

Phosphates Planning Sub Committee – 10 February 2022

Progress on the Interim Strategy and determination of planning applications held in abeyance

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1 Executive Summary/Purpose of the Report

- 1.1 As agreed by Full Council on 5 October 2021, Somerset West and Taunton Council is currently progressing a programme of interim measures which are being put in place to facilitate phosphate neutral development in the District. Since the previous Report to Full Council on 5 October 2021¹, the Council has:
- Appointed two dedicated Officers to support the unlocking of development in the catchment of the River Tone;
 - Established the Phosphates Planning Sub Committee (to whom this report is presented); and
 - Started to identify a series of projects to generate phosphate mitigation credits.
- 1.2 In addition to the above, Officers are continuing to collaborate with the other Somerset Authorities in the development of a Somerset wide nutrient strategy, and the Council continues to lobby central government for further action in relation to the phosphates issue.
- 1.3 There is no statutory requirement for Somerset West and Taunton Council to intervene to address the phosphates issue, however the impact of the problem is having wide ranging implications, which are discussed further within this report. As a result the Council is taking proactive action in order to try and find appropriate solutions.
- 1.4 The purpose of this report is to provide the Phosphates Planning Sub Committee with an update on the interim strategy and to set out a preferred option for the allocation of Phosphate credits or 'P credits', generated through the interim strategy, to planning applications currently held in abeyance.
- 1.5 The report briefly summarises the background to the issue, and the response of Somerset West and Taunton Council to date, including how P credits will be generated. It then sets out a preferred option for P credit allocation, acknowledging that there will not be sufficient P credits at present to 'unlock' all planning applications held in abeyance. Finally, the report sets out how the preferred option could be taken forward and implemented.

¹ Available online at: <https://www.somersetwestandtaunton.gov.uk/media/2894/somerset-levels-and-moors-phosphate-mitigation-report-to-full-council-05-oct-2021.pdf>

- 1.6 The report is focused on the first round of P credits generated through the interim measures approved by Full Council on the 5 October 2021 (herein referred to as Phase 1). It is anticipated that further P credits will become available in the future either through the progression of the Council's interim strategy, or through the work being undertaken to develop a Somerset wide nutrient strategy, the first report for which is due to be published in February 2022.

2 Recommendations

- 2.1 That the Phosphates Planning Sub Committee resolves to:
- a) Agree the recommended criteria for P credit allocation as set out from Paragraph 5.7;
 - b) Agree the preferred option for P credit allocation as set out from Paragraph 6.1;
 - c) Agree that P credits are to be allocated only to applications for 'implementable development'² as set out from Paragraph 7.9; and
 - d) Agree the next steps required for Officers to take forward the preferred option, including the establishment of a template Section 106 agreement and project level appropriate assessment template, as set out from Paragraph 9.1.

3 Background to the Report

- 3.1 On 17 August 2020, all the Local Planning Authorities (LPAs) in Somerset received an advice note from Natural England (NE) concerning the unacceptable levels of phosphates in the Somerset Levels and Moors Ramsar site³.
- 3.2 As a result of a court judgment known as Dutch N, Somerset West and Taunton (SWT) Council, were advised as the Competent Authority under The Conservation of Habitats and Species Regulations 2017 (The Habitats Regulations), that it must not permit any new residential development, infrastructure that supports agricultural intensification, anaerobic digesters, some tourism development and development that provides overnight accommodation unless it '*can be certain beyond a reasonable doubt*' that it would not give rise to additional phosphates within the hydrological catchment of the Somerset Levels and Moors Ramsar Site.
- 3.3 In effect this has meant that since the judgment, SWT Council (herein referred to as 'the Council') has not been able to grant planning permission for new affected development within the catchment of the River Tone. As a result, there are currently approximately 112 planning applications being held in abeyance (as well as approximately 36 discharge of conditions applications) which, applying the precautionary principle⁴, cannot be determined until such time as it can be proven that the proposed developments will be 'phosphate neutral' in perpetuity⁵.
- 3.4 In order to alleviate this issue, and secure phosphate neutral development in the District, at Full Council on 5 October 2021, the Council agreed to progress a

² i.e. development which can commence on site within 3 months of planning permission being granted

³ Available to view at: <https://www.somersetwestandtaunton.gov.uk/media/2434/natural-england-advice-to-lpas-on-nutrients-in-the-somerset-levels-and-moors.pdf>

⁴ See: <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site#take-a-precautionary-approach-to-decisions>

⁵ N.B. figures for applications held in abeyance are correct as of 27 January 2022

programme of interim measures designed to 'unlock' phosphate affected development⁶. Namely, the Council is currently pursuing the following:

- Retrofitting of council housing stock with improved water efficiency measures (which will restrict water usage to 110 litres (l) per person per day)⁷;
- A programme of land use measures including: wetland development at Cotford Saint Luke and several potential smaller scale opportunities for phosphorus offsetting measures e.g. woodland creation, riparian buffer strips.

- 3.5 In addition to the above, the Council is continuing to explore other potential schemes to include as part of the interim strategy.
- 3.6 In parallel with these interim measures, the Somerset authorities have also been working on progressing medium to long term strategic solutions for the 4 river catchment areas which feed into the Somerset Levels and Moors⁸ which is due to be published in February 2022.
- 3.7 It should be noted that, the interim strategy and Somerset wide strategy are endeavouring to ensure that new development in the District is 'phosphate neutral' i.e. does not make the situation on the Somerset Levels and Moors worse. These strategies are not associated with betterment. Until such time as monitoring demonstrates that the Somerset Levels and Moors Ramsar site is in a favourable condition, the phosphate issue will persist, and a breakdown of phosphate sources within Somerset south and west is provided at Appendix A. In recognition of this, the Council is continuing to hold briefing sessions and lobby central government for funding and changes to legislation, highlighting the need for a national response to address water quality.
- 3.8 The key aspect of the interim strategy as agreed at Full Council, is that it comprises short term solutions, designed to facilitate the determination of some planning applications which are currently held in abeyance without a phosphate solution.
- 3.9 As part of the interim strategy, the Council is developing nutrient neutral projects which will generate 'P credits' as set out in paragraph 3.4. Applicants will be able to make a monetary developer contribution to purchase the 'P credits' generated through the identified projects⁹.
- 3.10 A 'P Credit' will be equivalent to 1 kg/yr of removed total phosphate (see Appendix B for a full glossary of terms used throughout this report) which can be calculated by applicants using the established Phosphate Budget Calculator¹⁰ to work out how many credits they will need to ensure that their development is 'nutrient neutral'.
- 3.11 In line with its legal obligations under Regulation 63 of The Habitats Regulations, the Council is required to carry out an Appropriate Assessment in relation to the interim

⁶ SWT (2021) Report to Full Council, 5 October 2021, available at: <https://www.somersetwestandtaunton.gov.uk/media/2894/somerset-levels-and-moors-phosphate-mitigation-report-to-full-council-05-oct-2021.pdf>

⁷ Agreed in principle with Natural England and the Environment Agency on 27th January 2022.

⁸ The Parrett, Tone and Axe & Brue

⁹ Work is currently ongoing in relation to determining the cost of individual P credits.

¹⁰ See:

https://sccust1.spreadsheethosting.com/1/3d/08e177701b0026/Copy%20of%20P%20budget%20Calc_V3.1%20developer%20version/Copy%20of%20P%20budget%20Calc_V3.1%20developer%20version.htm

strategy. Council officers are currently progressing the Appropriate Assessment which will require sign off by Natural England.

- 3.12 To act in accordance with The Habitats Regulations, the Council must demonstrate that using '*best available evidence*', they can be '*certain beyond a reasonable doubt*' that any P credits generated through the interim strategy will ensure phosphate neutrality will be delivered in perpetuity.
- 3.13 In addition to the generic Appropriate Assessment for the interim strategy, planning applications for development proposals within the River Tone catchment will also be required to submit a project level Appropriate Assessment in order to progress their application. Further information on project level Appropriate Assessments for planning applications linked to P credits is provided in section 8 of this report.
- 3.14 The purpose of the Phosphates Planning Sub Committee ('the Sub Committee') is to oversee the delivery and implementation of the interim strategy. In line with the Terms of Reference, as agreed at Full Council on 5 October 2021¹¹, the Sub Committee is responsible for agreeing the criteria to be used for the allocation of any P credits generated from the above interim projects and the creation of a legally robust and transparent process for such allocation.
- 3.15 The purpose of this paper is to assist the Sub Committee in determining the process for the allocation of P credits. It builds on the work carried out to date in relation to the interim strategy and is focused on how P credits could be fairly allocated to planning applications which are currently held in abeyance. In addition, it sets out the proposed way in which a preferred option for the allocation of P credits could be implemented by the Council.

4 The Issue

- 4.1 At the time of writing, there are approximately 148 no. planning applications being held in abeyance by the LPA (112 planning applications plus 36 discharge of pre-commencement condition applications) which equates to approximately 3200 no. homes.
- 4.2 At the time of writing, through the schemes identified in paragraph 3.4, the Council will be able to generate sufficient P credits to release circa 100 homes¹². This first tranche of available P credits has been termed 'Phase 1'.
- 4.3 It is the case that P credits generated at Phase 1 will not be sufficient to 'unlock' all the applications currently held in abeyance. As a result, the Council must agree an approach to allocating these P credits to proposed developments which are currently awaiting a planning decision, in a fair and transparent way.
- 4.4 This report relates only to allocating P credits generated through the interim strategy, to planning applications that are currently held in abeyance. It presents a preferred option for prioritising applications held in abeyance to determine what applications will be offered P credits first. It is suggested that any preferred option implemented is regularly reviewed by the Sub Committee to ensure it remains fit for purpose.

