

EXECUTIVE - 12 OCTOBER 2017

ADOPTION OF ORDINARY WATERCOURSE BYELAWS

Executive Summary

The Council is intending to use its powers under the Land Drainage Act 1991 to implement local drainage byelaws to help it carry out its duties effectively and in doing so assist in reducing flood risk for local communities.

The making of byelaws is a policy matter reserved to Full Council in the Constitution. This report seeks authorisation to begin the process of byelaw making by carrying out a consultation exercise and taking the necessary steps to seek to introduce borough wide byelaws for ordinary watercourses.

The primary purpose of these byelaws is to ensure efficient drainage within the Council's area. The associated benefits of making the proposed byelaws are outlined in detail throughout this report but can be summarised as follows:

- Managing and reducing flood risk.
- Improving water quality.
- Improving biodiversity.
- Ensuring drainage infrastructure will be maintained and adapted over time.
- Improving the quality of life for people by improving the quality of public spaces and the water environment.

The proposed byelaws relate to ordinary watercourses, these are watercourses which do not come within the category of 'main river'. Main rivers remain the responsibility of the Environment Agency and are subject to separate byelaws.

Reasons for Decision

A decision is sought to allow the process of making land drainage byelaws to begin and to agree to make byelaws in connection with drainage matters to assist the Council in its role to help reduce the risk of flooding for local communities.

Recommendations

The Executive is requested to:

RECOMMEND to Council That

- i) the proposal to make drainage byelaws, as set out in Appendix 1 to the report, be endorsed;**
- ii) the Council consult with Defra, Natural England and the local navigation authority on the Council's proposal to make the drainage byelaws;**
- iii) subject to there being no objections by Defra, Natural England and the local navigation authority to the informal consultation the byelaws be made;**

Adoption of Ordinary Watercourse Byelaws

- iv) the Assistant Director (Place), in consultation with the Portfolio Holder, be authorised to consider and seek to resolve any objection to the said byelaws being made (including amending the proposed byelaws);
- v) the byelaws be submitted to the Secretary of State for confirmation with or without any outstanding objections (as the case may be); and
- vi) in the event these byelaws are adopted by the Council, authority be delegated to the Assistant Director (Place) to authorise or refuse any applications for consents submitted under the said byelaws.

This item will need to be dealt with by way of a recommendation to the Council.

Background Papers:

None.

Sustainability Impact Assessment
Equalities Impact Assessment

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1.0 Introduction

- 1.1 The making of drainage byelaws would help protect communities, especially those who are most vulnerable, from flooding. They will provide scope for the Council to work with local communities to reduce flood risk, and help empower communities to do more for themselves. Flooding can have serious consequences for communities and businesses affected, and can cause serious disruption to transport links.
- 1.2 The primary purpose of these byelaws is to ensure efficient drainage within the Borough. The associated benefits of making the proposed byelaws are outlined in detail throughout this report but can be summarised as follows:
- Managing and reducing flood risk.
 - Improving water quality.
 - Improving biodiversity.
 - Ensuring drainage infrastructure will be maintained and adapted over time.
 - Improving the quality of life for people by improving the quality of public spaces and the water environment.
- 1.3 The proposed byelaws relate to ordinary watercourses, these are watercourses which do not come within the category of ‘main river’. Main rivers remain the responsibility of the Environment Agency and are subject to separate byelaws.
- 1.4 Surrey County Council currently has powers under the Land Drainage Act but these are limited to structures that would impede or interfere with flows. There are no powers to control structures that go over or under watercourses or require a freeboard above banks to allow floating debris to pass unhindered. Nor are there powers to maintain access along watercourse banks for maintenance or to remove debris or to ensure development does not reduce flood storage or affect the flow of water within the surrounding ground. The Environment Agency does have such Byelaws that assist them to manage main rivers and to avoid flood risk.

2.0 Byelaws

- 2.1 Section 66 of the Land Drainage Act 1991, gives local authorities the power to make land drainage byelaws for the purpose of preventing flooding, or remedying or mitigating any damage caused by flooding. These byelaws create criminal offences that can be prosecuted in the Magistrates’ Courts if contravened.
- 2.2 The Act allows local authorities to make byelaws for the following purposes:
- To secure the efficient working of a drainage system in its area.
 - To regulate the effects of a drainage system on the environment.
 - To secure the effectiveness of flood risk management work.
- 2.3 The making of Byelaws is not mandatory but it is seen as a key element at a tactical level to deliver flood risk management and improve understanding and transparency of the Council’s requirements and expectations concerning drainage on new development.
- 2.4 The use of byelaws has been described as follows:

Adoption of Ordinary Watercourse Byelaws

'Byelaws generally require something to be done – or not to be done – in a particular location. They are accompanied by a sanction or penalty for non-observance. If validly made, byelaws have the force of law within the areas to which they apply. Offences against byelaws attract a penalty fine.'

