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HAVANT BOROUGH COUNCIL

CABINET

26th JUNE 2019

POSITION STATEMENT ON NUTRIENT NEUTRAL DEVELOPMENT

DAVID HAYWARD (PLANNING POLICY MANAGER)

FOR DECISION

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

Key Decision: Yes

1.0 Purpose of Report

- 1.1 To set out the change in approach regarding the Habitats Regulations Assessment of planning applications due to recent case law, the local impact this is having and the proposed approach towards mitigation.

2.0 Recommendations

- 2.1 That the Cabinet:

- a) Notes the Council's responsibilities under the Habitats Regulations¹, particularly in light of recent case law;
- b) Continue to make representations through the Council Leader to the Government's Ministry of Housing, Communities and Local Government (MHCLG) together with the Department for the Environment, Food and Rural Affairs (DEFRA), relevant Government agencies (including Natural England) and other bodies to provide an efficient, central solution to the need to ensure nutrient neutral development takes place;
- c) Continue to work collaboratively with neighbouring authorities, including through the Partnership for Urban South Hampshire (PUSH), relevant Government agencies (including Natural England) and other relevant bodies to ensure nutrient neutral development takes place;
- d) Approves the Position statement on nutrient Neutral development (Appendix 1);

¹ 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.

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- e) Delegates authority to the Planning Policy Manager², in consultation with the Cabinet Lead for Planning, Regeneration and Communities², 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;
- f) Delegates authority to the Planning Policy Manager², in consultation with the Cabinet Lead for Planning, Regeneration and Communities², to make any necessary amendments to the Position Statement on Nutrient Neutral Development and Nutrient Neutrality Implementation Plan prior to or after publication. These shall include any necessary factual updates, corrections of minor errors, typographical errors. These shall also include any necessary changes to reflect emerging best practice, standing advice, policy or case law.

3.0 Summary

- 3.1 The Council has a significant development and regeneration agenda. This has been already subject to debate and approval through 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 seriously its responsibility to provide for sustainable development in Havant Borough. 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 The Council is committed through the Havant Borough Local Plan 2036 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. 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

- 3.4 The Conservation of Habitats and Species Regulations (2017 as amended) are the UK's transposition of European Union Directive 92/43/EEC on the 'Conservation of natural habitats and of wild fauna and flora' (the Habitats Directive).
- 3.5 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. This could include many potential impacts, including the deposition of nitrogen into the marine environment through waste water from new development.
- 3.6 It is also important to note that this is a legal requirement as opposed to a material planning consideration. 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 disregard its obligations or not fulfil under the Habitats

² Or successor in similar or equivalent role

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Regulations or did not discharge them correctly, there would be a risk of judicial review of the decision made.

Recent case law

- 3.7 The European Court of Justice recently determined a case related to considering water quality in Appropriate Assessments³.
- 3.8 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.
- 3.9 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.
- 3.10 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, ie for it to be 'nutrient neutral'.

The impact of the case law at the local level

- 3.11 The impact of the case law is that any development which could result in a decrease in water quality would cause a likely significant effect on the Solent's European sites.
- 3.12 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 increase population such as hotels and care homes.
- 3.13 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.
- 3.14 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 solution. This threatens the ability to provide development in the most sustainable places, including the sites identified in the Council's Regeneration Strategy.
- 3.15 Up until this point, there has not been a solution. As such, the Council has been able to permit only a very small number of new residential dwellings in exceptional circumstances since 1st April.
- 3.16 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

³ 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>

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area and what solutions can be put in place⁴. Further engagement and collaboration is needed, particularly through the Partnership for Urban South Hampshire.

