

By Email to:

Robert Jenrick MP

(Secretary of State for Housing, Communities and Local Government)

Theresa Villiers MP

(Secretary of State for the Department of Environment, Food and Rural Affairs)

Enquires to: David Hayward

Email: david.hayward@havant.gov.uk

Date: 14 Jan 2020

Dear Robert and Theresa

**RE: Nutrient neutrality and the impact on housebuilding and five year supply**

As you know recent case law, most notably *The Dutch Case* is making it impossible to grant planning permission for all but a handful of planning applications for new housing in Havant Borough and parts of East Hampshire district. This issue extends to our Partnership for South Hampshire colleagues and a number of other areas of the country. Left unchecked will render it impossible for these parts of the country to meaningfully contribute to Government's target of providing 300,000 new homes a year.

This issue is not of our making as Local authorities, but as a result of it we are having to put significant resources and funding into finding a solution to it as swiftly as possible. As such, we are writing with three specific asks of Government at this point.

We are grateful for the attention that ministers and your officers have already shown to this issue. However more action is needed. Thus far, no substantive action has taken place from Government or its agencies to address this important issue – simply discussion and high level commitments. The response to my colleague Cllr Woodward<sup>1</sup>, highlights that Natural England are in the process of providing the necessary information to the Environment Agency to enable it to determine if a review of consents of waste water treatment works is required. This is welcomed, however, it should have taken place prior to Natural England issuing advice regarding the grant of planning permission to new development in the Solent. It is crucial that demonstrable actions are taken by Government immediately as set out below

First and foremost, it should be noted that our ability to contribute to the national drive to boost housebuilding will be significantly affected by this issue. The 2019 NPPF requires a boost to housebuilding at a national and local level to meet housing need. Particularly compared to the 2012 NPPF, it introduces a new requirement to make the most efficient use of land that is possible. This is significantly affected by the implications of *The Dutch Case*. The outcome of this case will be lower density development (due to the need to include mitigation land) and larger houses which do not meet our local needs. Both of these will significantly curtail the development potential of our areas and lead to poorer quality development. Put simply, we would need a reduction in the current

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<sup>1</sup> Letter from Mark Plowright (Ministerial Contact Unit – Defra) to Cllr Seán Woodward dated 14 November 2019.

requirement for housing numbers that the two areas will be able to provide through emerging Local Plans.

### **Clarity on the regulatory process**

It is necessary to clarify first and foremost the legal position that local authorities are in. It has been said on more than one occasion that none of MHCLG, DEFRA or Natural England are preventing Local Planning Authorities from issuing planning permissions. The joint statement issued by Natural England and the Environment Agency reinforces what is already present in the Habitats Regulations, namely (bold is our emphasis) “*While the final decision to consent a proposed plan or project rests with the decision maker (e.g. a local planning authority), **Natural England is a statutory consultee to the Appropriate Assessment and the decision maker must have regard to Natural England’s advice.***”

*The proposed plan or project can only proceed at this stage if (taking account of mitigation as appropriate) **there is no reasonable scientific doubt** that there will be no adverse effects on the integrity of any relevant habitats site(s).”* Our legal interpretation of the applicable regulations is that in a situation where the statutory consultee on Appropriate Assessments has issued advice that a development must be nutrient neutral and there is no information to the contrary, the LPA would not be duly having regard to Natural England’s advice. As such, any planning permission would be unlawful. If MHCLG or DEFRA have a definitive legal view that is different to the analysis above, it should be shared with affected Local Planning Authorities immediately.

Natural England’s current statement, as the Government’s statutory advisor on nature conservation, regarding development in Havant Borough is “*Natural England advises that there is a likely significant effect on the Solent’s European Sites due to the increase in waste water from the new housing as a result of the Havant Borough Local Plan 2036. Natural England also advises that any development proposed through any planning application providing overnight accommodation which would discharge into the Solent would be likely to cause a significant effect as there is uncertainty as to whether the increase in waste water from new housing in the Solent catchment will have an adverse effect on the Solent’s European Sites.*”

The advice that we have been provided by Natural England is clear and unambiguous. This is helpful in that it allows decision making to take place. However public statements in meetings and to the media from MHCLG and Natural England highlighting that those bodies are not preventing LPAs from issuing planning permissions for development affected by this issue are not true. Doing so leads to inaccurate interpretations of the legal position that all stakeholders find themselves in.

As such, statements from officers or ministers of MHCLG, DEFRA or its agencies should acknowledge that those bodies **are** preventing local authorities from granting planning permissions.

### **New burdens funding**

The need to address water quality through the Habitats Regulations is new. It has arisen out of international case law that is not of the Councils’ making. At this point in time, it is taking significant resources to manage this new area of work. This includes planners, property and estates professionals and solicitors. There are also new direct costs coming out of this judgement related to consultancy and legal advice.

