

Chichester District Council

Planning Committee

21 March 2022

Water resources in Northern Chichester District

1. Contacts

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2. Recommendation

2.1 That the Committee:

- a) note the content of this report,
- b) agree the date of publication of the Natural England Position Statement on 14 September 2021 as the date at which the Position Statement became a material planning consideration, and
- c) Revoke the resolution of the Planning Committee of 2 February 2022 to; Approve the date of publication of the Natural England position statement on 14 September 2021 as the date at which water neutrality is a material consideration, and consequently that its requirements are not applied retrospectively in respect of the determination of relevant planning applications, including applications for the revocation, modification or discontinuance of a permission on water neutrality grounds granted prior to that date.

3. Background

3.1 At its meeting on 2 February 2022, a report explaining what water neutrality is, when the requirements apply, and the impacts of the guidance upon the determination of planning applications within the Chichester Plan Area that falls within the Sussex North Water Supply Zone was presented to the Planning Committee.

3.2 The committee agreed the following recommendations contained within the report:

That the Committee:

- a) note the content of this report, and
- b) approve the date of publication of the Natural England position statement on 14 September 2021 as the date at which water neutrality is a material consideration, and consequently that its requirements are not applied retrospectively in respect of the determination of relevant planning applications, including applications for the revocation, modification or discontinuance of a permission on water neutrality grounds granted prior to that date.

3.3 A pre-action protocol letter has been received from Kirdford Parish Council in respect of the decision made by the Planning Committee setting out an intention to

challenge the decision of the Council's planning committee on 2 February 2022.

The proposed action has been made on the basis that:

- i. The Council purported to adopt a policy when it did not have power to do so, or
- ii. The Council adopted a policy erroneously considering it was not adopting a policy, and
- iii. The Council wrongly fettered its discretion to take into account the issue of water neutrality in relation to applications for the revocation, modification or discontinuance of a planning permission on water neutrality grounds, in cases where the original planning permission was granted prior to that date.

- 3.4 Officers have obtained legal advice from Counsel in respect of the pre-action letter. Counsel has advised "*...it is arguable that part 2 of the Committee resolution amounts to adopting an inflexible policy as to what will and will not be taken into account in relation to issues such as whether to exercise the Council's discretion under s.97 of the Town and Country Planning Act 1990 ("the TCPA 1990").*" Counsel goes on to advise that "*I consider that once the detailed stage of the proceedings is reached, the decision is defensible. I base this view on the position of NE that their advice does not apply to extant permissions and that in substance, it seems to me that the Council's aim is a lawful one i.e. that the Council does not intend to actively seek revocation of permissions recently granted in order to achieve water neutrality. The distinction here is one between a potentially unlawful, inflexible policy position on the one hand, and a perfectly lawful stated intention of practical response to NE's guidance on the other. The distinction is therefore arguably one of form rather than substance as the same outcome is achieved, and this is how we would seek to defend the challenge if the council determined to do so.*"
- 3.5 Whilst it is considered that the decision of the Council was not unlawful and is defensible, Counsel suggest rather than defending the challenge a more proportionate approach to resolve the matter is available. Counsel states that "*in my view there are potentially more proportionate means of achieving the Council's aims of giving certainty to developers that the Council does not propose to respond to the NE advice note by revocation of planning permissions than expending time and money defending the challenge. I consider that it would be entirely achievable for the Council to amend the report to refer to a point of practice that in the district, the Council does not propose to actively pursue revocation of extant permissions as a means of achieving water neutrality. Moreover, NE does not suggest that this is how water neutrality can or should be achieved and NE's note is clear that it applies only prospectively to applications yet to receive full permission.*"
- 3.6 In response to the advice received from Counsel this report seeks to address the concerns raised in the pre-action protocol letter from Kirdford Parish Council. The report explains in brief what water neutrality is, when it applies, the Counsel's advice on the previous recommendation to the planning committee and the proposed way forward.