- 2.5 The proposed byelaws for Woking Borough Council are based on the 'Model Land Drainage Byelaws for Local Authorities' produced by the Department for Environment, Food and Rural Affairs (DEFRA).
- 2.6 The use of the model byelaws is not compulsory but will help to ensure that byelaws introduced by a local authority are correctly worded and are within the authority's powers, thus reducing the risk of legal challenge in the future.
- 2.7 The model byelaws explicitly support the themes of Surrey County Council's Local Flood Risk Management Strategy (March 2017), which the Council agreed to in December 2016. They cover matters such as mitigating against disruptions to natural flows in watercourses, obstructions, vegetation control, damage to the bed or bank of a watercourse, access to drainage features for maintenance and other issues that are considered a risk to the water environment. A number of other local authorities have already adopted these across the country for flood management purposes.
- 2.8 There are a number of stages to the process of making the byelaws which are set out below:
 - i. The proposed draft byelaws are forwarded to Defra for comment.
 - ii. Early consultation with Natural England and the local navigational authority takes place to ensure that the proposed byelaw does not conflict with or interfere with the operation of any of their byelaws.
 - iii. Subject to no objections being received from the early consultation, the Council shall make the proposed byelaws. Under the Council's constitution this decision is reserved to Full Council.
 - iv. The Council shall make the byelaws and ensure that they are advertised in one or more newspapers circulating in the area affected. A copy shall also be held in reception and placed on the Council's website. The Council must allow one month for submission of any objection to the proposed byelaws. If any objections are received, the Council will be expected, where possible, to resolve the objections before the byelaws and any unresolved objections are forwarded to the Secretary of State for confirmation. The byelaws cannot come into operation until they are confirmed by the Secretary of State.
 - v. Confirmation by the Secretary of State where the byelaws will, unless otherwise decided, come into operation at the expiration of one month from the day on which they are confirmed by the Secretary of State.

3.0 Enforcement of the proposed Byelaws

- 3.1 Due to current resource and budgetary constraints, there are no plans at present to undertake routine regular inspections of ordinary watercourses within Woking. Byelaw contraventions will therefore come to light as a result of problems arising, third party reports or from other routine inspections or surveys.

Adoption of Ordinary Watercourse Byelaws

- 3.2 Where breach of a byelaw is discovered or suspected by the Council, the Officers will conduct an investigation. If there is evidence of a breach then enforcement action may be taken.
- 3.3 It is proposed that a proportionate, risk based approach to the enforcement of the byelaws is taken by the Council, taking into account the location and nature of any breach. This will ensure drainage issues can be rectified without the need for formal action and in order to use the Council's resources efficiently.

Enforcement Actions

- 3.4 The aims of enforcement in flood risk management are to ensure the proper flow of water in a watercourse and over the floodplain; the control of water levels and the security of existing assets. To achieve these aims, enforcement action is used to rectify unlawful and damaging or potentially damaging work, always using a risk based approach.
- 3.5 Enforcement action (not necessarily criminal sanction) may be taken where damaging or potentially damaging works have been undertaken without consent or are in contravention to an issued consent.
- 3.6 Some incidents are so serious that immediate action is required to mitigate the risk. Other incidents may only require a letter to the offender so that the requirements are clear. Methods of undertaking enforcement include:
- site visits and face to face meetings with perpetrator;
 - sending advisory letters;
 - sending warning letters;
 - using notices to enforce, prohibit or carry out works;
 - prosecution and reclaiming costs of prosecution; and
 - direct remedial action plus recharge of costs of remedial action.
- 3.7 Where enforcement action is pursued, the Council may serve notice under Section 66 (6) of the Land Drainage Act 1991, requiring any contravention of the proposed byelaws to be remedied within a period not exceeding 28 days. If the breach was not remedied within the specified time scale, the Council could use Section 66 (7) of the Land Drainage Act 1991 to undertake the necessary works and recharge the costs of such works to the offender.
- 3.8 For activities specified by byelaws, consent would be required and the activity cannot be undertaken until the consent has been issued.
- 3.9 Consenting' is the process whereby landowners or occupiers may apply to the regulatory body to undertake works within or close to a watercourse.
- 3.10 A fee is payable by applicants for watercourse consent. The Land Drainage Act (LDA) determines the fee in accordance with a "prescribed charging scheme". Currently, the fee for applications for consent is £50 per structure.

