

Cabinet Report



Listening Learning Leading

Report of Head of Development and Corporate Landlord

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To: CABINET

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Adoption of powers from Oxfordshire County Council under Land Drainage Act

Recommendations

- (a) To support the request from Oxfordshire County Council (OCC) for South Oxfordshire to adopt powers under the land drainage act as set out in paragraph 8 of this report
- (b) To recommend Council approve the adoption of powers under an agency agreement with OCC
- (c) Subject to Council approving the adoption of powers that Cabinet authorises the Head of Development and Corporate Landlord in consultation with the Head of Legal and Democratic to negotiate and finalise the agreement with OCC and enter into agreement to adopt the powers from OCC.

Purpose of Report

1. For cabinet to consider the request from Oxfordshire County Council (OCC) for the district council to act as an agent of the county council in the discharge of delegated functions for the operation and management of the powers and responsibilities of the lead local flood authority (LLFA) under Sections 19, 23, 24 and 25 of the 1991 Land Drainage Act.

In brief, the Functions of the Land Drainage Act 1991 that OCC are looking to discharge are:

- Section 19 - flood investigations
- Section 23 - the determination of applications for consent to alter a watercourse
- Section 24 – investigate any nuisance caused by erecting or altering an obstruction or culvert in a watercourse
- Section 25 - enforcement action (to comply with OCC policy for watercourse/ditch clearing enforcement)

Corporate Objectives

2. The management of watercourses and the reduction of flood risk meets the South corporate plan 2020-24 to 'Protect and restore our natural world' particularly by reducing flood risk.

Background

3. The Flood and Water Management Act 2010 (FWMA) established OCC as Lead Local Flood Authority, with a responsibility for leading the coordination of flood risk management for surface, groundwater and smaller watercourses in its area. Under this Act the functions under sections 24 and 25 of the Land Drainage Act 1991 were transferred to OCC.
4. OCC as the Highway Authority has a duty to maintain the physical fabric of adopted highways to appropriate standards as well as a general responsibility to assert and protect public highway rights. Therefore, there may be occasions when OCC needs to consider using its powers to secure an action to maintain a watercourse or culvert for example in the interests of safeguarding highway safety.
5. OCC has the power under section 24 of the Land Drainage Act 1991 to require a person to abate a nuisance caused by erecting or altering an obstruction or culvert in a watercourse without the consent of the drainage board/LLFA further to section 23 of the Land Drainage Act 1991.
6. OCC has the power under section 25 of the Land Drainage Act 1991 to compel certain persons to maintain a watercourse so that the proper flow of water is not impeded.
7. Note: "Watercourse" is defined as "including all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers (other than public sewers within the meaning of the Water Industry Act 1991) and passages, through which water flows. The watercourses referred to in this note are those which are defined in the Act as "ordinary watercourses" rather than 'Main rivers' which are the responsibility of the Environment Agency and do not fall under this agreement.

Delegation of functions

8. OCC is requesting the district council acts as an agent to carry out:
 - (a) formal flood investigations under Section 19 of the Land Drainage Act 1991 that meet specific criteria (i.e internal flooding to five or more properties or to one property for more than one week or flooding of critical infrastructure). Appendix 1 has the formal thresholds for the investigation

of flood incidents. In addition, OCC request the district council investigates and reports on flood events at any specific location as requested within South 'affecting habitable dwellings' and 'affecting highways'.

- (b) the determination of applications for consent under Section 23 to alter watercourse
 - (c) informal enforcement action under Section 24 and 25 on behalf of the County Council to ensure the proper flow of water (preliminary steps e.g. investigations, sending initial letter). If issue remains unresolved it is passed back to OCC for formal enforcement action.
9. In order to carry out this work, OCC has provided the following documents as part of the legal agreement available as background papers:
- (a) guidance notes for ordinary watercourse consent applications
 - (b) OCC enforcement procedure and protocol S24 and S25 (including flowchart outlining the enforcement procedure S25, templates for informal letters S24).
10. Formal investigations require a report to be provided from the council to OCC within agreed deadlines.