4. Main Issues

i. What is water neutrality

- 4.1 The Arun Valley is legally protected for its wintering birds, its wetland habitats, a rare snail species, invertebrates and several rare and uncommon aquatic and wetland plants. The protected sites, which have European designations, are:
- The Arun Valley Special Protection Area (SPA),
 - Special Area of Conservation (SAC), and
 - Ramsar sites.
- 4.2 Natural England (NE) has advised that the existing water supply in the Sussex North Water Supply Zone cannot be ruled out as contributing to the declines in wildlife within the Arun Valley protected sites.
- 4.3 In September 2021 NE published a Position Statement requiring water neutrality to be achieved for new developments that would otherwise increase water demand (see Appendix 2). In December 2021 NE published a Frequently Asked Questions (FAQ's) document (see Appendix 3) to address queries raised by local planning authorities and developers.
- 4.4 Water neutrality is defined as: "For every new development, total water use in the region after the development must be equal to or less than the total water-use in the region before the new development." This means for new developments that the total demand for water should be the same within the affected area after new development is built, as it was before.

ii. What type of development is required to demonstrate water neutrality

- 4.5 The requirement to demonstrate water neutrality applies to all new development that could increase water consumption from the public drinking water supply. This would likely include new dwellings, commercial development, and any other development that would likely increase demand on the public water supply.
- 4.6 When a planning application is assessed, the local planning authority is the competent authority under the Conservation of Habitats and Protected Species Regulations 2017 and so is responsible for assessing the likely impacts upon the designated sites in the Arun Valley. This is a two-step process:

a) The local planning authority must establish whether there would be a likely significant effect upon the designated sites through a screening exercise.

If it is found that there would not be a likely significant effect on the designated site in the Arun Valley no further action is required. If it is found that the development would result in a likely significant effect upon a designated site then the second step is necessary;

b) Where a likely significant effect is identified, the local planning authority must undertake an Appropriate Assessment. The Appropriate Assessment will consider the potential impacts and whether the proposed mitigation would adequately mitigate the identified impacts.

- 4.7 The guidance from NE explains that water neutrality is required to mitigate the likely significant effects of new development that would otherwise increase water demand in the Sussex North Supply Zone. The FAQs set out in detail how water neutrality can be achieved.
- iii. When does the requirement for water neutrality apply
- 4.8 The Position Statement was published on 14 September 2021 and was effective immediately. Therefore, the Position Statement applies to applications for development that would materially increase water consumption that were either; under consideration on 14 September 2021; or received on or after 14 September 2021. The most recent advice from NE (February 2022) confirms that the requirements of the habitat regulations cannot be applied retrospectively to projects that already benefit from full planning permission.
- iv. Revocation of Planning Permissions and Compensation
- 4.9 There is a legal process under Section 97 of the Town and Country Planning Act (TCPA) 1990 through which an extant planning permission may be revoked via a Revocation Order if the local planning authority considers it expedient to do so. This power allows the local planning authority to revoke or modify a planning permission prior to the development being completed, although a revocation order cannot apply to any part of the development that has already been built. In the case of a change of use permission, a revocation order may be made at any time before the change of use has occurred. The Act states that the authority shall have regard to the development plan and any other material considerations when considering the question as to whether it would be expedient to revoke or modify a permission that has already been granted.
- 4.10 Where a planning permission is revoked or modified by a local planning authority under S.97 of the TCPA, then if, on an appropriate claim being made, a person with an interest in the land shows that he has incurred expenditure and/or has sustained loss or damage as a result of the revocation order, then the LPA must pay compensation to the claimant (S.107 TCPA). Such payment of compensation would be the depreciation in the value of the land caused by the revocation of the permission and would also include expenditure incurred in the carrying out of works which are rendered abortive by the revocation order and any preparatory work such as the drawing up of plans.
- 4.11 Clearly in the case of planning permissions for housing developments, the depreciation of the value of the land as a result of the revoking of a planning permission would be substantial. In the case of *Health and Safety Executive v Wolverhampton City Council 18/7/2012* the courts held that the amount of compensation for which the authority might be liable for can be taken into account as a material consideration when deciding whether to revoke or modify a permission. In this case the scheme related to a £40m development of 5 student accommodation blocks. It is not possible to calculate the precise amount of compensation that the Council would be liable for should extant permissions be revoked as it would be dependent on a range of variables. Additionally, it would not be possible to reasonably determine the period of time for which extant permissions should be revoked. However, it would in all probability amount to very significant sums of money, likely to be in the order of millions of pounds. Material

