

HAVANT BOROUGH COUNCIL

PLANNING POLICY COMMITTEE

30 May 2023

LEGAL AGREEMENT FOR WARNFORD PARK ESTATE NUTRIENT MITIGATION SCHEME

PLANNING POLICY COMMITTEE

Portfolio Holder: Cabinet Lead for Planning, Environment and Water Quality

Key Decision: Yes

Report number: HBC/004/2023]

1. Purpose

- a. This paper is submitted to Planning Policy Committee for consideration and recommendation to Cabinet for decision.
- b. In order to satisfy the Habitat Regulations certain types of development¹ are required to be nutrient neutral in order to have no adverse impact on Solent European sites. The absence of mitigation would be an impediment to housing delivery.
- c. The report recommends that the Council enter into a legal agreement for the Warnford Park Estate nutrient mitigation scheme to ensure a continuing supply of nutrient mitigation. This will enable developers for large scale developments in Havant Borough to access nutrient mitigation from a third party mitigation scheme, reflecting that the Council's strategic mitigation scheme at Warblington Farm is reserved for use by smaller scale developments. The report also seeks delegated authority to enter into further legal agreements with appropriate third party mitigation schemes as they emerge onto the market.

¹ New housing schemes and other proposals which include a net gain in overnight accommodation or development which has a high volume of water use.

2. Recommendation

- a.** Members are requested to recommend to Cabinet to enter into nutrient neutrality mitigation agreements and delegate authority:
 - i.** To the Executive Head of Place² in consultation with the Monitoring Officer and Section 151 officer to enter into a legal agreement with the South Downs National Park Authority and the mitigation land owner at Warnford Park, Warnford, Hampshire;
 - ii.** To the Executive Head of Place, in consultation with the Cabinet Lead for Local Plan, Environment and Water Quality³, the Monitoring Officer and Section 151 officer to enter into other legal agreements for third party nutrient neutrality mitigation schemes.

3. Executive Summary

- a.** Development within Havant Borough which provides overnight accommodation must be nutrient neutral in order for it to be lawfully granted planning permission. This must be shown through a Habitats Regulation Assessment (HRA). It is required to secure mitigation for nutrient neutrality if it is to be concluded through the HRA process that the development will not have an adverse effect on the integrity of on Solent European sites.
- b.** Some development will be able to use on-site measures in order to achieve nutrient neutrality or reduce the scale of off-site mitigation required to achieve nutrient neutrality. However, for the vast majority of developments in Havant Borough, particularly brownfield development and regeneration schemes, on-site mitigation is not possible.
- c.** Havant Borough Council launched its own mitigation scheme for nutrient neutrality at Warblington Farm. However, this site has limited capacity to mitigate development with around 250kg/N remaining

² Or successors in similar or equivalent role

³ Or successors in similar or equivalent role

available as of April 2023. Following a Full Council decision on 18 November 2022, only developments which propose 15 dwellings or less (net) or are regeneration schemes are able to access Warblington Farm. As a result, larger development schemes in Havant Borough are required to secure mitigation from third party providers.

- d. Currently for development draining to Budds Farm Wastewater Treatment Works (WWtW), there are three mitigation schemes available, notably that of the Warnford Park Estate. This report seeks approval from Cabinet for the Executive Head of Place to enter into a legal agreement with Mr Sellick (the mitigation land owner) and the South Downs National Park Authority (SDNPA) to enable development in Havant Borough to secure nutrient neutrality mitigation using the scheme.
- e. The two other identified mitigation schemes (Whitewool and Hampshire & Isle of Wight Wildlife Trust) are close to being fully or completely reserved.
- f. However, there are other nutrient mitigation schemes which are emerging which are expected to launch later this year. As such, this report also asks for delegated authority for the Council to enter into further similar legal agreements.

4. Additional Budgetary Implications

- a. None.

