

# FAREHAM

## BOROUGH COUNCIL

### Report to the Director of Planning and Regeneration for Decision 18<sup>th</sup> May 2021

<b>Portfolio:</b>	Planning and Development
<b>Subject:</b>	<b>Nitrate Mitigation at Coleman's Lane, Porchfield, Newport, Isle of Wight – Legal Agreement with Heaton Farms Ltd &amp; Isle of Wight Council</b>
<b>Report of:</b>	Head of Development Management
<b>Corporate Priorities:</b>	Protect and Enhance the Environment

#### **Purpose:**

This report seeks authority from the Director of Planning and Regeneration for the Council to enter into a legal agreement with Heaton Farms Ltd and the Isle of Wight Council (IWC) in respect of land owned by Heaton Farms Ltd at Coleman's Lane Porchfield, Newport, Isle of Wight (IOW).

#### **Executive summary:**

In February 2019, Natural England updated its advice to local councils to reflect European case law and recommended an Appropriate Assessment is undertaken within the Borough of Fareham for every planning application for new dwellings.

Natural England has highlighted that increased levels of nitrates entering The Solent (resulting from increased amounts of wastewater from new dwellings) is likely to have a significant effect upon sites protected for their nature conservation value.

Where developers are not able to demonstrate that their proposals maintain or reduce the levels of nitrates leaving their site, mitigation measures need to be identified. The majority of residential planning applications will need to mitigate for increased levels of nitrates entering The Solent; in most instances developers are unable to provide this mitigation on their development site.

Heaton Farm Ltd proposes bringing forward agricultural land at Coleman's Lane on the Isle of Wight, to be used as mitigation for nitrates arising from new residential development within The Solent Fluvial catchment area.

Authority is sought from the Director of Planning and Regeneration for the Council to enter into a legal agreement with Heaton Farms Ltd and IWC to secure nitrate mitigation at Coleman's Lane in connection with residential planning permissions

granted within the Borough of Fareham.

**Recommendation:**

That authority be given by the Director of Planning and Regeneration for the Council to enter into a legal agreement with Heaton Farms Ltd and IWC to secure nitrate mitigation at Coleman's Lane in connection with residential planning permissions granted within the Borough of Fareham.

**Reason:**

Securing nitrate mitigation at Coleman's Lane will enable Fareham Borough Council to grant planning permission for a number of residential schemes within the Borough, many of which have been stalled for a considerable period of time following the European Court rulings and Natural England's advice. This in turn will ensure that residential planning permissions are granted and housing can be built which will contribute towards meeting the Council's housing need.

**Cost of proposals:**

The Council's legal costs in connection with the drafting of the legal agreement will be met by Heaton Farms Ltd.

**Appendices:**

- A: Location Plan showing the nitrate mitigation land at Coleman's Lane
- B: Plan showing Solent Nutrients- Isle of Wight Fluvial Catchments

**Reference papers:**

- A: Interim Nitrate Mitigation Solution – Report to the Executive 2<sup>nd</sup> September 2019
- B: Advice on achieving nutrient neutrality for new development in the Solent Region Version 5 published June 2020 by Natural England
- C: Nitrate Mitigation - Legal Agreement with Hampshire and Isle of Wight Wildlife Trust & Isle of Wight Council- Delegated Decision by the Director of Planning and Regeneration – 17<sup>th</sup> July 2020
- D: Call-In of Officer Delegated Decision No. 2195 - Nitrate Mitigation - Legal Agreement with Hampshire and Isle of Wight Wildlife Trust & Isle of Wight Council- Agenda and minutes of the Policy and Resources Scrutiny Panel 30<sup>th</sup> July 2020

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## BOROUGH COUNCIL

### Briefing Paper to Director of Planning and Regeneration

<b>Date:</b>	18 <sup>th</sup> May 2021
<b>Subject:</b>	Nitrate Mitigation at Coleman's Lane, Porchfield, Newport, Isle of Wight – Legal Agreement with Heaton Farms Ltd & Isle of Wight Council
<b>Briefing by:</b>	Head of Development Management
<b>Portfolio:</b>	Planning and Development

#### INTRODUCTION

1. In February 2019, Natural England updated its advice to local councils to reflect European case law and recommended an Appropriate Assessment is undertaken within the Borough of Fareham for every application for new dwellings and proposals which involve additional overnight accommodation.
2. Natural England has highlighted that increased levels of nitrates entering The Solent (resulting from increased amounts of wastewater from new dwellings) is likely to have a significant effect upon protected sites.
3. Where developers are not able to demonstrate that their proposals maintain or reduce the levels of nitrates leaving their site, mitigation measures need to be identified. The majority of planning applications for development comprising residential or other overnight accommodation will need to mitigate for increased levels of nitrates entering The Solent. In most instances, developers will be unable to provide this mitigation on their development site.