considerations taken into account when considering the revocation of a permission for housing would likely include the liability for compensation and the risk to the Council's 5 year supply of housing; the implications of which would be a greater number of speculative housing applications.

- 4.12 Counsel has advised that it is possible to comment within this report that *"should any application for revocation or modification of an extant consent be received, that officers' provisional view is that water neutrality alone is unlikely to justify revocation of an extant permission and it is unlikely that the Council would consider this a sufficient basis to use s.97 to affect an existing consent. Further, that the Council does not propose to use its powers under s.97 as part of its plan to pro-actively meet the aim of reducing water abstraction from the protected sites."*
- 4.13 However, and importantly, notwithstanding the above, Counsel also advised *"For the avoidance of doubt, I do consider that NE's position statement and the general change in position in relation to the need to achieve water neutrality across the supply zone is capable in law of amounting to a material consideration when the Council is considering the use of its powers under s.97. As such, Counsel's advice is "If the Council considered that this change in circumstances made it expedient to revoke extant consents, whilst this may be somewhat at odds with the NE guidance and reasons for departure would need to be given, I do not consider that the Council would be acting unlawfully in having regard to this change in circumstances as part of its consideration of expediency under s.97."*
- 4.14 On the basis of the foregoing, the Council considers that water neutrality may be a material consideration should an application to revoke a planning permission be received. In addition, any decision in response to a request for the revocation of an existing planning permission will be based on an assessment of the individual merits of the case having regard to all material considerations. The proposed recommendation in paragraph 2.1 of this report reflects this position. However, for clarity, the Council does not propose to proactively use revocation powers available under s.97 of the TCPA 1990 to reduce water abstraction affecting protected sites in order to achieve water neutrality within the local plan area.

5. Conclusion

- 5.1 The impact of water abstraction upon the Arun Valley designated sites and the matter of water neutrality emerged as an issue following its identification by Natural England. Water neutrality is therefore a new planning issue which is of very high importance and NE's Position Statement is a material consideration for a wide range of applications within the Sussex North Water Supply Zone, including undetermined applications under consideration on 14 September 2021, and those submitted on or after 14 September 2021. Applications within the Chichester Local Plan area will be determined in accordance with the process set out within this report, NE's Position Statement, and their published guidance.

6.0 Background documents

Map of Sussex North Water Supply Zone:

<https://www.chichester.gov.uk/media/36218/Map-showing-the-part-of-Chichester-District-and-surrounding-area-within-the-Sussex-North-Water-supply->

[zone/doc/Map of the part of Chichester District \(and surrounding area\) within the Sussex North Water supply z.docx](#)

Natural England Position Statement:

([Position statement on Water Neutrality Sept 21 2021.pdf \(chichester.gov.uk\)](#))

Natural England FAQ Document:

(https://www.chichester.gov.uk/media/36521/Arun-Valley-Water-Neutrality-Developer-FAQ/doc/22122021_Arun_Valley_Water_Neutrality_Frequency_Asked_Questions_Developer_FINAL.docx)

Natural England Advice:

https://www.chichester.gov.uk/media/36615/Water-Neutrality-Advice-Note-Feb-2022-V2/pdf/Water_Neutrality_Advice_Note_Feb_2022_V21.pdf

7.0 Appendices:

Appendix 1: Confidential Appendix – Counsel advice from Stephanie Hall of Kings Chambers