¹¹ SWT (2021) Report to Full Council, 5 October 2021, Appendix A - available at: <https://www.somersetwestandtaunton.gov.uk/media/2894/somerset-levels-and-moors-phosphate-mitigation-report-to-full-council-05-oct-2021.pdf>, Page 299

¹² Please note this figure is approximate and will depend on how the proposed interim solutions progress.

- 4.5 It should be noted that the LPA has made every effort to ensure that the only issue outstanding on the applications that are being held in abeyance is phosphate neutrality. As such once a solution is found for each proposal (through the use of Council generated P credits or otherwise), Officers should be in a position to readily determine applications subject to the agreement of planning obligations and conditions to ensure phosphate neutrality in perpetuity.
- 4.6 The Council is aware that there are applicants seeking to develop their own on or off-site phosphate mitigation solutions. This remains the LPA's preference for development proposals to achieve nutrient neutrality and the LPA continues to work with applicants and Natural England (NE) on these applications. In addition, applicants may also consider acquiring credits from other sources e.g. third-party trading platforms. As and when other phosphate solutions are found outside of the Council's 'P credit' process, these applications will be taken off the list of applications held in abeyance.

5 The Proposed Method

- 5.1 In order to start to address the issues related to phosphate held development, it is necessary to determine an approach as to how the Council proposes to allocate the P credits available to applications held in abeyance.
- 5.2 A four-stage approach is proposed:
- **Stage 1** sets out proposed objectives, which would determine what the P credits generated through the interim strategy should seek to achieve.
 - **Stage 2** sets out a series of proposed criteria for P credit allocation which have been developed by Officers in consideration of the objectives.
 - **Stage 3** sets out a proposed rating scale. This takes the proposed criteria and considers their prioritisation, with 1 being the most heavily weighted in terms of priority and 5 being the least.
 - **Stage 4** takes the criteria and their priority rating and uses this to propose an approach as to how the criteria can be applied to applications held in abeyance. Applications which correspond to the identified criteria are placed at the top of the list of applications held in abeyance, identified as a 'Phase 1 Priority'. Applications could then be offered P credits in order of priority based on the results of the criteria appraisal.
- 5.3 The remainder of this report describes each of the above stages in more detail, prior to setting out how Phase 1 priority applications would progress through to determination following an offer to purchase P credits from the Council.
- 5.4 For the avoidance of doubt, it should be noted that in developing the method as set out below, Officers have taken care to ensure that the approach is 'development anonymous' i.e. although the overall number and types of applications held in abeyance has been considered, in the interests of fairness and transparency, Officers have not considered the merits of individual applications in forming the method or associated criteria.

Stage 1 – Setting the Objectives

As set out above, and within the Full Council Report, there is no statutory requirement for the Council to intervene to resolve the phosphates issue, however the current planning applications being held in abeyance is having wide ranging implications, and preventing the Council delivering on wider objectives including:

- **Objective 1** – Facilitating the delivery of sustainable development,
- **Objective 2** – Supporting post-Covid 19 recovery,
- **Objective 3** – Supporting small and medium-sized businesses (SMEs),
- **Objective 4** – Maintaining a 5-year housing land supply (5YHLS) and meeting the housing delivery test (HDT),
- **Objective 5** – Meeting other housing duties, including facilitating the delivery of affordable housing.

5.5 It is for this reason that the Council's programme of interim measures was agreed.

5.6 Given that the interim strategy and associated P credits are being developed by the Council, it is considered appropriate that the approach to allocating these credits pays consideration to the abovementioned objectives¹³. In addition to the above, there are 2 no. additional key objectives which Officers considered were also pertinent to the P credit allocation process and which should be kept in mind when considering this report:

- **Objective 6 – Timely delivery:** the proposed strategy to generate the first P credits is interim in nature. The purpose of the interim measures, as agreed as Full Council on the 5th October 2021 is to support the unlocking of development in the catchment of the River Tone. As such it is important that P credits unlock development in a timely manner.
- **Objective 7 – Value for money/Cost recovery:** The Council is pursuing the interim strategy on a full cost recovery basis. It is proposed that capital cost and revenue return will be secured via contributions from S106 agreements as part of the determination of planning applications. It is therefore in the interests of the council taxpayer that the Council proceed to recoup costs in a timely manner.

Stage 2 - Setting the Criteria

5.7 In consideration of the objectives, Officers have devised a list of potential criteria that could be utilised to inform P credit allocation. The development of the criteria has taken into consideration the number of P credits available to allocate to applications at this 'Phase 1' stage. As such, whilst a range of criteria were considered, the below were shortlisted in order to streamline the allocation process. A detailed rationale and the evidence base which informed the development of each criterion is presented in Appendix C.

Table 1 Proposed Criteria and Definitions

Proposed Criterion	Definition	Evidence Base
First come, first served	Allocating P credits in 'oldest to newest' order from the date that applications were validated.	<ul style="list-style-type: none"> • Portsmouth City Council, Interim Nutrient Neutral Mitigation Strategy for New Dwellings – November 2019 • Herefordshire Council Nutrient Certainty Update for Developers – November 2021
Stage in the planning process	<p>Allocating P credits depending on their stage in the planning process, prioritising those closest to implementation.</p> <p>i.e. allocating P credits that meet the following sub-criteria hierarchy:</p> <p>(1) Allocating P credits to applications for the discharge of pre-commencement conditions¹⁴</p> <p>(2) Allocating P credits to applications for the approval of reserved matters, full planning permission/the approval or removal of a condition.</p> <p>(3) Allocation P credits to applications for outline planning permission.</p>	<ul style="list-style-type: none"> • Paragraph 66, NPPF
Housing	Allocating of P credits to applications for housing, i.e. only to applications for C3 use classes and applications related to traveller sites ¹⁵ .	<ul style="list-style-type: none"> • Chapter 5 NPPF • Policy CP4 Taunton Deane adopted Core Strategy • Policy SC2 Somerset West Local Plan to 2032 • Objective 8 Taunton Town Centre Area Action Plan • SWT Housing Delivery Test Action Plan 2020
Minor Development	Allocating P credits to applications that fall outside the definition of 'major	<ul style="list-style-type: none"> • Annex 2, NPPF • Paragraph 69, NPPF

¹⁴ Or applications for full planning permission which do not have any pre-commencement conditions.

¹⁵ Please see Appendix B for definitions of C3 use classes and traveller sites.

	development' as set out within the NPPF ¹⁶ .	
Affordable Housing	<p>Allocating P credits that meet the following sub-criteria hierarchy:</p> <p>(1) Prioritising P credits to planning proposals that exceed affordable housing policy requirements.</p> <p>(2) Allocating P credits to planning proposals that comply with affordable housing policy as per the adopted Local Plans</p>	<ul style="list-style-type: none"> • Paragraph 65, NPPF • Somerset Housing Strategy 2019 - 2023 • Policy CP4 Taunton Deane adopted Core Strategy • Policy SC4 West Somerset Local Plan to 2032 • Objective 8 Taunton Town Centre Area Action Plan • SWT Housing Delivery Test Action Plan 2020

Stage 3 - Prioritisation of the Criteria

5.8 In order to develop a process as to how the above criteria could be applied to applications held in abeyance, Officers have considered how the criteria could be prioritised.

5.9 The proposed approach takes each criterion and assigns them a proposed 'priority weighting' of 1-5 with 1 being highest priority and 5 being least. The priority rating was based on the extent to which the criteria would correspond with the identified objectives and national and local policy provisions and has been developed using professional judgement. A rationale for the priority rating of each criterion is presented in Table 2 below.

Table 2 Criteria Prioritisation

Criteria	Priority	Rationale for Prioritisation	Linked Objectives
Minor Development	1	<p>Minor development¹⁷ has been placed as priority 1 on the basis that it links to several of the objectives, most notably the need to ensure timely delivery.</p> <p>The NPPF acknowledges that small and medium sites can make an important contribution to meeting the housing requirement of an area and are often built out 'relatively quickly'. This is important in consideration of objectives 1, 2, 5 and 6</p>	<ul style="list-style-type: none"> • Facilitating the delivery of sustainable development. • Ensuring the timely delivery of new housing units. • Supporting SME businesses and Supporting post-Covid-19 recovery. • Ensuring value for money/ Cost Recovery.

¹⁶ Please see Appendix B for a glossary of terms.

¹⁷ The definition of 'minor development' for the purposes of this report refers to applications for less than 10 dwellings (in the case of residential development) or applications for sites under 1 hectare for all other development types.

