

Cross-Local Authority Boundary Arrangements for Securing Nutrient (nitrate and phosphate) Neutral Development

Report of the Planning Portfolio Holder

Recommended:

In order to facilitate cross-local authority boundary arrangements for securing nutrient (nitrate and phosphate) neutral development:

- 1. The Head of Planning and Building be authorised to conclude agreements under s106 of the Town and Country Planning Act 1990 in relation to mitigation land within its administrative area required by other local planning authorities as listed in 2 below.**
- 2. The exercise of monitoring and enforcement functions under s106 of the Town and Country Planning Act 1990 in relation to nutrient mitigation land within the Council's administrative area be delegated to:**
 - (i) Basingstoke and Deane Borough Council;**
 - (ii) BCP (Bournemouth Christchurch Poole) Council;**
 - (iii) Dorset Council;**
 - (iv) East Hampshire District Council;**
 - (v) Eastleigh Borough Council;**
 - (vi) New Forest District Council;**
 - (vii) New Forest National Park Authority;**
 - (viii) South Downs National Park Authority;**
 - (ix) Southampton City Council;**
 - (x) West Berkshire Council;**
 - (xi) Wiltshire Council; and**
 - (xii) Winchester City Council.**

subject to:

- a. the relevant authority having entered into an appropriate s106 (of the Town and Country Planning Act 1990) agreement with the Council in relation to the nutrient mitigation land; and**
 - b. that authority having suitably indemnified the Council in respect of any costs and expenses incurred in consequence of failure properly to discharge monitoring and enforcement functions.**
- 3. The Head of Planning and Building be authorised to conclude agreements under s106 in relation to nutrient mitigation land required by the Council outside its administrative area and to exercise monitoring and enforcement functions under s106 where such functions have been properly delegated to the Council by the relevant local authority.**

4. **The Head of Planning and Building be authorised to conclude agreements under s33 Local Government (Miscellaneous Provisions) Act 1982 and in particular to enter into such agreements in relation to nutrient mitigation land required by the Council outside its administrative area and to exercise monitoring and enforcement functions under s33 in relation to such land.**
5. **The Head of Legal and Democratic Services be authorised to make such amendments to the Constitution as may be necessary in consequence of 1-4 above.**

SUMMARY:

- The Council is considering requests to allow Nutrient Neutrality nitrate and phosphate (NNP) mitigation schemes including those which are part of Credit schemes which require the Council to enter into cross-boundary arrangements with neighbouring local authorities to ensure that the mitigation is agreed, provided and monitored and potentially enforced against for the lifetime of the arrangement.
- If the Council does not alter the Council's Constitution to provide the opportunity for this cross-boundary mitigation to take place it will be impossible to allow these types of NNP mitigation to take place.

1 Introduction

- 1.1 The Council has received a number of requests to consider cross-local authority boundary NNP schemes. The current Scheme of Delegation does not provide Officers with the necessary authority to enter into legal agreements and undertakings to provide and monitor such arrangements. The purpose of this report is to seek authority to amend the constitution accordingly

2 Background

- 2.1 In June 2019 Natural England advised Council that in order to satisfy the Habitats Regulations, all new residential development and overnight accommodation which would fall within the Test, and Itchen catchment areas (together with other catchments discharging into the Solent) would need to ensure that it did not result in additional Nitrate loads reaching the waterbodies covered by the international designations (Special Area of Conservation (SAC) and Special Protection Area (SPA) and Ramsar sites in and around the Solent which have a number of protected habitats and bird species. The excessive amount of Nitrates in the water of the Solent has caused eutrophication which has the effect of creating large mats of green algae forming in the estuary which blocks out light and has a harmful impact on the growth and development of micro-organisms in the water which birds feed on. This has, together with other agricultural practices, contributed towards the degradation of the SACs and SPAs.

- 2.2 Natural England has also advised that the river Avon SAC catchment area, which includes a relatively small area of the Borough around Shipton Bellinger and Cholderton, is degrading in its quality due to the amount of phosphates present in the water which has led to algal blooms which disrupt normal ecosystem function and cause major change in the aquatic community, impacting on the protected habitats and species. More recently, in March 2022 Natural England has similarly advised that the river Itchen SAC is also affected by excessive phosphates. For Test Valley, this affects the area draining to the Chickenhall Waste Water Treatment Works which discharges into the Itchen, and to Valley Park and the Hocombe area of Ampfield.
- 2.3 In January 2021 Council agreed a framework setting out options available for Nutrient Neutrality mitigation. This included providing and securing an in perpetuity bespoke off-site mitigation package for the development which would enable it to achieve Nutrient Neutrality.
- 2.4 The Council's preference is for off-site mitigation to be located within the administrative area of Test Valley. However, there is the ability for the applicant to use a mitigation solution that falls outside of the planning administration boundary of the Test Valley but within the affected catchment(s) of: the Test, Itchen or Bartley water watercourses for nitrates; the Itchen catchment for phosphates; and the river Avon catchment (likely to be limited to the Bourne tributary sub-catchment) for phosphates, respectively. Similarly, developments in other districts could use mitigation within Test Valley, where this is located within the same relevant catchment
- 2.5 In order to ensure that NNP mitigation schemes are robustly, delivered, monitored and where appropriate subject to any necessary enforcement measures, legal agreements are usually entered into with developers and landowners. Where mitigation is cross-boundary the co-operation of neighbouring local authorities is required.
- 2.6 The Council has been approached by a number of developers and other Councils who wish us to engage in cross-local authority boundary NNP schemes either to agree to enforce mitigation schemes in our Borough or to agree to mitigation schemes outside of our Borough which relate to planning applications which require this mitigation in order to be acceptable.
- 2.7 In order to allow the Council to engage in cross-boundary agreements, Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 provides the opportunity for neighbouring Councils to agree to ascribe powers of Enforcement to other Councils who may request such powers in relation to monitoring of NNP mitigation schemes. Under section 101 of the Local Government Act 1972 a Local Authority may arrange for the discharge of any of their functions by another Local Authority.
- 2.8 The Council's Constitution does not currently provide for cross-boundary monitoring and enforcement agreements with neighbouring authorities and it is recommended that authority be granted to allow the possibility of these arrangements being made where appropriate.