Risks

11. Both OCC and the district council have powers to investigate flooding. The County Council as LLFA has powers and duties under S19 of the 1991 Act in respect of investigations on becoming aware of a flood in its area. The District Council is a risk management authority under the 2010 Act and also has powers and duties as a local authority under the 1991 Act in respect of general drainage and flood risk management.
12. As both OCC as LLFA and the district council have powers to investigate flooding, the risk is that it is unclear who is responsible for investigating flooding and potentially work is doubled up or passed from one to the other causing delay and confusion. The delegation of function from OCC gives power to South council to investigate any internal flooding to a habitable dwelling, business or infrastructure. In addition, formal reports are required for flooding in accordance with the thresholds set out in appendix 1, note this excludes flooding from main river.
13. The risk of not having the resources to carry out the task in the agreement is mitigated as both sides are able to withdraw from the agreement on written notice.
14. There is a low risk if we do not have the internal resource to carry out the service and we have to employ an external resource (temporary staff) and we are not able to recharge 100 percent of this cost to OCC. This risk is mitigated by the terms of the proposed agreement including provision for OCC to accept recharge of interim staff costs although the total recharge amount is capped each year.

15. There is a low risk of resources being diverted to wide scale investigations following a major flood incident. In emergency flood situations, our land drainage engineers would be heavily involved in associated tasks prioritised over routine work.

Opportunities

16. As part of current duties, the council's engineering team provide expert advice to residents, councillors and internal teams, including major and minor planning applications in terms of land drainage. South has carried out a number of flood alleviation schemes over the years. These historic projects and the experience it brings provides the engineers with the ideal skills, geographical knowledge and understanding of land drainage to carry out the delegated functions as requested by OCC and to recharge for their work.
17. The council's engineering team has carried out the Sections (S) 19, 23, 24 and 25 work successfully on behalf of OCC on an informal basis since the service was brought in-house in April 2018.
18. The agreement allows for OCC to request flood investigations are carried out on other occasions other than stipulated as 'additional works', but these must be agreed by the engineers and can be recharged at the agreed rate.

Climate and ecological impact implications

19. Flood investigations and enforcement remind landowners of good practices for keeping water within watercourses by proper and regular maintenance.

Financial Implications

20. Any council decision that has financial implications must be made with the knowledge of the council's overarching financial position. For South, the position reflected in the council's medium-term financial plan (MTFP) as reported to Full Council in February 2022 showed that the council is due to receive £2.1 million less in revenue funding than it plans to spend in 2022/23 (with the balance coming from reserves).
21. This funding gap is predicted to increase to over £3 million by 2026/27. As there remains no certainty on future local government funding, following the announcement of a one-year spending review by government, and as the long-term financial consequences of the Coronavirus pandemic remain unknown, this gap could increase further. Every financial decision made needs to be cognisant of the need to address this funding gap in future years.
22. The engineering team keeps a record of the hours spent carrying out the service for OCC including travel costs and updates this each quarter. The agreement sets out an hourly recharge fee. There is an annual payment 'upfront' from OCC at the start of each financial year (non-returnable). The cost of providing the service by the engineers is fully recharged to OCC up to the agreed annual limit as set out in the funding agreement. Once this limit is reached authorisation is required from OCC for any further spend. The income this provides goes to supplement the land drainage budgets.
23. Officers keep account of actual time and spends up to the budget provided by OCC (with regular updates each month to monitor spend and identify ahead of time any

potential overspend). Once the upfront payment levels are reached no further work is undertaken until OCC provide additional budget. The agreement allows for requests for additional resource or payment from OCC during severe flooding for example and therefore will be subject to OCC confirmation at the time.

24. In the past few years, the cost recharged to OCC based on hourly rates is largely within the budget OCC will be paying the council each year in the future. To note however there have been no serious flood events during this period which would have potentially increased the amount of work.
25. For the consenting work S23, the council receives an application fee of £50 per structure (as set out in the Act). The council only recharges when the time spent on processing the application is greater than the fee received.
26. Going forward OCC will pay up front on a non-returnable basis an annual fee. The agency agreement will allow for recharging to be based on an hourly rate for the engineers' work. Once the agreement is confirmed, officers will adjust the base budgets accordingly for income received from OCC and for the income from the applications for consenting work.