#### BACKGROUND

4. Since February 2019, there has been a substantial impact upon the grant of planning permissions for new housing in Fareham, as developers have sought to secure nitrate mitigation. Most of the mitigation proposals which have been brought forward to date involve putting agricultural land into less 'nitrate' intensive uses. Many of these mitigation proposals have involved land outside of the Borough.
5. One of the largest schemes locally which has assisted with nitrate mitigation is at Little Duxmore Farm on the Isle of Wight. This particular scheme has been able to mitigate the impacts of nitrates from a number of developments in the Borough, but it does not have capacity to mitigate the impacts from all schemes. As a result, there are a considerable number of planning applications for residential development within the

Borough which will remain undetermined until nitrate mitigation has been identified and secured.

6. Fareham Borough Council is required to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement or local housing need.
7. Annually the Ministry of Housing, Communities and Local Government carries out a 'Housing Delivery Test' which measures the number of residential units delivered over the preceding three years against the Council's requirements. Where delivery is less than 85% of the Council's housing requirement, the Council is required to apply an increased buffer to its requirements. The latest Housing Delivery Test results show that housing delivery in the borough has fallen to 79%, meaning a 20% buffer must be added to its five-year housing land supply requirement.
8. The Council's ability to grant planning permissions for residential development has been affected since February 2019, as a result of the nitrates issue in The Solent. This in turn has impacted upon the deliverable sites this Council is able to identify as part of its five-year housing land supply. The reduction in the planning permissions the Council has been able to grant since February 2019 will impact further upon the Council's Housing Delivery Test results in the future.

## **COMMENTS**

9. The Council has worked hard to find resolutions as, by carrying out its legal duties in one area, namely in considering the effects of proposed developments upon protected sites, it is failing in another, which is to make provision for new housing within the Borough in line with the amount specified by the Government.
10. The potential impacts upon The Solent is an issue which involves a number of councils within South Hampshire. All of the affected councils, including Fareham, are members of the Partnership for South Hampshire (PfSH), a Partnership which seeks to resolve issues through local authorities working together with other relevant statutory bodies. PfSH is working with the Environment Agency, Natural England and Southern Water to address the issue of nitrates within The Solent.
11. Whilst this Council, working through PfSH, continues to explore broader strategic mitigation solutions for nitrates, short-term mitigation solutions are being bought forward by third parties.
12. In September 2019, a report was presented to the Executive to outline the situation in relation to the advice from Natural England and the extent of the nitrates problem. The report detailed a package of measures which together formed an interim mitigation solution which would move the Council towards a position of issuing planning permissions. The proposed approach to mitigation, as set out at paragraph 15 of the Executive report includes a mix of different measures. One of the first measures identified relates to the 'management of existing agricultural land' and managing land in a way that involves the use of less nitrogen fertiliser.
13. It is Natural England's view that mitigation land within the same 'catchment' as the development location is appropriate. All development within the Borough of Fareham drains to Peel Common Wastewater Treatment Works. Natural England consider that mitigation is therefore appropriate in any of the following catchments – River Meon, Portsmouth Harbour, Medina Estuary, Wootton Creek, Newtown Harbour and

Langstone Harbour. Plans showing all of these catchments are set out in the 'Advice on achieving nutrient neutrality for new development in the Solent Region Version 5' published June 2020 by Natural England.