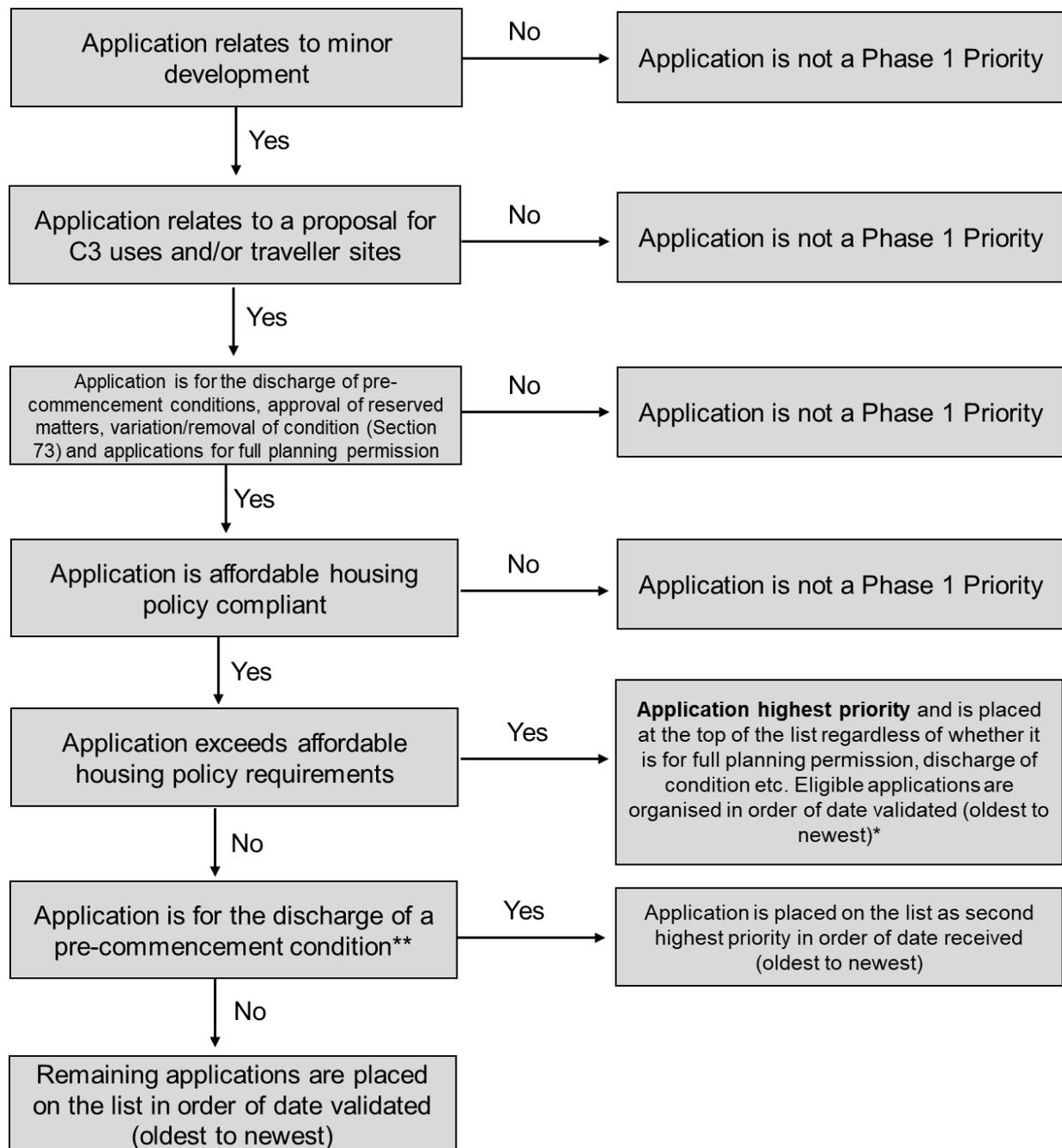
		It is also considered that prioritising minor development would positively benefit SME developers in line with objective 4, particularly in consideration of the fact that minor developments generally include less scope to development on-site solutions by reason of previous land uses and/or viability.	
Housing development	2	Applications for housing development (including C3 use classes and traveller sites) have been prioritised on the basis that this criterion directly corresponds to objectives 4 and 5, and given the primacy afforded to the delivery of housing with national and local policy.	<ul style="list-style-type: none"> • Facilitating the delivery of sustainable development • Ensuring the timely delivery of new housing units. • Meeting other housing duties, including facilitating the delivery of affordable housing • Maintaining a 5-year housing land supply and meet the Housing Delivery Test
Affordable Housing	3	Prioritising applications that exceed or comply with affordable housing policy (in accordance with the sub-criteria presented in Table 1) has been placed at priority 4 given that it would directly correspond to objective 5 and affordable housing delivery is a key strategic priority at a regional and local level.	<ul style="list-style-type: none"> • Meeting other housing duties, including facilitating the delivery of affordable housing. • Facilitating the delivery of sustainable development.
Stage in the Planning Process	4	Prioritising applications in terms of their stage in the planning process has been placed as priority 4 given its linkage with the objective to 'ensure timely delivery.' As explained in Table 1.	<ul style="list-style-type: none"> • Facilitating the delivery of sustainable development • Ensuring the timely delivery of new housing units. • Ensuring value for money/ Cost Recovery.
First Come, First Served	5	First come, first served has been ranked as priority 5, given that it would not, in isolation, directly contribute to any of the objectives. Notwithstanding this, it is considered that procedurally, 'first come, first served' would need to be a criterion within the preferred solution in order to clearly and fairly allocate P credits to applications which	<ul style="list-style-type: none"> • Ensuring the timely delivery of new housing units. • Facilitating the delivery of sustainable development.

		score equally against the other agreed criteria.	
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6 Preferred Option

- 6.1 Based on the prioritisation of the criteria presented in Table 2, a preferred option has been devised.
- 6.2 The preferred option is to organise the applications held in abeyance against the criteria to create a prioritised list. The 'Phase 1 priority' applications will be those that, as a result of the criteria appraisal, will be placed at the top of the list and offered P credits first.
- 6.3 The way in which applications will be organised into a priority order is illustrated in Figure 1 below.

Figure 1 Preferred Option for P Credit Prioritisation



*or date received in the case of discharge of condition applications.

**or full planning permission with no pre-commencement conditions attached.

7 Progressing the Preferred Option

- 7.1 Following the four-stage method set out above to devise a process for P credit allocation, Officers have also considered how the preferred option could be taken forward, and a proposed process is set out below.

Screening Applications

- 7.2 Firstly, it is acknowledged that potentially not all Phase 1 priority applications will want to progress to purchase P credits. As such it is suggested that the first step in taking forward the preferred option would be for Officers to prepare a 'screening form.' This could be sent to all eligible applicants to determine whether they wish to apply for the credits.
- 7.3 If the applicant confirms that they would like to purchase P credits, we propose that applicants submit along with their screening form the following pieces of additional information: -
- The number of P credits required based on the findings of the Phosphate Budget Calculator.¹⁸
 - Written agreement that application relates to '*implementable development*' and that the applicant would be willing to accept a planning obligation to commence development within three calendar months from the date of issuing the decision granting planning permission (this is explained further below).
- 7.4 As set out above, the preferred approach to phosphate mitigation is that applicants endeavour to develop their own on or off-site solutions. There may be situations where applicants propose to implement solutions, but these are not sufficient to fully mitigate their phosphate load, and as a result they apply for P credits to 'top up' the difference. These cases would be captured by the screening form and would follow the same forward process as set out below.

Determining the Number of P credits required

- 7.5 Once applicants have confirmed they would like to purchase P credits to mitigate the phosphate impact of their proposed development the next step would be to determine the number of P credits required. This will vary on a case-by-case basis, but applicants are able to determine the 'phosphate load' of their development through use of the Phosphate Budget Calculator and submit this information to the Local Planning Authority.
- 7.6 Further work is currently being carried out by Officers to ascertain what the cost of a P credit will be, and this will be based on the cost of the measures being progressed through the interim strategy. Further information will be provided to members of the Sub Committee in future meetings.

Implementable Development

¹⁸ See:

https://ssccust1.spreadsheethosting.com/1/3d/08e177701b0026/Copy%20of%20P%20budget%20Calc_V3.1%20developer%20version/Copy%20of%20P%20budget%20Calc_V3.1%20developer%20version.htm

- 7.7 It is suggested P credits are only released to Phase 1 priority applications on the basis that the application relates to ‘implementable development.’
- 7.8 Implementable development, for the purposes of this report, is considered to be **development which can commence on site within three calendar months from the date of issuing the decision granting planning permission.**
- 7.9 This overarching criterion for all eligible applications is considered to be important to ensure that P credit allocation ‘unlocks’ housing development ‘on the ground’ and P credits are not allocated to developments which do not result in the expedient delivery of housing units. This will be further secured through planning obligations on eligible development which is discussed further in section 8 of this report.
- 7.10 There is a mechanism for the LPA to shorten time limit conditions on planning applications by virtue of Section 91 of the Town and Country Planning Act 1990, sub-section 1(b) of which states that all planning permissions to be granted should be subject to a time limit condition which can be:
- ‘such other period (whether longer or shorter) beginning with that date as the authority concerned with the terms of planning permission may direct.’* Sub-section (2) provides further information, stating, *‘the period mentioned in subsection (1)(b) shall be a period which the authority consider appropriate having regard to the provisions of the development plan and to any other material considerations.’*
- 7.11 Paragraph 77 of the NPPF, supports alterations to time limit conditions specifically in the context of housing development, stating:
- ‘to help ensure that proposals for housing development are implemented **in a timely manner**¹⁹, local planning authorities should consider imposing a planning condition providing that development must begin within a timescale shorter than the relevant default period where this would expedite the development without threatening its deliverability or viability.’*
- 7.12 This is supported by Planning Practice Guidance Paragraph: 027 Reference ID: 21a-027-20140306.
- 7.13 It is therefore suggested that the following model condition is applied to all applications which require P credits to be able to commence development:

The development hereby permitted shall be begun within six months of the date of this permission.

