

Central Bedfordshire Council

Executive

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Proposed Drainage Byelaws for Flood Risk Management

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This report relates to a Key Issue

Purpose of this report

1. To agree to make byelaws in connection with drainage matters to assist the Council in meeting its statutory duties and in its role to help reduce the risk of flooding for local communities.

RECOMMENDATIONS

The Executive is asked to:

1. **endorse the proposal to make drainage byelaws as set out in Appendix 1; and**
2. **to recommend to Council to adopt the byelaws following completion of the stakeholder consultation.**

Overview and Scrutiny Comments/Recommendations

2. Discussion has taken place with the Chairman of the Sustainable Communities Overview and Scrutiny Committee who has agreed that the proposals do not require review by the committee.

Executive Summary

3. The Council is intending to use its powers under the Flood and Water Management Act 2010 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.
4. 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. Following a formal consultation period the Council will undertake the decision whether or not to make the byelaws.
5. 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.
6. 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.

Background to the Council's responsibility to Manage Flood Risk

7. As the Executive will be aware, the Council gained new flood risk management duties as an upper tier Authority under the Flood and Water Management Act in 2010 (the Act).
8. Under the Act, the Council was designated as a 'Lead Local Flood Authority' and given subsequent statutory duties to manage the risk of flooding from surface water runoff, groundwater, and ordinary watercourses. Collectively referred to as 'local flood risk'.
9. The Council is making good progress with the requirements of the Act outlined above. On 22 April 2014 the Local Flood Risk Management Strategy was presented to the Executive and was then adopted. The Strategy sets out how the Council intends to approach flood risk management through strategic objectives and locally set measures.

10. At the time the strategy was adopted it was made clear to Executive that the policies and objectives it identifies would develop overtime, it states that the Council “is considering the merit of establishing its own byelaws to regulate consenting and the serving of notices to riparian owners”. The proposal set out in this report aims to deliver on this action.
11. The proposed Drainage Byelaws (see Appendix 1) are considered a necessary tool for the long-term regulation, management, and enforcement of the Local Flood Risk Management Strategy and in delivery of the Council’s wider responsibilities for land use planning, transportation and local highways, managing open spaces, and general sustainability.

The proposed drainage byelaws

12. The Flood and Water Management Act amended Section 66 of the Land Drainage Act 1991, giving 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.
13. 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.
14. 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.
15. The use of byelaws has been described as follows:

‘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.’
16. The proposed byelaws for Central Bedfordshire Council are based on the ‘Model Land Drainage Byelaws for Local Authorities’ produced by the Department for Environment, Food and Rural Affairs (DEFRA). These are broadly similar to the byelaws that have been used for many years by the Bedford Group of Internal Drainage Boards (the IDB).

17. 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.
18. The model byelaws explicitly support the themes of the Council's Local Flood Risk Management Strategy (February 2014). 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.
19. Where the opportunity allows, the proposed byelaws will mirror those already in use by the Internal Drainage Board for the purpose of continuity across the Central Bedfordshire area. For example, following advice sought from the IDB, it is proposed that byelaw 10 states an easement distance of 9 metres. This is in order to control the erection of any building or structure within this distance from a watercourse and ensure there is adequate access to the watercourse for future maintenance (see byelaw 10 in Appendix 1).
20. Early engagement on the use of the model byelaws has been sought from DEFRA, and local strategic partners including the IDB, the Environment Agency, and Local Highways Authority and no objection has been raised.
21. Please note that the model byelaws set out in Appendix 1 include notes for the guidance of Councils and these are not for inclusion in the final byelaws.

Enforcement of the proposed byelaws

22. Due to current resource and budgetary constraints, there are no plans at present to undertake routine regular inspections of ordinary watercourses within Central Bedfordshire. Byelaw contraventions will therefore come to light as a result of problems arising, third party reports or from other routine inspections or surveys.
23. Where breach of a byelaw is discovered or suspected by the Council, the Lead Local Flood Authority officers will conduct an investigation. If there is evidence of a breach then enforcement action may be taken.
24. Enforcement powers are permissive, and therefore discretionary. It is proposed that the Council would not undertake action unless there is evidence of a significant drainage problem and persons affected do not have control of a remedy.

25. 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.
26. This approach compliments the Council's existing powers as the Lead Local Flood Authority under the Land Drainage Act and Flood and Water Management Act to pursue enforcement for those instances where the proper flow of an ordinary watercourse is being impeded.
27. Where enforcement action is pursued, the Council as the Lead Local Flood Authority 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.
28. For activities specified by byelaws, consent would be required and the activity cannot be undertaken until the consent has been issued. However, an authority can set out in a byelaw how an activity should be undertaken meaning that the public is free to undertake the activity when they like as long as they comply with the details prescribed in the byelaw. This approach is proposed.

