aside from annual increases due to inflation) increased, this would begin to threaten viability. If the Cabinet were minded to rely on third party, higher cost, mitigation schemes, this would necessitate a review of the emerging CIL charging schedule.

#### **Additionality from the [REDACTED] mitigation plan**

- 3.41. As well as providing mitigation for nutrient neutrality, [REDACTED] provides the following additional (non-financial) benefits:
- i. Securing a permanent refuge for Solent Waders and Brent Geese, the qualifying species for the Solent Protection Areas (SPAs) – there are a number of development allocations in the Council's emerging Local Plan which will need to provide a replacement habitat in order to appropriately mitigate the impact of development. Developer contributions would therefore be made to improve and secure the suitability of the habitat for this species [REDACTED]
  - ii. Providing replacement habitat for Curlew which currently use land at Campdown, one of the largest allocations in the Council's

emerging Local Plan which has the potential to deliver about 650 new homes<sup>6</sup>.

- iii. The Environment Bill proposals mean that there is likely to be an expectation for all new development to achieve a net gain in biodiversity. For development unable to make the necessary improvements on site, development contributions would be made to facilitate off-site improvements. [REDACTED] is well-placed to accommodate these.
- iv. The potential to create future wetland schemes on the estate and additional enhanced mitigation options. This would need to be the subject of feasibility and analysis.

### **Proposed way forward**

- 3.42. The Position Statement on Nutrient Neutral Development would be amended to make reference to the [REDACTED] mitigation scheme, given that at least one mitigation scheme is likely to be available to use in a short period of time. Updates would also be required to the Developer Contributions Guide (which is updated regularly as necessary by officers). This would unlock significant development, which is currently stalled, and address the other issues which the Dutch Case has presented.
- 3.43. The need for a mitigation scheme has also fed into the proposed changes to the Local Plan. [REDACTED] is proposed as well as a policy regarding water quality.
- 3.44. Whilst the mitigation scheme [REDACTED] would enable the Council as competent authority to lawfully grant planning permissions again, it should be noted that it would be several weeks after a scheme 'launches' that the first planning permission could be granted. This is due to the need to undertake a project level Habitats Regulations Assessment on each application and consult on it with Natural England. It would also be necessary to prepare a Unilateral Undertaking or legal agreement on each application. If the [REDACTED] mitigation scheme is progressed, following the Cabinet decision, there would be a period of several weeks for legal processes to take place prior to completion of the land transaction. During this time, the administrative elements of the planning permissions would be put in place to save time. It may also be possible for these two processes to take place in parallel.
- 3.45. Changes to internal processes are already being put into place at this point so that this can take place as swiftly as possible. If necessary,

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<sup>6</sup> This is based on a proposed modification to the Pre-Submission Havant Borough Local Plan, which will be considered at future Cabinet and Full Council meetings. The current, though not yet determined, planning application APP/19/01101 for the scheme by Persimmon Homes proposes 780 new homes.



additional resources will be put into the developer contributions team to enable them to accommodate the additional workload on a short-term basis as the backlog is cleared.

### Overall conclusions

- 3.46. Following more than 12 months of protracted, stop/start negotiations, (more recently during unprecedented times), a financially sustainable estates solution for the Council has been identified which can be delivered expeditiously.
- 3.47. There are changes needed to the Position Statement to update it and acknowledge that mitigation would be able to be progressed.
- 3.48. [REDACTED] represents an achievable mitigation scheme which can provide multiple additional non- financial benefits, both ecological and social. It is also possible to ensure that the project will be financially sustainable to the Council.
- 3.49. The proposed estates solution represents 'best consideration' having regard to the heads of terms agreed and the timescales for delivery.