3 Corporate Objectives and Priorities

- 3.1 The Council's Corporate Plan (2019 – 23) outlines the strategic challenges the Council is facing which includes encouraging inclusive growth within our towns, meeting local housing need and sustaining vibrant rural communities. The Council is also challenged by the government to maintain an up to date 5 year supply of housing. These objectives will all be significantly harder to achieve if the Council is not able to agree to sufficient NNP mitigation schemes to support housing delivery.
- 3.2 The protection of the environment generally and maintaining a high quality of environmental assets and quality of life are also key priorities. The provision of mitigation to achieve NNP neutrality enables the conservation status of the international designated sites to be protected from the adverse effects of excessive nutrients and phosphates.
- 3.3 Achieving NNP neutral development through the provision of mitigation is in line with the Council's Corporate Plan priorities of both People, in meeting housing need, and of protecting The Local Environment.

4 Consultations/Communications

- 4.1 Stakeholders have not been consulted upon as this report concerns the provision of discretionary legal powers which does not have any binding effect on the Council's position in relation to NNP mitigation.

5 Options

Option 1 (recommended)

- 5.1 To amend the Council's Constitution to allow the Head of Planning and Building the ability to agree cross boundary NNP mitigation schemes and associated Monitoring/Enforcement arrangements with other Local Authorities.

Option 2

To maintain the Council's Constitution in its current form, meaning that such arrangements would not be possible.

6 Option Appraisal

Option 1 (recommended)

- 6.1 Altering the Scheme of Delegation and obtaining Council authority to allow cross-boundary mitigation to take place would not bind the Council to exercise these powers but rather put those powers in place should it be appropriate to exercise them. There may be some expectation from planning applicants and developers that the Council is supportive of cross-boundary mitigation schemes and several neighbouring authorities have adopted a similar approach.

Option 2

- 6.2 Maintaining the status quo may present a limited risk to the Council's 5 year supply of housing as developers may find it harder to secure NN mitigation schemes if cross-boundary schemes are not able to be agreed to by this Council.

7 Risk Management

- 7.1 Any reduction in NNP mitigation opportunities may have a modest impact on the Council's housing delivery targets as the Council needs to ensure precautionary levels of mitigation are provided for all new residential development.
- 7.2 Without the ability to monitor and effectively enforce agreed mitigation which relate to development within TVBC's boundary would make any such schemes ineffective and would also be likely to contrary to the Conservation of Habitats and Species Regulations 2017 (Habitat Regulations) and our role as a competent authority. Decisions to grant planning permission without the means of effective enforcement would also leave the Authority open to challenge in the Courts.

8 Resource Implications

- 8.1 A limited amount of Legal and Planning officer time would be required in proceeding with these reports and re-drafting the relevant parts of the Constitution.
- 8.2 A greater degree of resource would need to be directed towards monitoring S106 agreements together with implementing any enforcement action where that might be necessary. Section 106 agreements relating to NNP usually include the requirement for a payment to the local authority to enable monitoring of the NNP mitigation to take place.

9 Legal Implications

- 9.1 The implications of proceeding in accordance with the recommendation are that the Council would be lawfully able to enter into agreements securing NNP mitigation where either mitigation land lies outside its boundary and/or when land outside the Council's administrative boundary (but within the catchment area of the relevant watercourses) requires mitigation in relation to land within its boundary. Section 101 of the Local Government Act 1972 permits local authorities to arrange for the discharge of their functions by another local authority. Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 permits allows covenants by local authorities in relation to land outside its administrative area. Any decision to utilise these powers must be made by Full Council.
- 9.2 The Council is also required within its role as a competent authority under the Habitats Regulations to ensure its decisions protect international designated sites for wildlife and associated habitats such that they are not unduly harmed by development proposals.

10 Equality Issues

10.1 There are no Equality issues arising from this matter.

11 Conclusion and reasons for recommendation

11.1 That the Head of Planning & Building is authorised to enter into such cross-Local Authority agreements as may be necessary to facilitate the operation of nutrient and phosphate mitigation/offsetting arrangements.

<u>Background Papers (Local Government Act 1972 Section 100D)</u> Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (SPA, SAC and Ramsar sites); Itchen SAC; and Avon SAC March 2022 Natural England			
<u>Confidentiality:</u> It is considered that this report does not contain exempt information within the meaning of Schedule 12A of the Local Government Act 1972, as amended, and can be made public.			
No of Annexes:	None	File Ref:	N/A
(Portfolio: Planning) Councillor P Bundy			
Officer:	Michael Lowe	Ext:	8161
Report to:	Council	Date:	16 November 2022