4.0 Planning and Byelaws

- 4.1 On 18 December 2014 the Department for Communities and Local Government (DCLG) and DEFRA released a Ministerial Statement announcing that requirements for Sustainable Drainage Systems (SuDS) on new development will be delivered through the existing planning system.
- 4.2 The Ministerial Statement confirmed that from April 2015, the Local Planning Authority must:
- satisfy themselves that the proposed minimum standard of operation of SuDS on new development is appropriate;
 - ensure through the use of planning conditions or planning obligations that there are clear arrangements in place for ongoing maintenance of the drainage system over the lifetime of the development; and
 - consult the relevant Lead Local Flood Authority on the management of surface water (Woking Borough Council undertake this role for Woking on Surrey County Council's behalf under agreement).
- 4.3 In pursuit of this, the Council gained a new role as Statutory Consultee on all major planning applications with surface water drainage implications on behalf of Surrey County Council. As such, it is now required to assess planning applications and provide technical advice in respect of proposed surface water drainage and its maintenance.
- 4.4 In accordance with this the Six Legal Tests required by the National Planning Policy Framework (NPPF) constrain the Council in terms of what is reasonable to request from a proposed development through the use of planning conditions or obligations without being legally challenged.
- 4.5 In summary, the legislative changes introduce new challenges and resource pressures for the Council to manage flood risk arising from new developments, to protect local communities, and in avoiding future maintenance and financial liabilities from 'orphan' drainage systems (i.e. those with no long term or robust maintenance arrangements).
- 4.6 If however, a planning application indicated that the Council's Drainage Byelaws might be contravened the Council would have reasonable grounds to object. For example, no provision of an undevelopable strip adjacent to a watercourse for maintenance needs.
- 4.7 Reasons for the objection would be given with guidance on how the proposals may be revised to comply with the Byelaws and therefore reduce flood risk to and from new development.
- 4.8 In summary, the proposed drainage byelaws, in setting standards for compliance when undertaking works on or close to a watercourse, will provide an alternative and robust approach to securing the efficient working of a proposed drainage system through enhanced land drainage regulation.

5.0 Implications

Financial

- 5.1 It is not anticipated that there will be any immediate or significant financial implications arising from the making of the byelaws. The costs associated with the implementation of

Adoption of Ordinary Watercourse Byelaws

local land drainage byelaws are principally administrative, comprising Officer time in managing the process (e.g. consultation and liaison, reporting, making, advertising and dealing with objections etc.) and sundry costs (printing, postage, newspaper advertising etc.).

- 5.2 Where enforcement of the byelaws would require the construction or remediation of drainage infrastructure, the financial implication of this would be with the responsible party/land owner and not the Council.
- 5.3 A fee is payable by applicants for watercourse consent. The Land Drainage Act (LDA) determines the fee in accordance with a “prescribed charging scheme”. Currently, the fee for applications for consent is £50 per structure.

Human Resource/Training and Development

- 5.4 Applications for consent for works undertaken in relation to ordinary watercourses are subject to a fee, currently £50. This level of fee is unlikely to cover the actual costs incurred by the Council in processing an application. It should be noted that (i) in future, fees may be determined in accordance with a charging scheme (prescribed by order). It is anticipated that the workload associated with applications for watercourse consent can, at present, be managed within current staffing resources.
- 5.5 As stated in paragraph 3.1, due to existing budgetary constraints and staff resource issues, there are no plans at present to undertake routine regular inspections of ordinary watercourses. The workload associated with enforcement powers will be restricted typically to the circumstances described in 3.6.

Community Safety

- 5.6 The adoption of proposed byelaws will enable the Council to maintain safe and secure environments around ordinary watercourses and to manage flood risk across the Borough.

Risk Management

- 5.7 The Environment Agency has provided guidance to local authorities on applying sanctions in relation to the regulation of ordinary watercourses. Notices may be served to deal with the repair, removal of obstruction and maintenance of flow in watercourses. An offence is committed under the Land Drainage Act 1991 by failure to comply with a notice and not by the deed itself. Failure to comply with notices served under Section 24 (abatement/removal of un-consented works from ordinary watercourses) and Section 25 (Requiring works to maintain flow of an impeded ordinary watercourse) of the Land Drainage Act may result in legal action being taken through the Magistrates Courts. Byelaws also create criminal offences which can be prosecuted in Magistrates Courts. Breaches of byelaws can lead to a fine, the maximum being generally between £500 and £2,500.