### 4.0 Additional Budgetary Implications

[REDACTED]

|            |            |            |
|------------|------------|------------|
| [REDACTED] | [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] |

[REDACTED]

[REDACTED]

- 4.4. The key consideration in the proposed mitigation scheme is to ensure that there would be no net cost for the council. The scheme is funded from developer contributions which are received in the early years and these

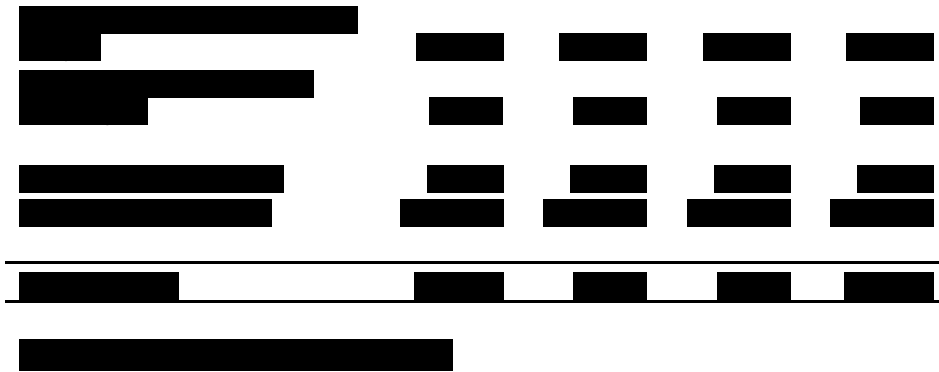
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<sup>7</sup> Produced without the application of fertiliser

funds cover the cost of the land transaction and the future years costs of the scheme. A cash flow model of all the income and expenditure discounted at the treasury rate and adjusted further for risk shows that there is a positive net present value.



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- 4.7. Once enough developer contributions have been received the compensation for the loss of income from the asset would be reinvested in another asset to support the ongoing delivery of public services. Through careful monitoring, if costs were higher then the charge to developers could be reviewed so the risk to the Council is reduced.



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- 4.9. Additional asset management benefits have also been identified which are more specifically set out in Appendix A

**5.0 Background and relationship to the Corporate Strategy and Directorate Business Plan/s**

- 5.1. This issue is directly related to the implementation of the Havant Borough Local Plan and the Regeneration Strategy. Without this issue being addressed, it will not be possible for either of these strategies to be implemented.
- 5.2. Analysis has taken place of the impact of the need to provide nutrient mitigation on development viability. This has concluded that the mitigation scheme proposed would not lead to a need to revisit the proposed CIL charging schedule. A higher rate, or principally relying on third party schemes, would lead to the need to review CIL rates.

## **6.0 Options considered and reasons for the recommendation**

- 6.1. This issue is not of the Council's making, it is as a result of case law. Nonetheless, there are a number of options for responding to that case law.
- 6.2. The advice of Natural England could be ignored, and planning permission granted regardless of the requirements of the Habitats Regulations. This is strongly discouraged. This course of action would lead to a judicial review of planning permissions granted. Ignoring the Council's obligations is not considered a viable option.
- 6.3. The Council could rely on the development industry to provide a mitigation scheme(s). This has been suggested by one housebuilder at this point. However significant flaws were found in the approach ecologically and it is very difficult to avoid 'double counting' on land. Furthermore, invariably housebuilders acquire land to build on so, in the short term at least, the land being used is land that is earmarked for development so the mitigation land would need to be 'moved' at some point. This would not be of any assistance to SME builders.
- 6.4. If the Hampshire and Isle of Wight Wildlife Trust were to administer the scheme which they are progressing, there are three principle issues:
  - i. The scheme would not be available for SME builders, at least initially. These represent a significant amount of the development coming forward, are most affected by this issue and are crucial to the Borough's prosperity. As such, a mitigation scheme is needed which accommodates this kind of development, which inevitably would need to be run by the Council or a partnership of local authorities.
  - ii. National housebuilders could 'block buy' the mitigation from the Wildlife Trust's scheme. Having a situation where one housebuilder has control over all of the mitigation available at any one time is not considered pragmatic as the solution could either be denied to other builders or the price significantly raised,

threatening our ability to provide affordable housing, infrastructure or other planning gain.