Securing more Resilient Drainage Infrastructure through Byelaws and Overcoming Existing Challenges

29. In response to recommendations made in 2007 by the Pitt Review to ensure the delivery of 'more effective and better maintained drainage systems', the Council has been expecting to become a Sustainable Drainage¹ Approving Body (the SAB) upon implementation by Government of Schedule 3 of the Flood and Water Management Act. This would have placed responsibility on the Council for the approval, adoption, enforcement, and maintenance of surface water drainage on new developments.
30. However, 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 and not by a SAB.

¹ Sustainable drainage systems (SuDS) are a range of sustainable methods of managing surface water runoff, such as swales, detention basins or permeable surfaces. They are designed to control surface water run off close to where it falls and mimic natural drainage as closely as possible. The Council pro-actively encourages the use of SuDS to manage surface water in a sustainable way, as set out in its Sustainable Drainage Supplementary Planning Guidance Document (SPD).

31. The Ministerial Statement confirmed that from April 2015, the Local Planning Authority must:
 - i. satisfy themselves that the proposed minimum standard of operation of SuDS on new development is appropriate;
 - ii. 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
 - iii. consult the relevant Lead Local Flood Authority on the management of surface water.

32. In pursuit of this, the Council as the Lead Local Flood Authority gained a new role as Statutory Consultee on all major planning applications with surface water drainage implications. As such, it is now required to assess planning applications and provide technical advice in respect of proposed surface water drainage and its maintenance.

33. Subsequently the proposed ministerial arrangements to give councils as the Lead Local Flood Authorities the necessary powers to inspect, enforce compliance with design, and adopt SuDS have been discontinued with no contingency arrangements. Further to 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.

34. 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).

35. If however, a planning application indicated that the Council's Drainage Byelaws might be contravened the Lead local Flood Authority would have reasonable grounds to object. For example, no provision of an undevelopable strip adjacent to a watercourse for maintenance needs. 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.

36. 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.

Addressing Council Priorities

37. Whilst the duties imposed by the legislative changes outlined in this report are statutory, the adoption of the proposed byelaws will also directly contribute towards the Council's strategic aim in enhancing Central Bedfordshire, and the unique character of our communities and our environment.
38. Specifically it will aid the Council to identify and manage flood risk across Central Bedfordshire and would facilitate stronger and more resilient communities and provide additional benefits deriving from ecosystem services, such as for leisure activities and nature protection.

Safeguarding Implications arising from the Proposal

39. There are no safeguarding implications.

Public Health Implications

40. The proposed drainage byelaws would potentially reduce flood risk for some properties, which would have benefits for those residents. The potential social impacts of flooding for those at risk can be severe, including: trauma, illness, displacement from homes, disruptions to livelihoods and longer term effects on mental health and wellbeing (WHO and Public Health England, 2013).

Environmental and Climate Change Implications

41. 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.
42. 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 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'.

Legal Implications

43. A byelaw is a local law which is made by a statutory body, such as a local authority, under an enabling power established by an Act of Parliament and operate to control or regulate activities in certain places. The enforcement of the proposed land drainage byelaws will be undertaken for the purpose of securing appropriate management of flood risk in Central Bedfordshire. The byelaws will be made under the Flood and Water Management Act 2010, Land Drainage Act 1991 and the Local Government Act 1972 and confirmed by the Secretary of State.

44. Section 236 of the Local Government Act 1972 sets out the legal requirements for making byelaws and DEFRA has published guidance for local authorities on making byelaws under section 66 of the Land Drainage Act 1991. The byelaws will create criminal offences that can be prosecuted in the Magistrates' Courts. Any person who acts in contravention, or fails to comply with the proposed byelaws, will be guilty of a criminal offence punishable in the Magistrate's Court by way of a fine. The new byelaws will assist the Council in meeting its obligations under the Flood and Water Management Act 2010, Land Drainage Act 1991 and Highways Act 1980 and any other relevant legislation concerned with land and highway drainage.

Financial Implications

45. 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 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.).
46. 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.

Equalities Implications

47. There are considered to be no equalities impacts in connection with making the proposed byelaws, which will be subject to formal consultation in due course.

Implications for Work Programming

48. Once finalised the proposed drainage byelaws will be taken for re-consideration by the Executive which will take into account any prior recommendations before making a recommendation to Council.