5. Background and relationship to Corporate Strategy and supporting strategies and policies

- a. Following the Court of Justice of the European Union judgements, Natural England advised that in order to comply with the Habitat Regulations, all new residential development resulting in a net gain of overnight accommodation should be nutrient neutral. This has profound implications for the Council in terms of the ability to grant planning permission for new development which provides overnight

accommodation. This is principally residential development but also applies to care homes, hotels and water intensive commercial development.

- b.** The origins and implications of the issue are well known and not repeated here. However, the Council has undertaken a number of workstreams to date to ensure that nutrient mitigation is available to development in order to ensure planning permissions can be granted and will not be stalled in the future.
- c.** The Council launched its own mitigation scheme at Warblington Farm in August 2020 alongside the current Position Statement and Mitigation Plan for Nutrient Neutral development. The Council was able to secure the first phase of Warblington Farm (25 hectares) to do this following authorisation from the Cabinet on 3 June 2020.
- d.** Since the scheme's launch it has been a success. Two thirds of the mitigation available from the phase one scheme has been used by development. On 18 November 2022 Full Council took the decision to restrict the eligibility of developments able to use the scheme to 15 dwellings or less at recognising the finite capacity of the scheme. This means larger developments are expected to secure their own third party mitigation from one of the strategic mitigation schemes.
- e.** This Council has worked with Partnership for South Hampshire (PfSH) to identify strategic mitigation schemes for nutrient neutrality, which are brought forward by third parties. This has led to a list of strategic mitigation schemes available from the PfSH website⁴ which have been developed and approved for use by Natural England.
- f.** The latest PfSH nutrient neutrality update in April 2023⁵ found there is a currently a large availability of strategic mitigation for the East Hampshire catchment, but with anticipated growth the currently available supply is currently expected to be exhausted mid-way through the 2024/25 financial year. This reflects the availability from third party providers as set out below.

⁴ [Potential Nutrient Mitigation Schemes - Partnership for South Hampshire \(push.gov.uk\)](https://www.push.gov.uk/potential-nutrient-mitigation-schemes-partnership-for-south-hampshire)

⁵ [Public Pack\)Agenda Document for Partnership for South Hampshire \(PfSH\) Joint Committee, 04/04/2023 18:00 \(push.gov.uk\)](https://www.push.gov.uk/public-pack-agenda-document-for-partnership-for-south-hampshire-pfsh-joint-committee-04/04/2023-18:00)

- g.** Warnford Park Estate is one of three mitigation schemes identified as being suitable to mitigate development draining to Budds Farm Wastewater Treatment Works (WWtW), alongside the Whitewool Stream Wetland, and the Hampshire & Isle of Wight Wildlife Trust (HIWWT) schemes. Authorisation to enter into the latter schemes is not sought at this time given that the Whitewool mitigation scheme is fully reserved, and the HIWWT Nunwell scheme is close to being fully reserved.
- h.** The Warnford Park scheme will be suitable to mitigate development draining to Budds Farm WwTW, which serves most of Havant borough with the exception of Emsworth which drains to Thornham WWtW.
- i.** In addition, there are two emerging mitigation schemes which will be suitable to mitigate development in the East Hampshire catchment which both have been granted planning permission and are anticipated to be delivered in the 2023/24 financial year.

Position Statement and Mitigation Plan for Nutrient Neutral Development

- j.** Following Full Council on 18 November 2022, the Council's Position Statement was updated to set out the full suite of options available for developments to use as nutrient mitigation in Havant Borough. This makes clear that applicants for larger new developments are now expected to use one of the third party mitigation schemes endorsed by PfSH. This reflects the change in eligibility for development to use Warblington – as planning applications of more than 15 dwellings (net) will need to use third party nutrient mitigation.
- k.** With the other strategic mitigation schemes now becoming subscribed, there will be an increasing reliance on the Warnford Park Estate scheme moving forwards. The Council does not yet have any legal agreements in place with third party providers of nutrient mitigation having largely relied on Warblington and on-site mitigation since the issue emerged. Development elsewhere in the sub-region

has, however, largely relied on a market of third party mitigation schemes⁶.

