Q: Has the Council sought legal advice?

A: Yes, officers have had regular meetings and discussions with the Council's Solicitor. We have also sought advice from Counsel and have specifically asked the following questions and a summary of the answers are provided below, including a note setting out the Council's position:

1) To comply with Regulation 63 of the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations), can an LPA rely upon the habitats regulation assessment (HRA) undertaken for a relevant development plan – particularly in respect of strategic housing allocations?

   A: As the advice letter from Natural England (NE) dated 17th August 2021 was received after the Council's Local Plans were adopted, the HRAs undertaken as part of the development plan process would not have fully assessed the issues raised by NE nor would they include any measures or controls that are sufficiently 'certain' to satisfy the requirements of an appropriate assessment in terms of planning applications made in relation to the sites that have been allocated in the Local Plans.

   It is, therefore, not possible to rely upon the habitats assessment undertaken as part of the respective Local Plan processes as a legally compliant appropriate assessment for the determination of those planning applications.

2) Can the LPA take into account the existence of a legitimate fallback position when undertaking the initial HRA screening and/or appropriate assessment? This would apply to (i) s.73 applications, (ii) applications where there is an extant permission for similar development, and (iii) applications where the discharge from the proposed development will be lower than from a current/lawful use of a site;

   A: The Habitats Regulations deal with the proposal which is at hand, not an alternative proposal which might already have permission but which has not been implemented or is not in operation.

   Therefore, the LPA may not take into account any purported 'fallback' position in terms of s.73 applications or where an extant permission exists for a similar development to that proposed.

   In most cases, this will mean that planning permission cannot be granted until the HRA has concluded that there is no significant effect.

   Notwithstanding this, whilst highly fact specific, an existing on-going use (or an existing lawful use which is likely to be resumed) which is to be replaced by a proposed development could be taken into account in the consideration of whether there is likely to be a significant adverse effect and in terms of an appropriate assessment. However, there a

change of use is from a non-population generating use e.g. offices to residential use, it is unlikely to overcome the need for a HRA.

Mendip District Council have taken the view that if a planning permission has been previously implemented and the development is taking place on site and the amended proposal does not increase the number of dwellings or amend foul drainage details, then a new s.73 permission can be issued as the HRA can conclude that there would be no increase in impact above that already permitted. Therefore, each application will be reviewed individually and assessed on its own merits.

3) Do the assessment requirements apply to approvals of reserved matters where an HRA was carried out on the outline application? What about reserved matters where an HRA was not carried out?

A: Where an HRA was undertaken at outline stage, the LPA is still required to consider, not least in light of NE's advice, whether there has been a material change in circumstances and therefore whether or not a further/updated assessment is required in relation to reserved matters.

Unfortunately, in most cases where an HRA was carried out at outline stage, it is unlikely to have specifically considered the impact of the development on the Somerset Levels and Moors Ramsar site, particularly in relation to phosphates. Therefore, in these cases, an HRA is almost certainly going to be required.

Where no assessment was undertaken at outline stage, the LPA is now required to undertake an HRA at reserved matters stage.

Planning permission cannot be granted until the HRA has concluded that there is no significant effect.

4) Do the assessment requirements also apply to the discharge of conditions on full or outline permissions – if so, is it all conditions or just those affecting phosphate discharge i.e. drainage?

A: As the requirement for assessment continues until such point as the relevant authority has made the 'implementing decision' and given the strong protection given to the environment, in conjunction with the requirement to apply the precautionary principle, the Habitats Regulations continue to apply in principle to applications for discharge of at least negatively worded planning conditions, whether or not they relate specifically to 'phosphates' (and arguably the discharge of all planning conditions).

Mendip District Council have taken the view that 'pre-commencement' conditions relating to affected developments within the catchment area, cannot be discharged until an HRA has been undertaken or is satisfied that one is not necessary.

Therefore if the LPA is unable to satisfy itself that discharging the condition would not adversely affect the integrity of the European site, then the LPA are prohibited by Regulation 63 from agreeing to the discharge.

Applicants and Agents are therefore strongly encouraged to seek pre-application advice before submitting applications to discharge pre-commencement conditions.

5) How should LPAs deal with any applications that were resolved for approval by planning committee prior to the receipt of the NE advice, but have not yet been issued?

A: Where planning applications benefit from a resolution to grant permission, it remains the case that no planning permission has been granted and in consequence the relevant authority has not 'agreed to' the project. Given the material change in circumstances arising from the NE advice letter, such applications will need to be returned to planning committee before a decision can be issued.

Furthermore, before returning the application to planning committee, Officers will need to re-assess the application in light of the NE letter. This may mean that an HRA becomes necessary and, ultimately, may mean that a previous resolution to permit may be changed to a recommendation of refusal.

6) In the absence of an identified solution at the time of the decision, would it be lawful for an LPA to report applications to committee to seek a resolution for delegated authority to grant permission, but 'subject to' a subsequent satisfactory HRA?

A: As the resolution to delegate to permit is not the grant of planning permission, and so is not the relevant authority 'agreeing' to the project, in principle it would be lawful for a planning committee to resolve to grant planning permission subject to a caveat that no permission is issued until it is determined that the proposal will not have an adverse effect upon the integrity of the Ramsar Site.

This will mean that the application would be returned to Officers to await the submission of sufficient information to satisfy the requirement that the proposal will not have an adverse impact upon the integrity of the Ramsar Site. Once a solution has been submitted by the Applicant/Agent, and is found to be acceptable, it may be necessary to

report the planning application back to committee for further consideration and ratification

If a solution is not forthcoming, or an acceptable solution cannot be found, then it is likely that the application will be reported back to committee, potentially with a recommendation of refusal.

This will need to be assessed on a case by case basis, however, unfortunately, the practicality of such an approach is debatable and therefore it is unlikely that the LPA will present an application to planning committee until they are satisfied that the proposal will not have an adverse impact upon the integrity of the Ramsar Site.