Conclusion and Next Steps

49. The proposed byelaws follow the DEFRA model byelaws.
50. The byelaws will enable the Council to monitor and enforce the efficiency of flood defences, including SuDS, and will provide scope for the Council to work with developers and local communities to reduce flood risk now and in the future.
51. Failure to make the byelaws would make it difficult for the Council to take action to reduce flood risk in some circumstances.

52. Byelaws cannot come into operation until they have been confirmed by the Secretary of State. Early correspondence between the Council and DEFRA has shown that there are no initial objections to the Council's proposal.
53. To achieve the aims set out in this report, there are a number of stages that must be completed when making the byelaws, which are prescribed by the DEFRA statutory process. These are set out below and will be pursued, if the recommendations made in this report are endorsed by Committee.
54. See table.

Executive	Executive considers and makes recommendations for the byelaw process to be started.
Informal check by DEFRA	The proposed draft byelaws are forwarded to DEFRA for informal checking.
Formal consultation with stakeholders	Formal consultation takes place with Natural England and the Local Navigational Authority (in Central Bedfordshire this is the Canal and River Trust) to make sure that the proposed byelaw do not conflict with or interfere with the operation of their byelaws.
Council decides whether or not to make byelaws	Under the Council's constitution, this decision is reserved to Full Council. The Council considers recommendations made by the Executive and undertakes the decision to formally adopt the byelaws.
Byelaws made and public consultation takes place (1 month)	<p>Once CBC has formally resolved to adopt the byelaws, a (statutory) process takes place where the byelaws are made, sealed and deposited for one month.</p> <p>As part of this process the Council will:</p> <ul style="list-style-type: none"> • Advertise in one or more newspapers circulating in the area affected the local authority's intention to apply to the Secretary of State for the Environment, Food and Rural Affairs for confirmation of the byelaws. Use may be made of the Council's own website, as well as on-line advertising, but should not be used instead of the local press. • Deposit a copy of the byelaws at the offices of the local authority for public inspection, for a period of at least one month, and supply a copy to any person on application. • Where possible, resolve any objections that are received.

Byelaws and feedback sent to Secretary of State	<p>The byelaws cannot come into operation until they are confirmed by the Secretary of State. The Council will make an application for confirmation accompanied by the following documents:</p> <ul style="list-style-type: none"> • Two sealed and signed copies of the byelaws. • A statement setting out (where the byelaws were deposited, where advertised, dates and times, copy of the newspaper page(s) and (if used) website pages where advertised, together with a statement that the board was satisfied that it had made appropriate efforts to reach all affected parties. • Copies of any objections that may have been sent to the local authority together with the local authority's response; or if no objections are received, a statement to that effect. • Statement that local and other public authorities (naming them) were notified and when; i.e.: Natural England.
Byelaws become effective	<p>Unless otherwise decided, the byelaws will come into operation at the expiration of one month from the day on which they are confirmed by the Secretary of State.</p>

55. All consultation will be conducted to the highest possible standard in accordance with the Council's internal guidance.
56. Should any objections be received during the consultation period the Council will be expected, where possible, to resolve these before forwarding any unresolved issues with the final proposed byelaws to the Secretary of State for confirmation.
57. Ideally, the local authority will resolve any objections and have them withdrawn before the byelaws are submitted to the Minister for formal confirmation. Otherwise, the Minister may take into account relevant objections that have not been withdrawn when determining whether or not to confirm a byelaw. In some cases, the Council may consider that it is appropriate to meet the objectors' concerns by amending the byelaw in question. If such modifications would lead to significant and substantive change, the Council should then re-advertise the amended byelaws, or at least give all affected parties the opportunity to comment upon any proposed changes.
58. It is proposed that the Council will develop and publish a series of advice notes that will accompany the byelaws to aid with their future delivery and compliance.

Appendices

59. The following Appendix is attached/provided through an electronic link:

- Appendix 1 – Proposed Drainage Byelaws (DEFRA Model)
- Appendix 2 – Glossary of terms

Background Papers

60. Supporting documents:

- The Flood and Water Management Act 2010 – www.legislation.gov.uk/ukpga/2010/29/contents
- The Land Drainage Act 1991 – <http://www.legislation.gov.uk/ukpga/1991/59>
- Sustainable drainage systems: Written statement (HCWS161) – www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2014-12-18/HCWS161/
- Application of the six tests in National Planning Policy Framework (NPPF) – <http://planningguidance.planningportal.gov.uk/blog/guidance/use-of-planning-conditions/application-of-the-six-tests-in-nppf-policy/>
- Central Bedfordshire Council – Climate Change Strategy – www.centralbedfordshire.gov.uk/Images/Climate%20Change%20Strategy%20v1_tcm6-24974.pdf