- i.** Often the strategic mitigation schemes are located outside of the administrative area where development is taking place, and there is a need to ensure that mitigation sites can be appropriately managed and monitored via legal agreement to ensure that the nutrient mitigation is properly secured.
- m.** Neighbouring authorities have entered into legal agreements with landowners who are willing to make their land available for nutrient mitigation and who have received approval from Natural England. These legal agreements enable applicants to bring forward development using nutrient mitigation sites that is located outside of the administrative area.
- n.** Any decision to enter into a legal agreement with Mr Sellick and the South Downs National Park Authority to enable land at Warnford Park Estate to be used as nutrient mitigation for new development within the catchment area would be the first of its kind for Havant Borough. Nevertheless, a number of neighbouring authorities already have similar legal agreements in place and developments are successfully accessing the private mitigation sector in this way.
- o.** The completion of the legal agreement with the Warnford Park Estate would ensure a continuing supply of mitigation for development in Havant Borough. This is essential in meeting the Corporate Strategy 2022-2026, and in particular the 'Pride in Place' and 'Growth' themes. The Council must be able to continue to grant planning permission for new homes in the Borough, to avoid any worsening of its five year housing land supply position at 1.81 years. The delivery of housing from large sites in particular will be key to recovering the Borough's housing shortfall – these sites being reliant on strategic mitigation schemes. It is anticipated that entering into legal agreements such as the one proposed will be part of the Council's business as usual approach to nutrient neutrality.

⁶ Eastleigh Borough Council has their own nutrient mitigation scheme similar to Warblington Farm

The Warnford Park Estate nutrient mitigation scheme

- p.** The land at Warnford Park is close to the upper reaches of the River Meon located within the administrative area of the SDNPA. A plan showing the mitigation land is attached at Appendix A to this report.
- q.** Warnford Park has historically been in use for a mixture of dairy and arable farming. The scheme involves taking the land out of agricultural use, similar to the Council's mitigation scheme. The scheme will be monitored by the SDNPA over 125 years who will be paid for doing so by the mitigation land owner. There is an upfront payment due to SDNPA of £46,960 and a tariff of £250 for each credit or kg/N (which is subject to a cap), all payable by the mitigation land owner.
- r.** Natural England has confirmed that the Warnford Park Nutrient Mitigation Scheme is suitable to mitigate development in Havant Borough draining to Budds Farm (see Appendix C). In addition, the Council has obtained evidence from the mitigation land owner to verify the nutrient budget for the mitigation scheme. This confirms the land has been used for agricultural use for over 10 years in accordance with Natural England's guidance.
- s.** As of April 2023, the first phase of mitigation has a capacity of 3,000 credits, equivalent to 3,000 kgN. This means the scheme is inherently more suitable for larger scale development schemes.
- t.** The mitigation is available for use by development in other local authority areas. However, the scheme links each development to a specific parcel of land within the mitigation scheme which becomes linked to the development once the mitigation is purchased. The scheme can therefore be easily monitored to identify which developments are secured by which parcel of mitigation land.
- u.** The legal agreement prevents mitigation from being double-counted for more than one development, including for developments in other local authority areas.

Appropriate Assessment

- v.** The agreement is neither a 'plan' nor 'project' under regulation 63 of the Habitats Regulations, and therefore there is no requirement to

consider the effect of the agreement on protected sites. A plan or project would ordinarily either involve some form of physical intervention or have an effect on land, whereas this agreement on its own will only have an effect on land in the event that development in Havant Borough is granted planning permission, which itself will require its own appropriate assessment.