Government have a proven track record of supporting local authorities to respond to new areas of work through new burdens funding. This has been provided in the past to support local authorities in undertaking Habitats Regulations Assessments on Local Plans. More recently it has been

provided to support the setting up of brownfield registers and self-build and custom-build registers.

This issue requires a substantial level of support which will be ongoing for the foreseeable future. As such, we would suggest that initial funding of £30,000 to support this work is essential for three years for any local authority within 10km of a European Site. Until now, it has been advised that this was not possible due to the fact that Government budgets have already been set. However it is considered likely that a new budget will be considered by Parliament. It is our strong recommendation that this issue is addressed through that process.

### **Five year housing land supply and the Housing Delivery Test**

Both local authorities take seriously the need to provide for sufficient housing, at a sufficient rate, to meet the local need for development. Both Councils currently have a five-year housing land supply. Both Councils are in the process of considering applications for substantial levels of housing development. There are now substantial numbers of new homes contained within live planning applications where the **only** reason for the application not to have been determined is the need for it to be nutrient neutral.

However, development proposals can at this point be proposed, on nutrient neutral sites which would run counter to other policies which inform housing supply. As an example, Havant Borough Council has determined a planning application for a site which the Environment Agency is exploring for flood storage. This would be as part of a flood alleviation scheme for the settlement of Emsworth and could protect hundreds of homes, businesses and infrastructure. The site itself is not in a flood zone and so is not protected from development. However, it is nutrient neutral.

This situation is materially different from most five-year supply related considerations. It is not that Councils are not playing their part in bringing forward development – both are bringing forward new Local Plans, considering applications for new housing and working up mitigation plans as swiftly as possible. There is no more that local authorities can do to unblock new housing than is already being done.

There is a significant danger that the NPPF requirements regarding five year supply will lead to poor decision making. If this happens, it makes a mockery of the plan led system that both Councils put considerable resources into. MHCLG have advised that the current implications of *The Dutch Case* does not mean that the application of a national policy, such as the need for a five year supply, should change<sup>2</sup>. This is an illogical conclusion to reach given the facts to hand. MHCLG were also not able to respond to Cllr Woodward's proposal in a recent letter that the transitional arrangements for the Housing Delivery Test be extended for Local Planning Authorities affected by *The Dutch Case* due to pre-election restrictions. As that is no longer the case, an expedient response to his original proposal is now sought.

The nature of this issue having emanated from well outside the local authority's area of jurisdiction and control, ie European case law, ensures that specific consideration is needed. We would propose that Local Planning Authorities that are included in advice from Natural England following the *Dutch Case* are not required to follow paragraph 11 d of the NPPF in relation to any development which would require appropriate assessment. For affected Local Authorities, the transitional arrangements for the Housing Delivery Test should also be extended by a further year.

We would appreciate specific answers to the following questions:

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<sup>2</sup> Communication from Michael Bingham (Head of Planning Policy, MHCLG) to David Hayward (Planning Policy Manager, Havant Borough Council) on 14 October 2019 at 1730

- Will MHCLG issue a directive to all affected Government branches and their agencies to desist from stating that they are not preventing local authorities from issuing planning permissions due to *The Dutch Case*? It is clear that the opposite is in fact true.
- Will MHCLG provide new burdens funding to those local authorities dealing with the fallout from *The Dutch Case*?
- Will MHCLG remove the obligation for those local authorities dealing with the fallout from *The Dutch Case* to comply with Policy 11 d) of the NPPF?
- Will MHCLG extend the transitional arrangements for the Housing Delivery Test for a year for those local authorities dealing with the fallout from *The Dutch Case*?

We hope that you give this urgent attention so that this issue can be dealt with pragmatically with a view to housebuilding recommencing and look forward to hearing shortly how Government wishes to address this matter.

Yours faithfully

Cllr Michael Wilson  
**Leader, Havant Borough  
 Council**

Cllr Ken Moon  
**Economic Development  
 and Rural Affairs Portfolio  
 Holder, East Hampshire  
 District Council**

Gill Kneller  
**Chief Executive, Havant  
 Borough Council & East  
 Hampshire District Council**

Copied to:

- Emma Howard Boyd (Chair of the Environment Agency)
- Hannah Hyland (Environment Agency)
- Marian Spain (Interim Chief Executive Natural England)
- Alison Potts (Planning and Conservation Senior Advisor, Natural England)
- Ian McAulay (Chief Executive Officer of Southern Water)
- Chris Nelson (Growth Planning Manager - Southern Water)
- Cllr Seán Woodward (Chair of the Partnership for Urban South Hampshire)
- Mark Plowright (Ministerial Contact Unit – DEFRA)
- Michael Bingham (Head of Policy – MHCLG)
- Alan Mak (MP for Havant)
- Flick Drummond (MP for Meon Valley)
- Nick Tustian (Chief Executive of Eastleigh Borough Council)