Staff Implications

27. The salary of the engineers who will carry out the delegated work is already included in the base budget and so this additional income will not have an impact on existing budgets. The work associated with the agency agreements can be carried out using existing resources by the four staff members in the engineering team. Delegated function work may have an impact on existing projects if there were a large number of investigations for example following a serious flood event (non main river). The agency agreement would allow negotiations between South and OCC in these circumstances to potentially seek extended timescales, and/or increase budget to allow for recruitment of additional resources.
28. The council is able to withdraw and terminate the agency agreement by written notice with any costs pro-rata payment returned to OCC.

Equalities Implications

29. No equalities implications have been identified through the development of this proposal.

Legal Implications

30. OCC request that the South council enters into an agreement under Section 101 of the Local Government Act 1972 and Section 19 of the Local Government Act 2000 relating to the management of functions under the Land Drainage Act 1991.
31. A delegation of functions requires full council approval. Page 19 of the South constitution, refers, Functions of the full Council 3. (o) "decide whether to accept a delegation from another local authority under joint arrangements".
32. Under General delegations, delegations to Chief Executive and Heads of Service, reference 7.5 the Head of Service is able "to exercise the powers delegated to the council under agency agreements or contracts with other councils".

33. Officers request that authority is given to the Head of Development and Corporate Landlord in consultation with the Head of Legal and Democratic to finalise the details of the agreement between South and OCC and enter into the agreements.
34. The agency agreement sets out OCC request to South to carry out informal enforcement action under Section 24 and 25 on behalf of the County Council to ensure the proper flow of water (preliminary steps e.g. discussions and meetings with landowners, site investigations, sending initial letter), all of which can be carried out by the engineers. If the issue remains unresolved it is passed back to OCC for formal legal enforcement action and there is no legal action taken by South. There is therefore no impact on additional work the legal team.

Conclusion

35. The district council has carried out numerous flood alleviation schemes over the years. The engineering team provide expert land drainage advice to residents, councillors and internal teams such as planning applications. The in-house skills and knowledge can be therefore best applied to carry out the flood investigations, consenting and enforcement on behalf of OCC.
36. The agreement allows for South to recharge all of their time associated with relevant flood investigations and be paid in advance of any work carried out.
37. The district council can decide to withdraw this service at relatively short notice if there are changes to resources in the future.

Background papers

- Guidance note for ordinary watercourse consent applications
- OCC enforcement procedure and protocol Sections 24 and 25 LDA 1991
- Draft agreement with OCC relating to management of functions under the land drainage act 1991.

Appendix 1

Thresholds for Section 19 formal flood investigations

Criteria for flood investigation:

- Internal flooding (including to basements) to five or more residential properties within an area of 1km²
- Internal flooding of two or more business premises within an area of 1km²
- Internal flooding (including to basements) of at least one property for one week or longer
- Flooding of one or more items of critical infrastructure, which could include hospitals, health centres, clinics, surgeries, colleges, schools, day nurseries, nursing homes, emergency services (police, fire, ambulance) stations, utilities and substations.
- Thames Water will investigate all foul sewer flooding affecting the public highway, properties and watercourses.

Caused a transport link to be impassable for the following periods:

- Motorways, trunk roads and major rail links – 2 hours or more
 - Class A and B highways and other railway links – 4 hours or more
 - Class C highways – 10 hours or more unless the route is the only means of access, or is primary route for critical infrastructure then reduce to 4 hours
 - Class U highways – 24 hours or more unless the route is the only means of access, or is primary route for critical infrastructure then reduce to 4 hours
- In addition to the formal investigations as above, OCC has agreed that investigations should also be carried and recharged where there is any internal flooding to a habitable dwelling, business or infrastructure.