Reason: In accordance with the provisions of Section 91 Town and Country Planning Act 1990 (as amended by Section 51(1) of the Planning and Compulsory Purchase Act 2004).

8 Section 106 and Appropriate Assessment

¹⁹ Emphasis added by report author

- 8.1 As set out above and in the Full Council report, the cost of the Council generated P credits will be recovered through developer contributions associated with their purchase.
- 8.2 Officers are working to develop a template S106 agreement with the support of Shape Mendip. An initial working draft of the S106 template is provided at Appendix D of this report. Some key elements of the draft S106 are as follows:
- The developer will covenant with the Council implement their planning permission within 3 calendar months of the date of the decision notice granting planning permission unless otherwise agreed with the Local Planning Authority.
 - At the time that the S106 Agreement is signed, the applicant will pay a 10% non-refundable deposit to the Council to reserve P credits for their development.
 - The Council will confirm that, upon developer entering into the S106 covenants and reserving the agreed number of P credits, the Council (as competent authority) is satisfied that the development will be 'phosphate neutral' and that it will not adversely affect the integrity of the Ramsar site i.e. that the development satisfies the HRA Regulation 63 test (see also 8.3 below)
 - The developer will covenant not to implement the development (i.e. start on site) unless and until it has paid the remaining balance to the Council to 'redeem' the P credits required. The development may then be implemented and proceed to completion/occupation.
- 8.3 In addition to a S106 agreement, all applicants will be required to produce a project level Appropriate Assessment to show that the proposed development will achieve nutrient neutrality by the allocation of P credits. It should be noted that this is in addition to the Appropriate Assessment for the interim measures, currently being produced by Officers. The project level Appropriate Assessment would consider the specific impact of the proposed development on the Somerset Levels and Moors SAC.
- 8.4 In order to assist applicants in preparing a project level Appropriate Assessment, it is proposed that a standard template is produced by Officers. This is currently being prepared and further details will be presented to the Sub Committee at subsequent meetings.

9 Next Steps

- 9.1 In consideration of the above actions required to progress the preferred option, there are several actions required over the next few months which are outlined below²⁰:
- **February – March 2022** – Officers are working to determine the costs of individual P credits, based on the interim measures being progressed. Officers are also working to finalise the interim measures and finalise templates for a project level Appropriate Assessment and S106.
 - **March – April 2022** – Officers will carry out engagement with applicants to communicate processes for P credit allocation, should the preferred option be

²⁰ Please note that these dates are indicative, and the programme is subject to change.

agreed by members of the Sub Committee. Officers will also work to develop an advice note to sit alongside the S106 and project level Appropriate Assessment templates.

- 9.2 Key outputs arising from the above work will be presented to the Sub Committee for approval at future meetings.

10 Risk Assessment

- 10.1 It is acknowledged that there are several risks associated with the proposed preferred option for P credit allocation, and these are set out in Table 3 below. The risk analysis considers these risks, which are expressed as the product of the likelihood multiplied by the impact to give a score (also colour coded red, amber, and green) for each overall risk as follows:

Rating of 1-4	Rating of 5-7	Rating of 8-10+
Low overall risk	Medium overall risk	High overall risk

- 10.2 Officers have also set out how identified risks could be mitigated and assessed how this might impact the likelihood and impact to produce an overall residual risk rating.

Risk Description	Likelihood			Mitigation Measures	Overall residual risk		
	Likelihood	Impact	Overall		Likelihood	Impact	Overall residual risk
Failure to recover initial Council expenditure and fees	2	3	6	The details of costs to obtain P credits are currently being considered in detail. Clear costs will be determined prior to recharge through S106 agreements.	1	3	4
Impact of the cost of P credits on infrastructure delivery, financial viability. The cost of mitigating some sites where this is a significant additional cost and/or on sites that already have marginal viability may result in some developments proposals stalling.	3	4	12	This will continue to be monitored closely. The Council is continuing to review the full range of possibilities available through the interim strategy to ensure P credits represent the best value for money, and further information in relation to costs will be presented to the Sub Committee in due course.	2	2	4
Cost pressures resulting in an overall reduction of new homes results in a linked reduction in affordable housing delivery	2	3	6	In recognition of the importance of affordable housing delivery, this has been incorporated specifically into the criteria	2	2	4

				for P credit allocation to ensure affordable housing delivery is prioritised as much as possible (whilst being balanced against other objectives). In addition, the highest level of affordable housing contribution tends to come from major strategic site proposals and the Council is aware that some of these sites are continuing to explore their own on-site solutions for phosphate mitigation to enable site delivery. The impact that this has on the overall level of affordable housing delivery will continue to be monitored closely.			
The preferred option does not meet objectives in practice	3	3	9	It is proposed to monitor the approach as it progresses and undertake periodic reviews to check that the preferred option is still fit for purpose.	2	3	6
Failure to generate and/or obtain further P credits for the remainder of applications held in abeyance.	3	3	9	The Council continues to explore all available options for P credit generation to include as part of the interim programme of measures.	2	3	6
Risks associated with the ongoing management and maintenance of Package Treatment Plants (PTPs) and Septic Tanks and other requirements placed on the LPA for this by NE.	3	2	6	The Council continues to engage with NE to understand their advice and requirements in relation to these measures. In addition, Officers continue to work with Shape Mendip to understand the legal implications for the Council with regard to all aspects of the interim strategy.	2	2	4

11 Links to Corporate Strategy

- 11.1 The Corporate Strategy and its Key Objectives are set out on the SWT website at: <https://www.somersetwestandtaunton.gov.uk/your-council/corporate-strategy/>
- 11.2 The report and the wider interim strategy strongly support various corporate priorities. In particular the Council's ambition to:

Our Environment and Economy

- Shape and protect our built and natural environment
- Encourage wealth creation and economic growth
- Support town centres.

Homes and Communities

- Increasing the number of affordable and social homes.

An Enterprising Council

- Ensure our land and property assets support the achievement of the council's objectives.

12 Finance/Resource Implications

- 12.1 At Full Council on the 5 October 2021, the Council approved a Supplementary Capital Budget of £2m for Phosphates Mitigation Interim Measures to be included in the General Fund Capital Programme for 2021/22 and 2022/23. This has been agreed to initially be funded by borrowing, however it is the intent that full cost recovery of capital costs will be secured via contributions from S106 agreements as part of the determination of planning applications. The proposed process for putting in place these agreements has been presented within this report.
- 12.2 The additional revenue costs required to maintain the assets/ liabilities will be included as part of these agreements.

13 Legal Implications

- 13.1 The legal and policy background to the 'phosphates issue' is set out the body of this report.
- 13.2 Overall the programme of interim measures, and the process for redeeming P credits are intended to apply and operate within the legal and policy framework of the planning system.
- 13.3 SWT Officers have also sought legal advice from Shape Mendip in relation to the preferred approach and the use of planning conditions and S106 agreements to secure phosphate mitigation through the interim measures. The Council will produce a standard S106 agreement to cover such matters.
- 13.4 SWT officers have also sought legal advice from Shape Mendip and Counsel on various matters associated with the determination of planning applications. A summary of Counsel's legal advice is on the SWT web site at: <https://www.somersetwestandtaunton.gov.uk/media/2587/legal-summary.pdf>.
- 13.5 The applications that wish to reserve/redeem P credits through this programme will require a project level Appropriate Assessment in order to be acceptable to Natural England. A standard project level Appropriate Assessment template for applicants will be produced by the Council.
- 13.6 Upon the developer entering into the S106 agreement and reserving the agreed number of P credits, the Council will confirm (as the HRA competent authority) it is satisfied that the development is 'phosphate neutral', that the development will not

have an adverse impact on the Ramsar site, and that the planning permission will be issued.

14 Climate and Sustainability Implications

- 14.1 The climate and sustainability implications of development proposals is a material planning consideration which will be assessed for each planning application which applies for P credits.

15 Safeguarding and/or Community Safety Implications

- 15.1 None related directly to this report.

16 Equality and Diversity Implications

- 16.1 The Public Sector Equality Duty has the following aims which the authority must have due regard to:

- Eliminate discrimination, harassment, victimisation;
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

- 16.2 None of the above relate directly to this report.

17 Social Value Implications

- 17.1 It is considered that the following text as set out in the Full Council Report (remains applicable to this report:

'In line with our corporate priorities (see section 5 above), SWT is committed to providing much need affordable and social housing. The interim programme of measures is aimed at unlocking the significant number of planning applications awaiting determination in the River Tone catchment area. Many of these applications involve homes, including much needed affordable and social housing. Their delivery is essential to the social outcomes of our District.'