- iii. It would give the Trust the ability to 'veto' development which it had objected to by denying the applicant access to the mitigation scheme.

- 6.5 Estates options considered included acquisition of alternative agricultural land within the Borough. Discrete approaches were made to various landowners on a confidential basis via the consultant and opportunities to acquire additional agricultural land were considered to be unachievable within realistic timescales and at reasonable cost.

## **7.0 Resource Implications**

- 7.1. Financial Implications: A cash flow for the mitigation scheme (Appendix B) has been prepared in order to confirm that the scheme would be financially sustainable in terms of value to the Council.
- 7.2. An indication of the outcome of the LEP Board meeting, held on 22 May 2020, which considered allocating Growth Deal funding to this scheme is expected imminently. However the income figures above exclude any LEP funding for prudence.
- 7.3. There is no way to force a housebuilder to use the Council's mitigation scheme and there will be choice available. The only alternative scheme is being run by the Wildlife Trust which will be more expensive than the Council's nutrient mitigation scheme. It will also be more complex with another Local Planning Authority and the Wildlife Trust needing to be signatories to legal agreements.
- 7.4. A change in regulations could affect the need for mitigation. However, the Government has made a commitment not to change the environmental standards emanating from European Union directives (the UK previously committed to, which includes the Habitats Regulations) or a significant Government sponsored scheme. Up to now Government has not suggested anything of that nature. As such, the risk of this is considered low.
- 7.5. Human Resources Implications - there will be additional resources required to administer the mitigation scheme and prepare legal agreements associated with planning permissions. Work is underway to prepare processes for this shift; however, its impact is not envisaged to be significant as legal agreements are already needed for the Solent Recreation Mitigation Strategy and this mitigation scheme would be folded into the same agreement. The costs of administration are included in the mitigation scheme to ensure that it is financially sustainable.
- 7.6. Information Governance Implications – none.

7.7. Other Resource Implication – none envisaged at this point.

## **8.0 Legal Implications**

8.1. The issue has emerged out of The Dutch Case, case law emanating from the European Court of Justice. It impacts on the Council's obligations under The Conservation of Habitats and Species Regulations 2017.

## **9.0 Risks**

- 9.1. The proposed estates solution to [REDACTED] is recommended and represents 'best consideration', however no approach to this major issue is without risk.
- 9.2. The necessary note of caution is that the future for this issue is not certain. Particularly now that the UK has left the EU, the Government can amend the Habitats Regulations if it desires to. Furthermore, Government's approach to this issue could change, for example an end of pipe solution at affected wastewater treatment works could be enacted through Southern Water's Business Planning process. This could remove the need for the mitigation scheme. Lastly, particularly relevant for [REDACTED] is that other mitigation schemes are likely to be put in place. As such, an element of commercial competition is likely to arise.

## **10.0 Consultation**

10.1. Not applicable.

## **11.0 Communication**

11.1. Preparation work has already taken place on marketing material to support the launch of a mitigation strategy and revised position statement. Further engagement on a communications strategy will also be necessary as this represents a potential for positive media coverage.

11.2. Appendices:

Appendix A: Estates Report and recommendations [REDACTED]  
[REDACTED]

Appendix B: Cashflow analysis of the [REDACTED] Nutrient Mitigation Scheme

11.3. Background Papers: Position Statement on Nutrient Neutral Development, agreed at Cabinet on 26 June 2019<sup>8</sup>

Agreed and signed off by:

Monitoring Officer:

S151 Officer:

Director of Regeneration and Place:

Portfolio Holder: 27 May 2020

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<sup>8</sup> Available at

<https://havant.moderngov.co.uk/ieListDocuments.aspx?CId=128&MIId=10857&Ver=4>