

# FAREHAM

## BOROUGH COUNCIL

### Report to the Director of Planning and Regeneration for Decision 22 October 2021

<b>Portfolio:</b>	Planning and Development
<b>Subject:</b>	<b>Nitrate Mitigation – Legal Agreement with William and James Butler and Butler Farms Ltd</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 William Butler, James Butler and Butler Farms Ltd in respect of land owned by William and James Butler at Whitewool Farm, Whitewool Lane, East Meon, Hampshire GU32 1HW. The agreement will allow the Council to accept nitrates mitigation for proposed residential developments in the Borough from the mitigation scheme at Whitewool Farm.

#### **Executive summary:**

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

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

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.

William and James Butler and Butler Farms propose bringing forward agricultural land and a wetland scheme at Whitewool Farm, Hampshire to be used as mitigation for nitrates arising from new residential development within the catchment area. The wetland scheme has obtained planning permission from South Downs National Park Authority.

Authority is sought from the Director of Planning and Regeneration for the Council to enter into a legal agreement with William and James Butler and Butler Farms to secure nitrate mitigation at Whitewool Farm 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 William and James Butler and Butler Farms to secure nitrate mitigation at Whitewool Farm in connection with residential planning permissions granted within the Borough of Fareham.

**Reason:**

Securing nitrate mitigation at Whitewool Farm 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 William and James Butler and Butler Farms.

**Appendices:**

Appendix A: Location Plan showing the nitrate mitigation land at Whitewool Farm, Whitewool Lane, East Meon, Hampshire GU32 1HW

Appendix B: Plan showing Solent Nutrients- Isle of Wight Fluvial Catchments

**Reference papers:**

A: Interim Nitrate Mitigation Solution – Report to the Executive 2nd September 2019

B: Advice on achieving nutrient neutrality for new development in the Solent Region  
Version 5 published June 2020 by Natural England.

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## BOROUGH COUNCIL

### Briefing Paper to Director of Planning and Regeneration

<b>Date:</b>	22 October 2021
<b>Subject:</b>	Nitrate Mitigation – Legal Agreement with William and James Butler and Butler Farms
<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 recent European case law and now recommends 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 (because of 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 are unable to provide this mitigation on their development site.

#### BACKGROUND

4. As a result of the decisions by the European Court and the subsequent advice by Natural England, there has been a substantial impact upon the grant of planning permissions for new housing in Fareham. Whilst mitigation schemes at Little Duxmore Farm, Heaton Farms and Warnford Estate have been able to mitigate the impacts of nitrates from a number of schemes, it is desirable to have additional mitigation schemes to ensure there is adequate supply and to provide applicants with a range of options.
5. 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.
6. 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 this Council's delivery has fallen to 79% meaning a buffer of an additional 20% must be added to its housing requirement.

7. The Council's ability to grant planning permissions for new residential development has been affected by the need to achieve mitigation of nitrates since early 2019. This has impacted upon the specific 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 is able to grant, impacts even further upon the Council's Housing Delivery Test results in the future.

## **NUTRIENT MITIGATION STRATEGY**

8. 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.
9. The potential impacts upon The Solent are 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.
10. Whilst this Council, working through PfSH, continues to explore broader strategic mitigation solutions for nitrates, shorter-term mitigation solutions are being bought forward by third parties.
11. In September 2019, a report was presented to the Executive to outline the situation in the Planning Service 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. Two of the measures identified relates to the 'management of existing agricultural land' (managing land in a way that involves the use of less nitrogen fertiliser) and 'wetland creation' (stripping nitrates from watercourses).

## **THE NUTRIENT MITIGATION PROPOSALS AT WHITEWOOL FARM**

12. The land at Whitewool Farm, Whitewool Lane, East Meon, Hampshire GU32 1HW (hereafter referred to as Whitewool Farm) has historically been in use primarily for dairy farming. Data obtained from the farm's crop management records has been used as evidence of the historic and current use of the land. This in turn has then been used to calculate the nitrate output of the agricultural land resulting in a nitrogen 'credit' for the land to be taken out of farming use.
13. The proposed nitrate mitigation scheme at Whitewool Farm, involves removing land from agricultural use and providing mitigation in two ways: the creation of a wetland and the removal of land from agricultural production.
14. The creation of the wetland will decrease the rate the water flows through the land and with the addition of appropriate planting will create a 'filter' to remove nitrates from

Whitewool Stream before the water leaves the site and moves downstream to join The River Meon and ultimately The Solent.