18 Partnership Implications

- 18.1 As set out in section 3 of this report, the Council is continuing work with the other Somerset Authorities to publish a joint strategy setting out a strategic solution to the phosphate issue. A joint report on this is expected to be published in February 2022.
- 18.2 The Council will continue to work with other public bodies, namely Natural England, the Environment Agency and Wessex Water to discuss potential interim solutions and strategic responses.

- 18.3 Liaison is also ongoing with local developers affected by this issue and representative bodies such as Home Builders Federation (HBF) to lobby central government for further support in addressing the overarching issue of water quality.

19 Health and Wellbeing Implications

- 19.1 The Health and Wellbeing Implications set out in the Full Council Report, remain applicable; *'by facilitating the delivery of housing we will contribute to the provision of infrastructure, affordable housing and homes that are good for our health and a local economy that provides opportunities for all.'*

20 Asset Management Implications

- 20.1 None related directly to this report. The management of interim phosphate solutions on SWT owned sites will be passed to the External Operations team to manage in the long term.

21 Data Protection Implications

- 21.1 We may require information sharing agreements between the Council and any purchaser of P credits as part of the long-term implementation of sites for phosphate mitigation.

22 Consultation Implications

- 22.1 There is no statutory requirement to carry out consultation, however engagement events will be scheduled with applicants/developers to discuss the implications of the preferred option on applications held in abeyance, and the process to purchase P credits for eligible applications including progressing S106 agreements and project level Appropriate Assessments.

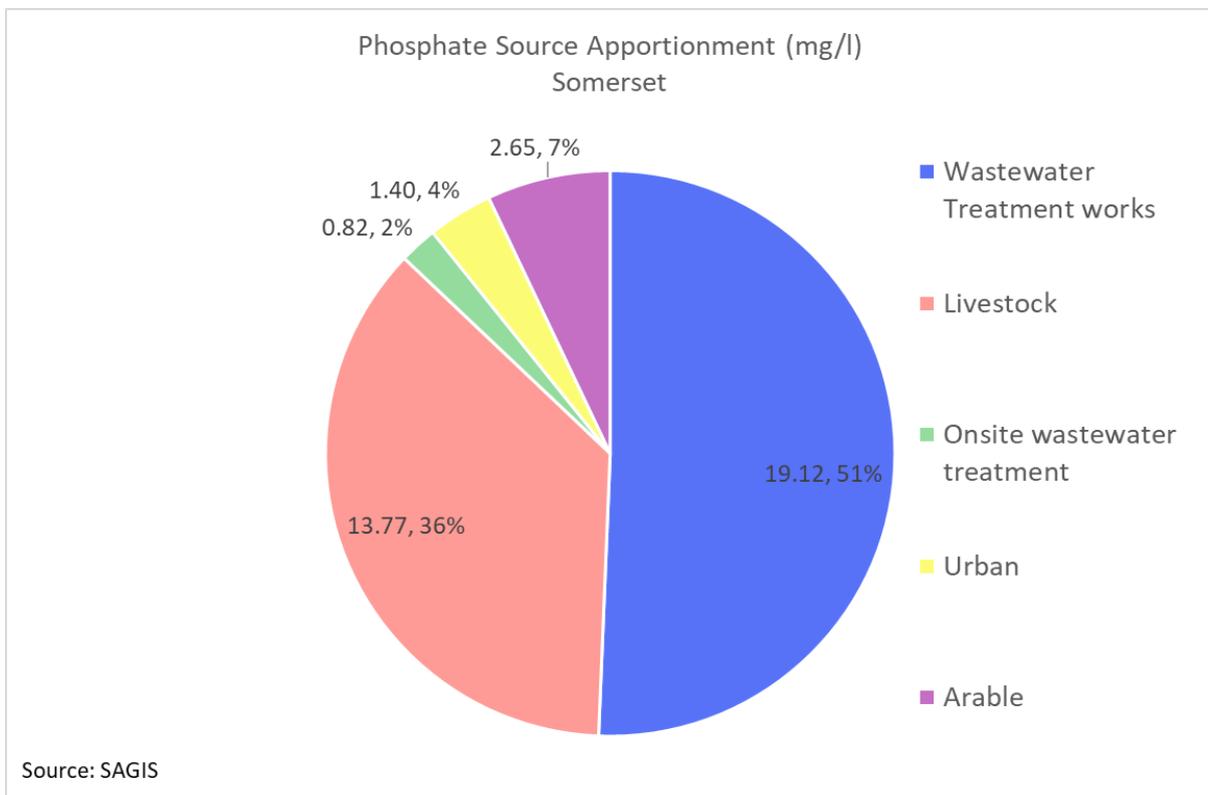
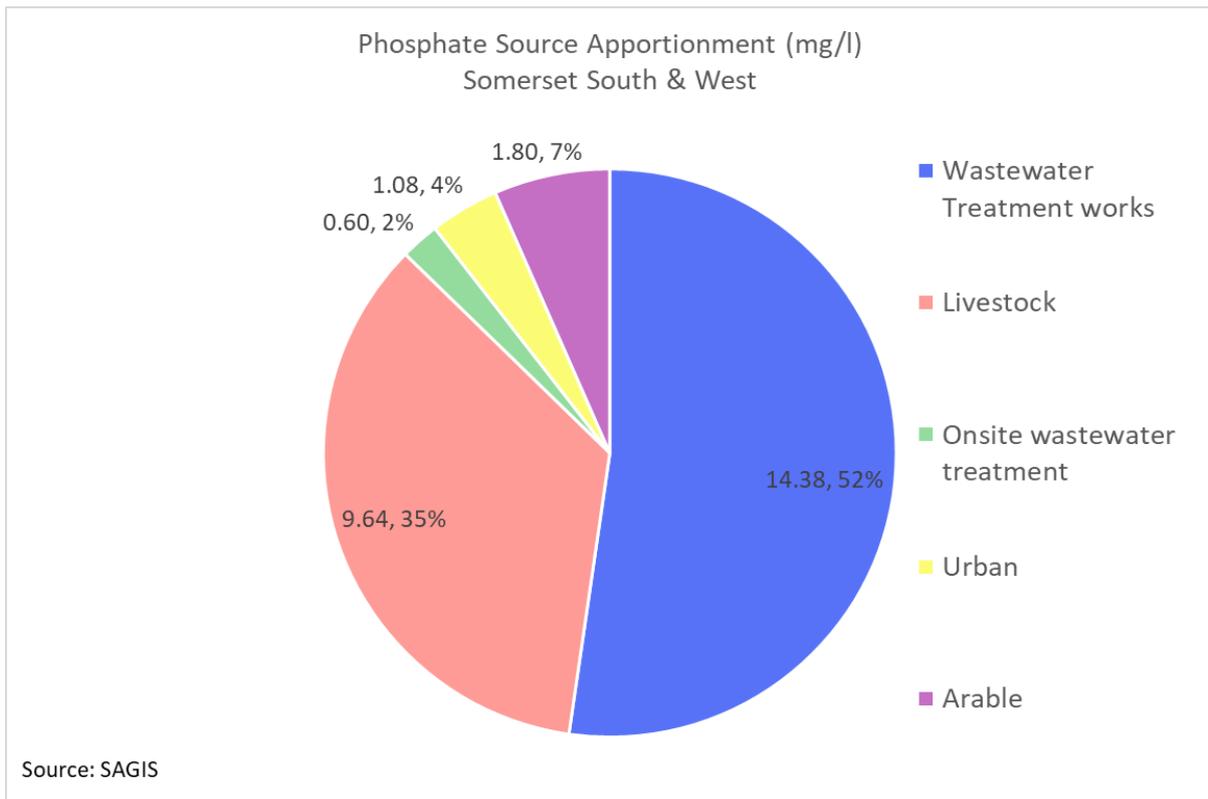
Evidence Base/References

1. Department for Levelling Up, Housing and Communities (2021), *National Planning Policy Framework*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf
2. Herefordshire Council (2021) '*Nutrient Certainty Update for Developers*', available at: <https://www.herefordshire.gov.uk/downloads/file/23131/nutrient-certainty-update-for-developers-30-november-2021>
3. Landmark Chambers (2018), *European Union Cases: Dutch Nitrogen Case*, available at: <http://www.landmarkchambers.co.uk/wp-content/uploads/2018/11/C-293.17-and-294.17-Judgment.pdf>
4. Legislation.gov.uk (2017) *The Conservation of Habitats and Species Regulations 2017*, available at: <https://www.legislation.gov.uk/ukxi/2017/1012/contents/made>
5. Opinion Research Services (2021) *South Somerset and Somerset West and Taunton Councils: Local Housing Needs Assessment 2020, Report of Findings*, available at: <https://www.somersetwestandtaunton.gov.uk/media/2860/swt-local-housing-needs-assessment-aug-2021.pdf>
6. Portsmouth City Council (2019), *Interim Nutrient Neutral Mitigation Strategy for New Dwellings*, available at: <https://www.portsmouth.gov.uk/wp-content/uploads/2020/05/Interim-Nutrient-Neutral-Mitigation-Strategy.pdf>
7. Somerset Authorities (2019), *Somerset Housing Strategy 2019-2023*, available at: <https://www.somersetwestandtaunton.gov.uk/media/1449/somerset-housing-strategy-2019-2023.pdf>
8. Somerset Authorities (2020) *Somerset Recovery and Growth Plan*, available at: <https://modgov.southsomerset.gov.uk/ieDecisionDetails.aspx?Id=1178>
9. Somerset West and Taunton Council (2019) *Corporate Strategy 2020-2024*, available at: <https://www.somersetwestandtaunton.gov.uk/your-council/corporate-strategy/>
10. Somerset West and Taunton (2020) *Housing Delivery Test Action Plan*, available at: <https://www.somersetwestandtaunton.gov.uk/media/2496/swt-hdt-action-plan-2020.pdf>
11. Somerset West and Taunton (2021) *Strategic Housing Land Availability Assessment*, available at: <https://www.somersetwestandtaunton.gov.uk/media/2720/swt-shlaa-2021-main-doc.pdf>
12. Somerset West and Taunton (2022) *Adopted Local Plans*, available at: <https://www.somersetwestandtaunton.gov.uk/planning-policy/adopted-local-plans/>