- w.** However, even if the agreement were to be considered to be a plan or project, such that regulation 63 applies, officers are nevertheless of the view that the agreement would not have a likely significant effect on the protected sites, meaning that it could be 'screened out'. This is for three reasons: firstly, whilst there is no specific definition of the term 'significant' in the Habitats Regulations, it can be interpreted in the context of the protective objectives of the Habitats Regulations as meaning a negative or adverse effect. Once the agreement takes effect, the result will be to remove land at Warnford Park from intensive agricultural use and secure the cessation of large inputs of fertiliser and, as a consequence, reduce the amount of nutrients entering into The Solent, thereby reducing the risk of eutrophication and preventing the deterioration of the protected sites. This will be a positive effect in light of the sites' conservation objectives.
- x.** Secondly, even if it were to be considered that (as the mirror opposite to development having a likely significant effect), the equivalent reduction may equally have a likely significant effect, there is no effect on the land as a result of the agreement unless a notice is served. When that notice is served, it is in combination with another development in Havant Borough (which would be subject to its own assessment). Therefore, on its own, it has no effect since the land remains unaffected by the agreement unless 'credits' are purchased, and the covenants crystallise.
- y.** Finally, in an assessment in combination with other development, the effect of the agreement, when a notice is served, is the decrease in

nitrate from the site, resulting in no net change to the area when considered with the specific linked development or any proposed development in Havant. It won't give rise to a negative effect let alone a significant one.

- z.** Officers are of the view that the agreement is not caught by regulation 63 of the Habitats Regulations (since it is not a 'plan or project') but even if were, the agreement would not have a likely significant effect and can be screened out as set out above. Therefore, no appropriate assessment is required.

6. Options considered

Do Nothing Option

- a.** If the Council decided not to enter into legal agreement(s) with third party mitigation providers, developers would still be able to access the mitigation scheme, but the Council would not have any power to directly secure and enforce the mitigation obligations. This would mean that the Council would be reliant on the local planning authority where the mitigation scheme is located to secure the effectiveness and efficacy of the mitigation.
- b.** The ability to have certainty about the effectiveness of mitigation is significant in the context of assessing whether planning applications would have an effect on protected sites under the Habitat Regulations, which require the Council to approve only plans or projects (such as planning applications or a local plan) if significant effects on any European designated nature conservation site can be mitigated.
- c.** The absence of any overarching legal agreement(s) could also lead to uncertainty about the suitability and availability of third party mitigation for large scale developments, and potentially frustrate their ability in terms of being able to purchase and secure third party mitigation.

Option to enter into legal agreements with third party mitigation providers

- d.** This is the most precautionary of way of securing nutrient mitigation with a third party provider under the Habitat Regulations. Entering into a legal agreement provides the ability to directly enforce the covenants given by the mitigation landowner (cessation of the use of the land for agricultural purposes). It secures monitoring obligations on the local planning authority where the mitigation land is located and funding for such monitoring.
- e.** In the case of Warnford Park scheme, the mitigation is to be kept in place for the lifetime of the developments to which it relates. It will be monitored over 125 years by the South Downs National Park Authority who will be paid for doing so by the mitigation landowner.

7. Resource implications

a. Financial implications

- i.** In terms of the legal cost associated with entering into the legal agreement, the solicitor for the mitigation land owner has provided the Council's solicitor with a costs undertaking. The Council's costs for undertaking the legal work will be fully reimbursed by the mitigation land owner.
- ii.** The cost of mitigation itself will be paid by the applicant/developer to Warnford Park Estate. The Council will not be involved in these financial transactions. It is anticipated that the Council's costs associated with entering into the legal agreement will be paid by the land owner of Warnford Park Estate.
- iii.** The cost of mitigation will be paid by the applicant/developer to Warnford Park Estate. The Council will not be involved in these financial transactions.

- iv. Monitoring will be undertaken by the SDNPA paid for by Mr Sellick.

Section 151 Officer comments

The proposal has no budget implications for Havant Borough Council. The majority of the financial risks remain with land owner/s or the developer/s and Havant Borough Council's financial risks are limited to collection of any legal fees reimbursement.

Therefore, this recommendation has my approval.

Steven Pink

Chief Finance Officer & Section 151 Officer

b. Human resources implications

- i. None.

c. Information governance implications

- i. None.

d. Climate and environment implications

- i. None.

e. Other resources implications

- i. None.