15. The scheme also proposes the removal of land from agricultural use to enable mitigation to be provided prior to the creation of the wetland and in case the wetland does not deliver the amount of nitrate mitigation anticipated.
16. Natural England has endorsed the proposed scheme which was granted Planning Permission by the South Downs National Park Authority on 17<sup>th</sup> February 2021. Natural England have advised that the nitrate leaching value for dairy use used to calculate the nitrate output from the land when in agricultural use is consistent with the figures stated in Natural England's 'Advice on achieving nutrient neutrality for new development in the Solent region' (v5 June, 2020). Natural England have also confirmed that the stated future nitrate leaching value of 5 kg/ha/yr for the land to be removed from agricultural use is appropriate. Lastly Natural England accept that the proposed wetland has the ability to remove 2000 Kg/TN/yr.
17. The proposed nitrate mitigation scheme at Whitewool Farm is considered suitable as nitrate mitigation for development which would discharge wastewater through the Peel Common WasteWater Treatment Works (WWTW). This includes development connected to the mains sewers across the whole of the Borough of Fareham. The removal of land from agricultural production and the creation of a wetland would substantially reduce nitrogen inputs into the land. The use of fertilisers would be restricted and there would be no waste omitted by animal livestock. This reduces the nitrogen run-off and other discharge into protected sites within The Solent, via Whitewool Stream and the River Meon, which can be used to mitigate for the impact of new development.

#### **SECURING MITIGATION AT WHITEWOOL FARM FOR DEVELOPMENTS WITHIN THE BOROUGH OF FAREHAM**

18. 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 buy from Butler Farms. When developers buy 'credits', Butler Farms will allocate an amount of the nitrates that will be removed by the wetland. The allocation of credits will be secured within an 'allocation agreement' entered into by the applicant and Butler Farms to prevent any 'double counting' or the oversubscription of the mitigation 'credits'. The allocation of credits will limit the amount of nitrates which enters the ground and ultimately The Solent.
19. In order to rely on the Whitewool farm site for nitrate mitigation, and to ensure that it is managed in an appropriate way, the Council must enter into a legal agreement with the landowners William and James Butler together with the tenant (Butler Farms). The legal agreement will provide a legal framework to facilitate the purchase of nitrate credits for applicants/developers, will control how the land at Whitewool Farm is managed and for what period of time, and will ensure monitoring is undertaken to ensure compliance with the legal agreement.
20. 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 Butler Farms 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.

21. A legal agreement has been drafted to this effect with input from solicitors acting for the landowners and Fareham Borough Council. 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 the owner complies with its requirements, will be undertaken by the South Downs National Park Authority (SDNPA).

## **RISK ASSESSMENT**

22. 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.
23. The Council's Solicitors are further satisfied that the construction of the legal agreement, including the monitoring of its provisions by the SDNPA, would ensure that it meets the requirements of the Habitat Regulations as emphasised through recent European Court judgments when determining planning applications.
24. 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 (ie 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**

25. The purpose of this agreement is simply to allow the Council to directly enforce provisions that are mirrored in a section 106 agreement between the owners of Whitewool Farm and SDNPA. The wetland at Whitewool Farm has received planning permission from SDNPA, who is the competent authority for that development. The works at Whitewool Farm that are comprised in that development will take place regardless of the terms of the proposed section 33 agreement, the purpose of which is to provide certainty to this Council when granting planning permission for residential development in the borough that seeks to rely on this nitrate mitigation scheme. Each proposed residential development scheme in Fareham will be subject to its own appropriate assessment where the effectiveness of the mitigation will be reviewed. Therefore, no appropriate assessment is required in connection with the Council entering into this s33 agreement.

## **FINANCIAL IMPLICATIONS**

26. The costs associated with preparing the legal agreement will be split between the Council and the principal developer to benefit from the Whitewool scheme, Taylor Wimpey.
27. Any mitigation 'credits' will involve a financial transaction between the applicant/developer and Butler Farms. This Council will not be involved in these financial transactions.
28. There will be no cost to the Council for the monitoring work, which will be undertaken by the SDNPA.

## **CONCLUSION**

29. 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.
30. 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.
31. Authority should be given by the Director of Planning and Regeneration for the Council to enter into the legal agreement with William and James Butler and Butler Farms, to secure nitrate mitigation at Whitewool Farm in connection with residential planning permissions granted within the Borough of Fareham. This in turn will enable 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.