List of Appendices

Appendix A	Phosphate Source Apportionment (Somerset South and West)
Appendix B	Glossary of Terms
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Appendix A – Phosphate Source Apportionment (Somerset South and West)



Appendix B - Glossary of Terms

1. **Affordable housing** – The definition of affordable housing for the purposes of this paper is as per Annex 2 of the NPPF which reads:

“housing for sale or rent, for those whose needs are not met by the market (including housing that provides a subsidised route to home ownership and/or is for essential local workers); and which complies with one or more of the following definitions:

a) Affordable housing for rent: meets all of the following conditions: (a) the rent is set in accordance with the Government’s rent policy for Social Rent or Affordable Rent, or is at least 20% below local market rents (including service charges where applicable); (b) the landlord is a registered provider, except where it is included as part of a Build to Rent scheme (in which case the landlord need not be a registered provider); and (c) it includes provisions to remain at an affordable price for future eligible households, or for the subsidy to be recycled for alternative affordable housing provision. For Build to Rent schemes affordable housing for rent is expected to be the normal form of affordable housing provision (and, in this context, is known as Affordable Private Rent).

b) Starter homes: is as specified in Sections 2 and 3 of the Housing and Planning Act 2016 and any secondary legislation made under these sections. The definition of a starter home should reflect the meaning set out in statute and any such secondary legislation at the time of plan-preparation or decision-making. Where secondary legislation has the effect of limiting a household’s eligibility to purchase a starter home to those with a particular maximum level of household income, those restrictions should be used.

c) Discounted market sales housing: is that sold at a discount of at least 20% below local market value. Eligibility is determined with regard to local incomes and local house prices. Provisions should be in place to ensure housing remains at a discount for future eligible households.

d) Other affordable routes to home ownership: is housing provided for sale that provides a route to ownership for those who could not achieve home ownership through the market. It includes shared ownership, relevant equity loans, other low-cost homes for sale (at a price equivalent to at least 20% below local market value) and rent to buy (which includes a period of intermediate rent). Where public grant funding is provided, there should be provisions for the homes to remain at an affordable price for future eligible households, or for any receipts to be recycled for alternative affordable housing provision or refunded to Government or the relevant authority specified in the funding agreement.”

2. **C3 Dwellinghouses** – Definition is formed of three parts, as per the Use Classes Order as follows:

- *C3(a) covers use by a single person or a family (a couple whether married or not, a person related to one another with members of the family of one of the couple to be treated as members of the family of the other), an employer and certain domestic employees (such as an au pair, nanny, nurse, governess, servant, chauffeur, gardener, secretary and personal assistant), a carer and the person receiving the care and a foster parent and foster child*

- C3(b) covers up to six people living together as a single household and receiving care e.g. supported housing schemes such as those for people with learning disabilities or mental health problems
 - C3(c) allows for groups of people (up to six) living together as a single household. This allows for those groupings that do not fall within the C4 HMO definition, but which fell within the previous C3 use class, to be provided for i.e. a small religious community may fall into this section as could a homeowner who is living with a lodger²¹.
3. **First Come, First Served** – Taking applications in date order (oldest to newest) based on the date the application was validated by the Local Planning Authority (or received by the Local Planning Authority in the case of pre-commencement conditions which do not go through a validation process).
 4. **Housing development** – Any development which fall into Class C3 (Dwellinghouses) as per the Town and Country Planning (Use Classes) Order 1987 (as amended).
 5. **Implementable development** – Development which can commence on site within three calendar months from the date of issuing the decision granting planning permission.
 6. **Minor development** – Development involving the provision of less than 10 dwellinghouses, the provision of a building or buildings where the floor space to be created by the development is less than 1,000 square metres or development carried out on a site having an area of less than 1 hectare.
 7. **'P Credit'** – also known as a 'Phosphate Credit' equivalent to 1 kg/yr of removed total phosphate.
 8. **Travellers and Traveller Sites** - The definition of travellers and traveller sites for the purposes of this paper is as per national planning policy guidance, 'Planning policy for traveller sites' (2015) as published by the then Department for Communities and Local Government, which states:

For the purposes of this planning policy "gypsies and travellers" means: Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily, but excluding members of an organised group of travelling showpeople or circus people travelling together as such.

In determining whether persons are "gypsies and travellers" for the purposes of this planning policy, consideration should be given to the following issues amongst other relevant matters: a) whether they previously led a nomadic habit of life b) the reasons for ceasing their nomadic habit of life c) whether there is an intention of living a nomadic habit of life in the future, and if so, how soon and in what circumstances.

For the purposes of this planning policy, "travelling showpeople" means: Members of a group organised for the purposes of holding fairs, circuses or shows (whether or not travelling together as such). This includes such persons who on the grounds of their own or their family's or dependants' more localised pattern of trading, educational or health needs or old age have ceased to travel temporarily, but excludes Gypsies and Travellers as defined above.

²¹ Planning Portal (2020) https://www.planningportal.co.uk/info/200130/common_projects/9/change_of_use

For the purposes of this planning policy, “travellers” means “gypsies and travellers” and “travelling showpeople” as defined above.

For the purposes of this planning policy, “pitch” means a pitch on a “gypsy and traveller” site and “plot” means a pitch on a “travelling showpeople” site (often called a “yard”). This terminology differentiates between residential pitches for “gypsies and travellers” and mixed-use plots for “travelling showpeople”, which may / will need to incorporate space or to be split to allow for the storage of equipment.

Appendix C – Site Criteria Evidence Base/Justification

Criterion	Informing Evidence/Policy Justification	Sources
First Come First Served	A clear way of allocating credits which has precedent as it follows recent approaches taken by other local authorities facing a similar issue	<ul style="list-style-type: none"> • Portsmouth City Council, Interim Nutrient Neutral Mitigation Strategy for New Dwellings (November 2019) • Herefordshire Council Nutrient Certainty Update for Developers – (November 2021)
Stage in the planning process	<p>The purpose of the interim measures, as explained in the Full Council report is to ‘support the unlocking of development in the catchment of the River Tone.’</p> <p>In light of their interim nature and the need to act quickly to support the re-commencement of development in the catchment area, it is reasonable to allocate P credits to development’s closest to implementation. For this reason, this criterion includes the following hierarchical sub-criteria:</p> <p>(1) Allocating P credits to applications for the discharge of pre-commencement conditions (2) Allocating P credits to applications for the approval of reserved matters, full planning permission/the approval or removal of a condition. (3) Allocating P credits to applications for outline planning permission.</p> <p>Applications for the discharge of pre-commencement conditions are prioritised given that these are applications which have gone through the majority of the planning process and as a result are closest to implementation. In the interests of ensuring ‘timely delivery’ it is therefore considered appropriate to prioritise these applications.</p> <p>By contrast, outline planning permission are ranked as lowest priority in the sub-criteria given that applications for outline planning permission are those that are at the earliest stage in the planning</p>	<ul style="list-style-type: none"> • Paragraph 69 of the NPPF

	<p>process whereby only the general principles of how a site can be developed are agreed with the LPA. Prior to being able to start work on site, they would need to submit an application(s) for the approval of reserved matters and appropriately satisfy any pre-commencement conditions.</p> <p>If outline applications were prioritised it could result in a situation whereby credits are allocated to application which are likely to take a considerable length of time to be delivered, particularly when compared to applications which are accompanied by much more detail. By prioritising these applications, the Council would be jeopardising the need for timely delivery (objective 6 of this report) and it could also mean that the Council is left waiting for a much longer period of time prior to seeing a return on investment, contrary to objective 7 of this report.</p>	
Minor Development	<p>Paragraph 69 of the NPPF acknowledges that smaller sites can generally be built out quickly and therefore by prioritising minor development it is considered that the Council is helping to ensure that the P credit allocation meets objective 6 of this report (ensuring timely delivery).</p> <p>The quicker that the Council is able to ‘unlock’ development and get housing units being built, the closer it gets to ensuring that it meets its wider housing duties including meeting housing delivery targets and ensuring that there is a 5YHLS, corresponding to objectives 4 and 5.</p> <p>Furthermore, minor development is generally brought forward by smaller scale developers and delivered by the local construction industry and therefore prioritising this type of development proposal could indirectly support objective 3 - Supporting SME businesses and objective 2 – supporting post Covid-19 recovery.</p> <p>Finally, minor development’s generally have less scope than larger strategic sites to deliver on site phosphate mitigation particularly at scale (e.g. wetlands) due to of site location, plot size and/or viability. As such there is an argument that P credits should be reserved for minor development specifically for this reason.</p>	<ul style="list-style-type: none"> • Paragraph 69 of the NPPF
Housing Development	<p>Housing is a planning priority at both a national and local level, as evidenced by:</p> <p>Chapter 5 NPPF - Delivering a sufficient supply of homes which sets out specific requirements for local authorities to determine housing requirement figures and requirements for maintaining supply and delivery, including demonstrating a five year housing land supply.</p>	<ul style="list-style-type: none"> • Chapter 5 NPPF • Policy CP4 Taunton Deane adopted Core Strategy