14. In July 2020 the Council took the decision to enter into a legal agreement with Hampshire and Isle of Wight Wildlife Trust (HLOWWT) and the Isle of Wight Council (IWC) to enable land at Little Duxmore Farm on the Isle of Wight to be used as mitigation for nitrates arising from new residential development within the catchment area. The legal agreement was completed and signed in September last year and the first planning permissions in this Borough, relying on nitrate mitigation land provided at Little Duxmore Farm, were issued in November 2020. The proposed use of land at Coleman's Lane would work in a similar way to the scheme already in use at Little Duxmore Farm.
15. The proposed mitigation land has historically been in use for intensive agricultural production of silage and maize as part of a larger dairy farm. The nitrates mitigation proposal involves taking this land out of agricultural production, in perpetuity, to be secured through the implementation of an approved woodland planting scheme as it becomes 'credit linked' to a development. This change of use of the land would achieve a reduction in nitrogen output of 31.2Kg/N/ha/yr.
16. In order to agree the nitrogen loss from the current land use, Natural England has reviewed the evidence submitted by Heaton Farms Ltd in relation to historic land use including photographs from Google Earth and land use data from the Rural Payments Agency in connection to the historic Basic Payment Scheme. Natural England concur with the land use conclusion that the site would fall under the 'dairy' agricultural use type and it has been demonstrated that this land use has occurred for a period of time well in excess of 10 years. This was further confirmed through records for historic Higher Level Stewardship agreements.
17. In accordance with the 'Advice on achieving nutrient neutrality for new development in the Solent region' (v5 June, 2020), the rate of nitrogen loss for dairy land is 36.2 Kg/N/ha/yr. A change of use of the land to woodland would result in a nitrogen loss from the site of 5kg/N/ha/yr. Natural England has confirmed that by taking the eligible areas of the site (15.6ha) out of dairy production and securing the implementation of a woodland planting scheme, the available budget for the site as a whole would be 486.72 Kg/N/yr. In the urban area where there is no corresponding change in land use, a single new dwelling would typically need to offset 0.7Kg/N/yr.
18. The proposed nitrate mitigation scheme is considered suitable as nitrate mitigation for development served by the Peel Common WasteWater Treatment Works (WWTW) which discharges treated wastewater into the centre of The Solent Channel. The mitigation land slopes on a shallow gradient towards an adjacent watercourse 'Rodge Brook', and the soil type is heavy clay. The mitigation land is within the fluvial catchment of Newtown Harbour Site of Special Scientific Interest (SSSI). The SSSI is a component part of the Solent & Southampton Water Special Protection Area (SPA) & Ramsar, and the Solent Maritime Special Area of Conservation (SAC).
19. Natural England have confirmed that the proposed mitigation land is appropriately sited in terms of lower fluvial catchment, geology and hydrology to deliver nutrient offsetting for Newtown Harbour SSSI, the Solent and Southampton Water SPA and Ramsar site, and the Solent Maritime SAC. A plan showing the mitigation land is attached at Appendix A to this report. A second plan attached at Appendix B shows the mitigation land and its relationship to river catchments feeding into the Solent.

20. In the first instance, the Council will need to agree with developers the amount of nitrates leaving the site that will arise from carrying out their proposed development (the amount of nitrates is measured in kilogrammes on an annual basis). Where the development will lead to an increase in the discharge of nitrates, the developer can then establish how many 'credits' they need to purchase from Heaton Farms Ltd. When developers buy 'credits', Heaton Farms Ltd will undertake to manage a specified area of the site in a way which limits the amounts of nitrates which enters the ground and ultimately The Solent fluvial catchment.
21. In order to rely on the site at Coleman's Lane for nitrate mitigation, and to ensure that it is managed in a particular way, the Council must enter into a legal agreement with Heaton Farms Ltd and IWC. The legal agreement will provide a legal framework to facilitate the purchase of nitrate credits for applicants/developers, will control how the land is managed and for what period of time, and will ensure monitoring is undertaken to ensure compliance with the legal agreement.
22. The legal agreement does not specify how many nitrate credits will need to be provided in mitigation for specific development sites. The amount of mitigation needed for each development proposal will need to be agreed on a case by case basis with this Council as part of the planning application process. Once the level of mitigation has been established, and the Council has concluded following an appropriate assessment that there will be no adverse effect on the integrity of protected sites as a result of the development, the applicant/developer will then enter into arrangements with Heaton Farms Ltd to purchase the nitrate mitigation. The applicant/developer will need to satisfy this Council that the mitigation has been secured at the time of granting planning permission, with proof of the purchase of credits to be provided before their development commences.
23. A legal agreement has been drafted to this effect with input from solicitors acting for Heaton Farms Ltd, Fareham Borough Council and IWC. The legal agreement includes obligations to control the uses that should be prohibited from the site and the period of time for which the mitigation should be secured. The monitoring of the legal agreement, ensuring that Heaton Farms Ltd complies with its requirements, will be undertaken by the Isle of Wight Council.

## **RISK ASSESSMENT**

24. This Council's Solicitors are satisfied that the legal agreement as drafted provides an appropriate mechanism for securing nitrate mitigation for development involving residential or other overnight accommodation being undertaken within Fareham Borough.
25. The Council's Solicitors are further satisfied that the construction of the legal agreement, including the monitoring of its provisions by the IWC, would ensure that it meets the requirements of the Habitat Regulations as emphasised through European Court judgments when determining planning applications.
26. When granting planning permission, the Council is not under a legal duty to ensure that measures are secured to achieve the improvement of protected sites (i.e. a net reduction in the amount of nitrates entering The Solent) where those sites are in an 'unfavourable' condition. The Habitat Regulations, which transpose the Habitats Directive into UK law, are quite clear that, when granting planning permission, the Council must ensure that there will be 'no adverse effect on the integrity' of protected sites. There are no EU or domestic court decisions that state that more than nitrate

neutrality must be achieved. In many cases, a small improvement may be achieved anyway because developers may be required to purchase a rounded-up number of 'credits' where their requirement is not a whole number.