- 3.17 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 year⁵. The Council's ability to meaningfully contribute to this target, indeed the ability for the Solent area as a whole to do so, would be extremely limited.
- 3.18 If left unresolved, the issue would have far reaching economic consequences. A large number of small building 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.
- 3.19 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 position where it is impossible to grant most residential planning applications will threaten that reputation.
- 3.20 The Council is also assessed on various measures related to its development management performance. The fact that planning permissions for residential development could generally not be granted will, if left unresolved, 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 or be able to meet the requirements of the Housing Delivery Test.
- 3.21 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 housing⁶, waiting between 10 months and 5.5 years for a suitable property to become available through Hampshire Home Choice⁷. 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.

Proposed approach to mitigation

- 3.22 An initial nitrogen budget for the Havant Borough Local Plan 2036 has been prepared. This concludes that the impact arising from all development planned within the Borough to 2036 can be quantified as 2,924 kg/nitrogen/year.
- 3.23 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

⁴ See report to Portsmouth City Council's Cabinet on 11th June 2019 at <https://democracy.portsmouth.gov.uk/ieListDocuments.aspx?CId=126&MId=4256>.

⁵ See Autumn 2017 budget at www.gov.uk/government/publications/autumn-budget-2017-documents

⁶ As at 7 June 2019.

⁷ Average taken for the period 1 April 2018 to 31 March 2019

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standard for nitrogen emissions. Government could also provide ‘mitigation banking’ whilst a centrally considered review of the most appropriate mitigation takes place.

- 3.24 As such, the Leader of the Council and the Chief Executive wrote to Government on 28th May to request intervention to address the current issue strategically. A copy of the letter 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.
- 3.25 Nonetheless, in the short term at least, it is necessary for a pragmatic solution to be found which ensures that the Council can meet its obligations in terms of both housebuilding and the environment.
- 3.26 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 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
- 3.27 These will need to be enacted in several ways and require discussions with third parties. However nitrogen budgeting for the Havant Borough Local Plan 2036 has shown that it is possible to mitigate the plan through several combinations of mitigation measures, thus providing certainty that an appropriate solution can be found.
- 3.28 A position statement is proposed that acknowledges the Council’s responsibilities and the need for mitigation, the kinds of mitigation that are needed and the approach towards securing this through Grampian Conditions⁸ on planning permissions. The proposed Position Statement can be found at Appendix A.
- 3.29 However an implementation plan will also be necessary in order to clarify precisely what package of mitigation measures will be enacted in the short term. This will also need to calculate the resultant cost for development schemes of providing the mitigation and ensuring that it is suitably maintained for at least 80 years⁹.

Engagement with Natural England

- 3.30 Natural England’s role in this matter (as set out in The Habitats Regulations) is to provide advice to the Council in its role as competent authority. In this matter, Natural England are not a decision making body.
- 3.31 The Council already engages extensively with Natural England on matters related to the Habitats Regulations. This takes place through the Bird Aware Partnership but also through constant informal engagement. Constant discussion with Natural England has

⁸ Grampian conditions prohibit development authorised by the planning permission or other aspects linked to the planning permission (in this case it will be the occupation of new homes) until a specified action has taken place (in this case it will be the agreement of a mitigation strategy in line with the proposed Implementation Plan and the provision to the Local Planning Authority of the mitigation package).

⁹ Under the Regulations, it is necessary for mitigation to be provided in perpetuity, acknowledged as being at least 80 years.

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taken place recently regarding nutrient neutral development following the recent case law.

- 3.32 The Council benefits from a successful working relationship with Natural England, which has helped in bringing forward this Position Statement for consideration swiftly and making sure that its content is robust and reflects the most up-to-date position.
- 3.33 Moving forwards, it is proposed to continue to engage with Natural England. The Council is not obligated to take on board any advice provided by Natural England. However it is prudent to engage with the Government's statutory advisor on nature conservation regarding this matter, to move forward collaboratively with Natural England and consider any advice received.