	<p>Taunton Deane Core Strategy Strategic Objective 4 sets out the need to provide for at least 17,000 new dwellings over the period 2008 to 2028, this is supported by Policy CP4 which states that the delivery of homes will be broadly phased with the delivery of 4,500 expected between 1 April 2016 and 31 March 2021.</p> <p>Policy SC2 of the West Somerset Local Plan sets out that ‘the plan will deliver approximately 2,900 dwellings to provide for the area’s housing needs during the period to 2032.’</p> <p>Objective 8 of the Taunton Town Centre Area Action Plan relates to a ‘town centre that is home to many more people’ which makes provision for about 2100 new homes to be built in the town centre.</p> <p>In meeting the Housing Delivery Test, the Council should be delivering a minimum of 562 homes per year across the District, of which a significant contribution comes from planned development within the affected River Tone catchment area.</p> <p>Objectives 4 and 5 of this report are solely focused on housing given that it is a key policy driver at a local and national level, more so than other types of development e.g. tourist accommodation. Therefore the criterion to prioritise C3 housing development (including traveller sites) is considered to be in line with national and local policy and strategy.</p>	<ul style="list-style-type: none"> • Policy SC2 Somerset West Local Plan to 2032 • Objective 8 Taunton Town Centre Area Action Plan • SWT Housing Delivery Test Action Plan 2020
<p>Affordable Housing</p>	<p>Affordable housing is also a key planning priority at a local and national level, as demonstrated by:</p> <p>Paragraph 62 of the NPPF which states that, ‘the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies.’ Paragraph 65 sets out that, at least 10% of the total number of homes on major development sites should be affordable in most cases.</p> <p>Priority 1 of the Somerset Housing Strategy 2019 – 2023 is to ‘maximise the number of affordable homes (all tenures).’</p> <p>Policy CP4 of the Taunton Deane Core Strategy sets a of 25% of new housing to be in the form of affordable units over the Plan Period.</p> <p>Policy SC4 of the West Somerset Local Plan states that ‘<i>Affordable housing will be provided from developments in the minimum ratio of 35 affordable units for every 65 open-market (prorata) based on</i></p>	<ul style="list-style-type: none"> • Paragraphs 62-65 NPPF • Somerset Housing Strategy 2019 - 2023 • Policy CP4 - Taunton Deane adopted Core Strategy • Taunton Deane Borough Council Affordable Housing Supplementary Planning Document • Policy SC4 West

	<p><i>the total number of dwellings to be provided in the development.'</i></p> <p>Objective 8 of the Taunton Town Centre Area Action Plan sets out that of the 2100 new homes to be built in the town centre, at least 500 should be affordable homes.</p> <p>In addition to the above, the SWT Council Corporate Strategy (2020-2024) has a strategic theme of 'homes and communities' the first objective linked to this theme is to <i>'increase the number of affordable and social homes in our urban towns, rural and coastal communities; including those built by the Council.'</i></p> <p>In response to the Covid-19 pandemic, the five Somerset Council's developed the Somerset Growth and Recovery Plan. This also sets an aim to deliver new affordable homes across Somerset.</p> <p>Finally, the report to Full Council on the 5th October in relation to the interim strategy, highlighted the non-delivery of affordable housing as a key risk in the 'do nothing' scenario.</p> <p>In light of the above, it was considered that prioritising applications which exceed affordable housing policy requirements is justified in consideration of national and local policy and guidance.</p>	<p>Somerset Local Plan to 2032</p> <ul style="list-style-type: none"> • Objective 8 Taunton Town Centre Area Action Plan • Somerset Recovery and Growth Plan • Somerset West and Taunton Corporate Strategy (2020-2024) <p>Somerset Levels and Moors Phosphate Mitigation Report to Full Council 5 Oct 2021</p>
Implementable Development	<p>The purpose of the interim measures, as explained in the Full Council report is to 'support the unlocking of development in the catchment of the River Tone.'</p> <p>In light of their interim nature and the need to act quickly to support the re-commencement of development in the catchment area, it is reasonable to allocate P credits to development proposals where the first housing unit can commence development on site within 3 months of permission being granted. This is considered to be critical to prevent P credits from being exhausted by development's which do not materialise until years after permission is granted.</p>	<ul style="list-style-type: none"> • Paragraph 77 NPPF

Appendix D – Working Draft Template Section 106 Agreement

THIS DEED of AGREEMENT is made the _____ day of _____ 2022

PARTIES:

- (1) **SOMERSET WEST AND TAUNTON COUNCIL** of The Deane House, Belvedere Road, Taunton, Somerset TA1 1HE (“**the Council**”)
- (2) [.....] (Co. Regn. No. [.....]) whose registered office is situated at [.....] (“**the Owner**”)

RECITALS:

- 1 The Council is the Local Planning Authority for the purposes of the 1990 Act for the area in which the Site is situated
- 2 The Owner is the registered freehold proprietor of the Site with title absolute at the Land Registry under Title Number [.....]
- 3 The Application was submitted to the Council by [the Owner] on [.....] and validated on [.....].
- 4 Pursuant to its statutory duty under Regulation 63 of The Conservation of Habitats and Species Regulations 2017 the Council has undertaken an assessment of the Development and has concluded that the Development is likely to have a significant effect upon the Ramsar Site as (in the absence of mitigation) the Development will give rise to additional phosphates within the catchment of the Ramsar Site
- 5 The Council has identified the quantity of P-Credits which will be required to ensure the Development will be phosphate neutral
- 6 The Owner has agreed to pay to the Council the P-Credit Sum to secure the Initial Reservation and subsequent Allocation of the P-Credit Requirement to the Development
- 7 Pursuant to its statutory duty under Regulation 63 The Conservation of Habitats and Species Regulations 2017 to undertake an appropriate assessment of the implications of the Development the Council is satisfied beyond reasonable doubt that the allocation of the P-Credit Requirement to the Development will ensure that the Development is phosphate neutral and thus will not result adversely affect the integrity of the Ramsar Site
- 8 The Council has resolved to grant the Permission subject to conditions and the completion of a Section 106 Agreement to secure various planning obligations
- 9 This Agreement has been entered into by the parties hereto to secure the planning obligations set out herein

NOW THIS DEED WITNESSES AS FOLLOWS:

1 DEFINITIONS

For the purposes of this Agreement the following expressions shall have the following meanings:

- 1.1 **“1990 Act”** means the Town and Country Planning Act 1990 and all subsequent statutory amendments to it
- 1.2 **“Allocation”** means the permanent allocation by the Council of the P-Credit Requirement to the Development following receipt of the Final Payment from the Owner and **“Allocated”** shall be construed accordingly
- 1.3 **“Application”** means the full application for the [.....] at [.....]. and accorded Council reference number [.....]
- 1.4 **“Commencement of Development”** means the date on which a material operation as defined in Section 56(4) of the 1990 Act shall be commenced in respect of the development provided that it shall not include operations in connection with site investigation demolition site clearance archaeological work and the erection of hoarding or other means of enclosure for the purpose of securing the site and the word **“Commence”** and **“Commenced”** in relation to the Development shall be construed accordingly.
- 1.5 **“Development”** means the development of the Site in accordance with the Application and the Permission
- 1.6 **“Dwelling”** means each dwelling to be constructed on the Site pursuant to the Permission and the phrase **“Dwellings”** shall be construed accordingly
- 1.7 **“Indexation”** means the Building Cost Information Service General Building Cost Index of the Royal Institution of Chartered Surveyors (or in the event of the said index being discontinued the nearest equivalent index)
- 1.8 **“Initial Deposit”** means 10% of the P-Credit Sum
- 1.9 **“Initial Reservation”** means the provisional reservation by the Council of the P-Credit Requirement to the Development following receipt of the Initial Deposit from the Owner
- 1.10 **“Interest”** means interest at 8% above the base lending rate of National Westminster Bank plc from to tome
- 1.11 **“Interim Strategy”** means the programme of interim measures and projects to be undertaken by the Council (as adopted by Full Council on 5th October 2021) to improve water quality and efficiency within the catchment of the Ramsar Site
- 1.12 **“Final Payment”** means 90% of the P-Credit Sum