## **APPROPRIATE ASSESSMENT**

27. The agreement is neither a 'plan' nor 'project' under regulation 63 of the Habitats Regulations, and therefore there is no requirement to consider the effect of the agreement on protected sites. A plan or project would ordinarily either involve some form of physical intervention or have an effect on land, whereas this agreement on its own will only have an effect on land in the event that development in Fareham is granted planning permission, which itself will require its own appropriate assessment.
28. However, even if the agreement were to be considered to be a plan or project, such that regulation 63 applies, officers are nevertheless of the view that the agreement would not have a likely significant effect on the protected sites, meaning that it could be 'screened out'.
29. This is for three reasons: firstly, whilst there is no specific definition of the term 'significant' in the Habitats Regulations or Habitats Directive, it can be interpreted in the context of the protective objectives of the Habitats Directive as meaning a negative or adverse effect. Once the agreement takes effect, the result will be to remove land at Coleman's Lane from intensive agricultural use and secure the cessation of large inputs of fertiliser and, as a consequence, reduce the amount of nitrates entering into The Solent, thereby reducing the risk of eutrophication and preventing the deterioration of the protected sites. This will be a positive effect in light of the sites' conservation objectives.
30. Secondly, even if it were to be considered that (as the mirror opposite to development having a likely significant effect), the equivalent reduction may equally have a likely significant effect, there is no effect on the land as a result of the agreement unless a notice is served. When that notice is served, it is in combination with another development in Fareham (which would be subject to its own assessment). Therefore, on its own, it has no effect since the land remains unaffected by the agreement unless 'credits' are purchased and the covenants crystallise.
31. Finally, in an assessment in combination with other development, the effect of the agreement, when a notice is served, is the decrease in nitrates from the site, resulting in no net change to the area when considered with the specific linked development or any proposed development in Fareham. It won't give rise to a negative effect let alone a significant one.
32. Officers are of the view that the agreement is not caught by regulation 63 of the Habitats Regulations (since it is not a 'plan or project') but even if were, the agreement would not have a likely significant effect and can be screened out as set out above. Therefore, no appropriate assessment is required.

## **FINANCIAL IMPLICATIONS**

33. The Council's costs associated with preparing the legal agreement have been paid by Heaton Farms Ltd.
34. Any mitigation 'credits' will involve a financial transaction between the applicant/developer and Heaton Farms Ltd. This Council will not be involved in these financial transactions.

35. The monitoring work undertaken by IWC will be paid for by Heaton Farms Ltd.

## **CONCLUSION**

36. The land at Coleman's Lane has historically been used for intensive agricultural purposes in association with dairy farming. The way in which Heaton Farms Ltd will use and manage the land will substantially reduce nitrogen inputs into the land and therefore nitrogen run-off and other discharges into protected sites in the Solent Fluvial Catchment.
37. The legal agreement will provide a legal framework to facilitate the purchase of nitrate credits for applicants/ developers, will control how the mitigation land is managed and for what period of time, and will ensure monitoring is undertaken to ensure compliance with the legal agreement
38. The legal agreement does not specify how many nitrate credits will need to be provided in mitigation for specific development sites. The amount of mitigation needed for each development proposal will need to be agreed on a case by case basis with this Council as part of the planning application process. Once the level of mitigation has been established, and the Council has concluded following an appropriate assessment that there will be no adverse effect on the integrity of protected sites as a result of the development, the applicant/ developer will then enter into arrangements with Heaton Farms Ltd to purchase the nitrate mitigation. The applicant/ developer will need to satisfy this Council that the mitigation has been secured at the time of granting planning permission, with proof of the purchase of credits to be provided before their development commences.
39. There is an urgent and pressing need to grant planning permissions for housing development within the Borough so that the Council can ensure that it identifies deliverable sites sufficient to provide a minimum of five years' worth of housing. Further delays in the granting of planning permissions and in turn the delivery of residential units on the ground, are likely to lead to the Council being required to make provision for even larger numbers of housing in the future.
40. The recent restrictions put in place to tackle the spread of Covid-19 have had a considerable impact upon the housing market and construction industry. The granting of planning permissions at the earliest possible date would assist in stimulating the construction industry and housing market.
41. Authority should be given by the Director of Planning and Regeneration for the Council to enter into the legal agreement with Heaton Farms Ltd and IWC, to secure nitrate mitigation at Coleman's Lane in connection with residential development within the Borough of Fareham. This in turn will provide an opportunity for a large number of stalled residential schemes within the Borough to proceed.

## **Enquiries:**

For further information on this report please contact Lee Smith (Ext 4427) Head of Development Management.