Sustainability

- 5.8 The drainage byelaws will help conserve and enhance the area’s local character, biodiversity, and habitats, by contributing to a healthier environment with reduced pollution and contamination.
- 5.9 Extreme weather events are forecast to become more frequent and severe in the UK due to the effects of climate change. We are already seeing increasing numbers of heavy rainfall events, and expect this increase to continue, with greater risk of river and flash

Adoption of Ordinary Watercourse Byelaws

flooding. The introduction of the proposed byelaws will reduce flood risk for local communities and assist the Council in being better prepared for the impacts of a changing climate. In doing so, they would contribute to the delivery of the Council's vision and strategic aims to mitigate and adapt to climate change, as set out in its 'Climate Change Strategy'.

Equalities

5.10 There are no equality and diversity issues arising from the report.

6.0 Consultations

6.1 The Portfolio Holders have been consulted.

REPORT ENDS

EXE17-065

Adoption of Ordinary Watercourse Byelaws

APPENDICES

Equality Impact Assessment

The purpose of this assessment is to improve the work of the Council by making sure that it does not discriminate against any individual or group and that, where possible, it promotes equality. The Council has a legal duty to comply with equalities legislation and this template enables you to consider the impact (positive or negative) a strategy, policy, project or service may have upon the protected groups.

		Positive impact?			Negative impact?	No specific impact	What will the impact be? If the impact is negative how can it be mitigated? (action) THIS SECTION NEEDS TO BE COMPLETED AS EVIDENCE OF WHAT THE POSITIVE IMPACT IS OR WHAT ACTIONS ARE BEING TAKEN TO MITIGATE ANY NEGATIVE IMPACTS
		Eliminate discrimination	Advance equality	Good relations			
Gender	Men					x	The recommendations have no specific impact
	Women					x	
Gender Reassignment						x	
Race	White					x	
	Mixed/Multiple ethnic groups					x	
	Asian/Asian British					x	
	Black/African/Caribbean/Black British					x	
	Gypsies / travellers					x	
	Other ethnic group					x	

		Positive impact?			Negative impact?	No specific impact	What will the impact be? If the impact is negative how can it be mitigated? (action) THIS SECTION NEEDS TO BE COMPLETED AS EVIDENCE OF WHAT THE POSITIVE IMPACT IS OR WHAT ACTIONS ARE BEING TAKEN TO MITIGATE ANY NEGATIVE IMPACTS
		Eliminate discrimination	Advance equality	Good relations			
Disability	Physical					x	
	Sensory					x	
	Learning Difficulties					x	
	Mental Health					x	
Sexual Orientation	Lesbian, gay men, bisexual					x	
Age	Older people (50+)					x	
	Younger people (16 - 25)					x	
Religion or Belief	Faith Groups					x	
Pregnancy & maternity						x	
Marriage & Civil Partnership						x	
Socio-economic Background						x	

The purpose of the Equality Impact Assessment is to improve the work of the Council by making sure it does not discriminate against any individual or group and that, where possible, it promotes equality. The assessment is quick and straightforward to undertake but it is an important step to make sure that individuals and teams think carefully about the likely impact of their work on people in Woking and take action to improve strategies, policies, services and projects, where appropriate. Further details and guidance on completing the form are [available](#).

Sustainability Impact Assessment

Officers preparing a committee report are required to complete a Sustainability Impact Assessment. Sustainability is one of the Council's 'cross-cutting themes' and the Council has made a corporate commitment to address the social, economic and environmental effects of activities across Business Units. The purpose of this Impact Assessment is to record any positive or negative impacts this decision, project or programme is likely to have on each of the Council's Sustainability Themes. For assistance with completing the Impact Assessment, please refer to the instructions below. Further details and guidance on completing the form are [available](#).

Theme (Potential impacts of the project)	Positive Impact	Negative Impact	No specific impact	What will the impact be? If the impact is negative, how can it be mitigated? (action)
Use of energy, water, minerals and materials			x	
Waste generation / sustainable waste management			x	
Pollution to air, land and water	x			Will help ensure watercourses are protected from pollution
Factors that contribute to Climate Change	x			Will help ensure watercourse capacity is not reduced and there floodplain protected
Protection of and access to the natural environment	x			Will help ensure maintenance of watercourses
Travel choices that do not rely on the car			x	
A strong, diverse and sustainable local economy			x	
Meet local needs locally			x	
Opportunities for education and information			x	
Provision of appropriate and sustainable housing			x	
Personal safety and reduced fear of crime			x	
Equality in health and good health			x	
Access to cultural and leisure facilities			x	
Social inclusion / engage and consult communities			x	
Equal opportunities for the whole community			x	
Contribute to Woking's pride of place	x			