- 1.13 **“Permission”** means planning permission to be issued for the Development pursuant to the Application
- 1.14 **“P-Credit”** means the instrument(s) that represents the water quality and efficiency improvements generated by the Council through the Interim Strategy
- 1.15 **“P-Credit Sum”** means [£.....] being the total cost to the Owner of the P-Credit Requirement
- 1.16 **“P-Credit Requirement”** means [.....*number*.....] of P-Credits being the quantity of P-Credits which are required to ensure the Development will be phosphate neutral
- 1.17 **“Plan”** means the plan attached to this Agreement
- 1.18 **“Ramsar Site”** means the Somerset Levels and Moors Ramsar Site
- 1.19 **“Redemption Certificate”** means written confirmation by the Council that the P-Credit Requirement has been Allocated to the Development
- 1.20 **“Released”** means the release and cancellation of the Initial Reservation
- 1.21 **“Site”** means the land at [.....] Somerset against which this Agreement may be enforced as shown edged red for identification purposes on the Plan
- 1.22 **“Working Days”** means any day from Monday to Friday (inclusive) which is not Christmas Day Good Friday or a statutory bank holiday and including the days between Christmas Day and New Years Day and **“Working Days”** shall be construed accordingly

2 CONSTRUCTION OF THIS DEED

- 2.1 Where in this Agreement reference is made to any clause, paragraph, schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph, schedule or recital in this Agreement.
- 2.2 Words importing the singular meaning where the context so admits include the plural meaning and vice versa.
- 2.3 Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all such words shall be construed interchangeably in that manner.
- 2.4 Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans, regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it

2.5 Unless the context otherwise requires, references to any party to this Agreement shall include the successors in title to that party and to any person deriving title through or under that party and in the case of the Council the successors to its statutory functions.

2.6 The headings are for reference only and shall not affect construction.

LEGAL BASIS

3 This Agreement is made pursuant to Section 106 of the 1990 Act to the intent that it shall bind the Owner and its successors in title to each and every part of the Site.

4 The covenants on the part of the Owner contained in Schedule 1 hereto are planning obligations for the purposes of Section 106 of the 1990 Act which are enforceable by the Council

5 This Agreement is also entered into pursuant to Section 111 of the Local Government Act 1972 and Section 1 of the Localism Act 2011 and all other enabling legislation.

CONDITIONALITY

6 This Agreement is conditional upon the grant of the Permission

COVENANTS

7 The Owner covenants with the Council so as to bind the Site as set out in Schedule 1 hereto

8 The Council covenants with the Owner as set out in Schedule 2 hereto

MISCELLANEOUS

9 This Agreement shall be registrable as a local land charge by the Council

10 This Agreement shall cease to have effect if the Permission is quashed, revoked or otherwise withdrawn or (without the consent of the Owner) it is modified by any statutory procedure or expires prior to the Commencement of Development

11 No person shall be liable for any breach of any of the planning obligations or other provisions of this Agreement after it shall have parted with its entire interest in the Site or its interest in the part of the Site in relation to which the breach subsists but without prejudice to liability for any subsisting breach arising prior to parting with such interest.

12 Nothing in this Agreement shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Permission or a further planning permission granted pursuant to Section 73 of the 1990 Act in relation to the Permission) granted (whether or not on appeal) after the date of this Agreement.

13 This Deed shall not be enforceable against any tenant of an individual Dwelling nor against those deriving leasehold title from them.

14 If and to the extent that the Permission or any condition attached to the Permission shall be varied or amended then any covenant in this Agreement which is inconsistent with the Permission or condition as so varied or amended shall be deemed to have been discharged by virtue of such variation or amendment of the Permission or condition

- 15 Any provisions in this Agreement referring to the consent or approval of the Council are to be construed as imposing an obligation on the Council not to refuse any such consent or approval unreasonably or to delay in the provision of such consent or approval and to act reasonably
- 16 The Council shall upon receipt of a written request from the Owner and without unreasonable delay at any time after the planning obligations under this Agreement have been fulfilled issue written confirmation thereof and thereafter note all related entries in the Register of Local Land Charges
- 17 The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement and its terms shall not be enforceable by or against anyone other than the Owner and the Council and any person deriving title from them
- 18 This Agreement shall not be binding on nor enforceable against any statutory undertaker or other person who acquires any part of the Site or any interest in it for the purposes of the supply of electricity gas water drainage telecommunication services or public transport services;
- 19 The Owner shall pay to the Council on completion of this Agreement the reasonable legal costs of the Council incurred in the negotiation preparation and execution completion and registration of this Agreement

WAIVER

- 20 No waiver (whether expressed or implied) by the Council or the Owner of any breach or default in performing or observing any of the covenants terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council and the Owner from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default.

CHANGE IN OWNERSHIP

- 21 The Owner agrees to give the Council written notice of any change in ownership of any of its interests in the Site occurring before all the obligations under this Deed have been discharged such notice to give details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Site or unit of occupation purchased by reference to a plan within 15 Working Days of the said change in ownership PROVIDED THAT this clause shall not apply to individual disposals of Dwellings to tenants

SETTLEMENT OF DISPUTES

- 22 Any dispute arising out of the provisions of this Agreement may be referred with the agreement of all parties to that dispute to a person having appropriate qualifications and experience in such matters ("**the Expert**") for the determination of that dispute PROVIDED THAT the provisions of this clause shall be without prejudice to the right of any party to seek the resolution of any matter relating to the Agreement by the Courts and/or in accordance with Section 106(6) of the 1990 Act and the referral of any matter to the Expert shall not prejudice prevent or delay the recourse of any party to the Courts or to the provisions of Section 106(6) of the 1990 Act for the resolution of any matter arising from the Agreement

- 23 The Expert shall be appointed jointly by the relevant parties to the dispute ("**the Relevant Parties**") or in default of agreement by a person nominated by the President for the time being of the Royal Institution of Chartered Surveyors on the application of any of the parties
- 24 The decision of the Expert shall save in the case of manifest error or fraud be final and binding upon the Relevant Parties and the following provisions shall apply:
- 24.1 the charges and expenses of the Expert shall be borne equally between the Relevant Parties unless the Expert shall otherwise direct
- 24.2 the Expert shall give the Relevant Parties an opportunity to make representations and counter representations to him before making his decision
- 24.3 the Expert shall be entitled to obtain opinions from others if he so wishes
- 24.4 the Expert shall make his decision within the range of any representations made by the Relevant Parties themselves
- 24.5 the Expert shall comply with any time limit or other directions agreed by the Relevant Parties on or before his appointment

INDEXATION, INTEREST AND VAT

- 25 Any **sum to be paid to the Council hereunder shall be** increased by an amount equivalent to the increase in the Index from the date of this Deed until the date on which such sum is due to be paid pursuant to this Deed.
- 26 If any payment due under this Deed is paid late, Interest shall be payable from the date payment is due to the date of payment.
- 27 All monies paid in accordance with the terms of this Deed shall be exclusive of any value added tax properly payable

JURISDICTION

- 28 This Agreement is governed by and interpreted in accordance with the law of England and the parties submit to the non-exclusive jurisdiction of the courts of England

DELIVERY

- 29 The provisions of this Agreement (other than this clause which shall be of immediate effect) shall be of no effect until this Agreement has been dated.

IN WITNESS whereof the Owner and the Council have executed this Agreement as a Deed on the day and year first before written

SCHEDULE 1
Owner's Covenants

The Owner hereby covenants with the Council:

1. On the date hereof to pay the Initial Deposit to the Council and the Owner acknowledges that the Initial Deposit shall be non-refundable
2. The Owner shall Commence the Development within three calendar months of the date of the issue of the Permission unless otherwise agreed in writing with the Council (such agreement to be at the Council's absolute discretion)
3. Not to Commence the Development until the Final Payment has been paid to the Council and the Council has issued the Redemption Certificate
4. In the event that the Development is not Commenced within the period stipulated in or otherwise agreed pursuant to Paragraph 2 of this Schedule:
 - 4.1 the Initial Reservation shall be Released and the Owner acknowledges that the Council shall then be entitled to re-allocate the relevant P-Credits to other development and projects in its administrative area; and
 - 4.2 the Council shall be released from the obligation in Paragraph 4 of Schedule 2 to accept the Final Payment and issue the Redemption Notice
5. Not to Occupy or allow or permit the Occupation of any Dwelling unless and until the Council has issued the Redemption Notice or unless otherwise agreed in writing with the Council
6. To notify the Council in writing of the Commencement of Development within 5 Working Days of the date of the same

SCHEDULE 2
Council's Covenants

1. Within 5 Working Days of receipt of the Initial Deposit the Council shall provide the Owner with written confirmation of the Initial Reservation

2. On receipt of the Initial Deposit from the Owner the Council shall not allocate the P-Credit Requirement to any other development or project within its administrative area unless Released in accordance with Paragraph 4 of Schedule 1

3. In the event that the Development is not Commenced within the period stipulated in or otherwise agreed pursuant to Paragraph 2 of Schedule 1 the Council's agrees and acknowledges that the Owner shall be released from the obligation in Paragraph 4 of Schedule 1 to pay the Final Payment

4. Subject to Paragraph 4.2 of Schedule 1, within 5 Working Days of receipt of the Final Payment from the Owner the Council shall issue the Redemption Notice

THE COMMON SEAL of)

SOMERSET WEST AND TAUNTON COUNCIL)

was affixed in the presence of:)

Authorised Signatory

EXECUTED by affixing the Common Seal of)

in the presence of:

)
)

Director

Director/Secretary

DRAFT