8. Legal implications

a. Do nothing – in this scenario developers could still access the scheme to mitigate development in Havant Borough but it would not provide the same degree of certainty about the mitigation, or give the Council the ability to be confident about the efficacy of the mitigation. This could be key in any judicial challenge to a planning permission relying on a third party mitigation scheme.

b. Entering into legal agreement(s) option - this is the most precautionary of way of securing nutrient mitigation with a third party provider and provides the ability to directly enforce the covenants given by the mitigation landowner (cessation of the use of the land for agricultural purposes). It secures monitoring obligations on the

local planning authority where the mitigation is located, and funding for such monitoring. In the case of the Warnford Park scheme, the mitigation is to be kept in place for the lifetime of the developments to which it relates. It will be monitored over 125 years by the South Downs National Park Authority who will be paid for doing so by the mitigation landowner.

Monitoring Officer comments

The Council has a duty as local planning authority and competent authority under the Habitat Regulations to ensure that there is no adverse effect on the integrity of protected sites as a consequence of new development.

The Council is empowered to enter into planning and other agreements to facilitate mitigation measures under section 106 of the Town and Country Planning Act 1990, section 33 of the Local Government (Miscellaneous Provisions) Act 1986, section 111 of the Local Government Act 1972 and section 1 of the Localism Act 2011.

Jo McIntosh

Chief Legal Officer & Monitoring Officer

9. Risks and mitigations

- a.** The proposal to enter into a legal agreement for the Warnford Park Estate and other approved third party nutrient mitigation schemes is recommended, however no approach to this major issue is without risk.
- b.** The strategic mitigation schemes provided by third parties are in commercial competition with the Council's mitigation scheme at Warblington Farm. However, this risk is mitigated by only development in Havant borough being able to use Warblington, and the fact that the scheme is reserved for small scale development schemes (15 dwellings or less).

- c. It should also be noted 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 these types of mitigation scheme.
- d. However, given the experience to date with this issue, this risk is considered low. The Environment Act 2021 and other developments in national policy signal an increased focus by the UK Government on ensuring gains in biodiversity and an increased focus on protection for the country's environment.

10. Consultation

- a. No public consultation is proposed on entering into the legal agreement. This is not required under the regulations pertaining to Local Plan preparation⁷ nor under the Council's Statement of Community Involvement⁸.

11. Communications

- a. A great deal of communication material has been provided to support this topic and the Council's approach. This includes the Position Statement and Mitigation Plan for Nutrient Neutral Development⁹ which sets out the Council's approach towards securing off-site mitigation to ensure that mitigation is in place prior to the commencement of development.
- b. It is considered appropriate for the Council to update the nutrient webpage explaining which mitigation schemes are available for larger scale developments to use in Havant borough.

⁷ The Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended), available at <http://www.legislation.gov.uk/uksi/2012/767/contents/made>.

⁸ <https://www.havant.gov.uk/statement-of-community-involvement>

⁹ [Nutrient neutrality - what developers need to know | Havant Borough Council](#)

12. Appendices

- a. Appendix A: Location Plan showing the nutrient mitigation at Warnford Park Estate
- b. Appendix B: Letter from Natural England to Havant Borough Council re. Warnford Estate Nutrient Mitigation Scheme dated 5 May 2023
- c. Appendix C: Mitigation Schemes in the Solent

13. Background papers

- a. Update to the Position Statement and Mitigation Plan on Nutrient Neutral Development – considered by the Planning Policy Committee on 27 October 2022 and approved by Full Council on 16 November 2022¹⁰

Agreed and signed off by:

Portfolio Holder: Elizabeth Lloyd 09/05/2023

Executive Head: Alex Robinson 10/05/2023

Monitoring Officer: Jo McIntosh 17/05/2023

Section 151 Officer: Steven Pink 28/04/2023

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¹⁰ <https://havant.moderngov.co.uk/ieListDocuments.aspx?CId=531&MId=12726&Ver=4>