Minimising the risks associated with the proposed approach and additional budgetary implications

- 3.34 Doing nothing brings with it significant risks, as set out above. Nonetheless the proposed Position Statement is not without a degree of risk to the Council.
- 3.35 It is an approach that is considered an interim solution to addressing the issue. Such approaches are considered a pragmatic solution to addressing the need for Habitats Regulations mitigation when the issue arises. Indeed such an approach was enacted to address recreational disturbance at the Solent with an interim strategy used from 2014 until the definitive Solent Recreation Mitigation Strategy was approved in 2018.
- 3.36 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 evolve moving forwards. As such, it is necessary to maintain a flexible approach and so a recommendation has been included to allow the Position Statement to be updated should there be a change in case law, policy, best practice or standing advice.
- 3.37 The mitigation measures that will be necessary are known but not yet in place. As such, the final costs for developments are not yet known. The Council should look to ensure that costs that are passed to housebuilders are cost-effective and do not hamper the ability for, particularly small scale brownfield sites, to come forward.
- 3.38 As a result, there are no additional budgetary implications at this point. However it may be necessary to explore mitigation banking. This would involve the Council implementing mitigation schemes but not passing all of the costs associated with that on to housebuilders. This may particularly be necessary for mitigation to be provided from first occupation of homes permitted shortly after the Position Statement comes into effect. However this would only be implemented as a final resort and, if it were to be, Government funding would be sought to cover any associated costs.

Moving towards a definitive mitigation strategy

- 3.39 The proposed Position Statement would enable the Council to return to granting planning permission to proposals for sustainable development.

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- 3.40 The Council has been engaged in discussions with surrounding authorities through the Partnership for Urban South Hampshire (PUSH) on this issue. An Integrated Water Management Strategy was approved in 2018 which assessed the capacity of wastewater treatment works serving the PUSH area. Following that, a Water Quality Working Group was set up to look in more detail at the issue of nutrient neutrality and discussion has taken place at the PUSH Joint Committee.
- 3.41 It is necessary for a comprehensive and definitive mitigation strategy to be agreed which will enable nutrient neutral development to take place into the future. This would ideally be facilitated by Government. However failing that, a PUSH strategy addressing the issue should be prepared in collaboration with Natural England. This would seek to mitigate in full the new PUSH Spatial Position Statement¹⁰.

4.0 Conclusions

- 4.1 The issue addressed through this report has arisen due to recent case law. It is proposed that the Council to adopt a flexible and responsive approach in order to fulfil its obligations regarding development, regeneration and the natural environment.
- 4.2 It is proposed that the recommended approach achieves these aims. Moving forward, a more comprehensive approach will be needed, ideally through Government or on a PUSH wide basis.

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.
- 5.2 Moving forward, the matter will continue to require extensive staff resources to address as the Council puts together the proposed Implementation Plan and puts 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 of¹¹. This has been done in the past for work required as a result of the Habitats Regulations.
- 5.4 **Legal:** please see main body of the report.
- 5.5 **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.
- 5.6 **Risks:** please see main body of the report.

¹⁰ A review of the PUSH Spatial Position Statement was agreed by the Joint Committee on 4 December 2018 - www.push.gov.uk/wp-content/uploads/2018/12/SWI-181204-PUSH-JC-Minutes-NEW.pdf.

¹¹ 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.

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- 5.7 **Communications:** please see the main body of the report.
- 5.8 **For the Community:** please see the main body of the report.
- 5.9 **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.

5.7 An Integrated Impact Assessment has been prepared.

Appendix A: Position statement on nutrient neutral development

Appendix B: Letter from the Leader and Chief Executive to ministers regarding nutrient neutrality and the impact on housebuilding in Havant Borough and across South Hampshire

Background Papers: Counsel advice has been sought regarding this matter and is available to Cabinet members on request.

Agreed and signed off by:

For Head of Legal Services: Sara Bryan - 11 June 2019

For Head of Finance: Andrew Clarke - 17 June 2019

Director of Regeneration and Place Making: Simon Jenkins - 11 June 2019

Cabinet Lead for Planning, Regeneration and Communities: Cllr Tim Pike - 10 June 2019

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