

Legal Position Statement – August 2023
Proposed development at Brook Farm, Yarpole, Herefordshire

1. Introduction

- 1.1 This Position Statement has been prepared in respect of the above planning application for 6 dwellings and a phosphate credit bank at Brook Farm, Yarpole, Herefordshire (“the Site”) (reference 214309/F) (“the Application”).
- 1.2 It is agreed that the Application falls to be considered in light of the provisions of regulation 63 of the Conservation of Species and Habitats Regulations 2017 (“the Habitats Regulations”) by way of appropriate assessment.
- 1.3 This Position Statement considers the legal aspects of the appropriate assessment noting that further submissions have been made to the Council in respect of the scientific aspects of the appropriate assessment and more broadly in respect of the consideration of the Application.

2. Background

- 2.1 The Application’s neutrality status and surplus phosphate credit bank is to be created from the total cessation of livestock farming on the site, together with the removal of the agricultural buildings and concrete yard, agricultural drainage infrastructure and manure/slurry store, all of which will generate a significant phosphate reduction.
- 2.2 It is proposed that the change of use from intensive livestock housing to small scale residential will generate phosphate betterment, to mitigate the proposed development and to offset other development in the River Wye SAC and River Lugg sub-catchment area. This land use change would be permanent and certain. As and when the principle has been agreed, the draft legal agreements to support the latter will be provided.
- 2.3 The Site was acquired by Border Oak Farms in [REDACTED]. Border Oak Farms is a growing agricultural enterprise which owns and operates other land and agricultural buildings in Yarpole, Kingsland and Eardisland. Border Oak Farms is a registered agricultural holding, has appointed an agricultural consultant, employs agricultural contractors, buys and sells agricultural goods and services [REDACTED]
[REDACTED]
[REDACTED] The Site comprises a farm yard which is registered with adjacent and further agricultural land in Yarpole all within the same agricultural holding.
- 2.4 While Border Oak may also operate a property development enterprise, that operates as an entirely separate entity. The yard in Yarpole is held and registered as part of the agricultural holding, distinct from development land or the development business. In the absence of planning permission for residential development of the Site, it has remained within the control, ownership and use of Border Oak Farms. It is clearly evidenced that the Site has been and continues to be designated and used solely for agriculture.

2.5 Planning permission has been granted previously for the residential development of the Site (for 8 dwellings). This was implemented by way of the demolition of some of the farm buildings (but not the farmyard, the remaining farm buildings or the farm drainage infrastructure – they remain to this day). That planning permission (reference 162256 as varied by reference 193900) remains extant and is not subject to any pre-commencement conditions (all pre-commencement conditions were varied to enable compliance after works had been commenced), but other conditions remain to be discharged including the drainage condition. While development pursuant to that permission has lawfully commenced, it is not possible for development pursuant to that permission to proceed if nutrient neutrality cannot be secured to the satisfaction of the Council.

2.6 During the course of consideration of the Application, further legal developments and guidance has been released. Most notably, the High Court decision in R (on the application of Wyatt, Chairperson of the Brook Avenue Residents Against Development) v Fareham Borough Council [2021] EWHC 1434 (Admin) was upheld by the Court of Appeal (R (on the application of Wyatt, Chairperson of the Brook Avenue Residents Against Development) v Fareham Borough Council). The Council has not therefore advised whether the Wyatt case alters their position on the Application. Furthermore, following this decision, Natural England has provided further guidance to assist local planning authorities in carrying out appropriate assessments.

3. The Current Position

3.1 It is noted that appropriate assessments have been undertaken previously by the Council, but none to take account of the changing legal framework nationally or the further evidence submitted with the Application, including this Position Statement.

3.2 It is apparent from the appropriate assessment dated 27 July 2022 that the Council has concerns as to the removal of farm buildings from the Site and the resulting farm type classification use within the classification. An ecology objection was reached on the basis that:

“The Council is not satisfied, however, with the approach taken in the Phosphorous Strategy (2022) to the baseline phosphate outputs from previous land uses. The document sets out the site as being an area of farmyard used for beef farming and an area of permanent pasture used for the same beef cattle rearing and has set the phosphate coefficients used based on beef farming as the current landuse.

The site, both at the time when the planning application made, was no long in use for farming with the livestock buildings and the associated infrastructure having been demolished and removed from the site, the stock having been sold off, the largest extent of the grazing land associated with the holding having been sold of separately and the small area of pasture retained with the former yard area no longer being used for stock grazing.”

3.3 The appropriate assessment states:

“applying the precautionary principle correctly in this case requires that the ‘do nothing’ position is considered to be the site’s current status since the application was made with low

phosphate outputs resulting from the areas of hard standing and former yard and the area of former pasture neither of which are used for livestock production”

3.4 As such, the appropriate assessment disregards the past use of the Site (notably including any livestock or farm buildings and infrastructure which have since been removed from the Site), the current agricultural use of the Site and the agricultural use to which the Site could be put without requiring planning permission.

3.5 The Phosphorous Strategy and photographic evidence submitted to the Council with the Application, noted that:

“the site comprised 0.54ha of farmyard and 0.21ha of adjoining pasture/field which is understood to be permanent pasture.

The farmyard comprised cattle stores, a Dutch barn, muck heap, areas of hardstanding and vegetated areas. Historically the farm livestock comprised cattle. The buildings and yard were constructed pre-1991. However, the farmyard manure (FYM) storage areas was upgraded in 2000 in line with the new SSAFO Regulations. This comprised a weeping wall structure where effluent was collected. This structure remained the only FYM storage area serving the whole farm until it was sold and subsequently removed in [REDACTED]. The farm ceased dairy production in 2007 and became exclusively beef from that point to its closure, with circa 250 head of cattle.

*...
Brook House Farm increased livestock store area in 2009 through construction of additional stores/barns, located to the southwest of the application area. It has been confirmed by the previous owner that cattle were housed in both areas until its sale to Border Oak...Cattle were housed in the barns and Brook House Farm yard area throughout the winter and in the barns only in the summer months.*

The buildings and FYM storage, within the Application Area, were removed in [REDACTED]. The landowner moved, with their cattle, to a new property [REDACTED].

3.6 Border Oak purchased the Site as a functioning agricultural livestock yard with buildings and infrastructure and it remained as such post-completion when it was subsumed into Border Oak Farms holding. Brook House Farm had previously been in the same ownership since [REDACTED] and was run as an intensive livestock agricultural business. Therefore the designation and use of the site for agricultural purposes has never ceased and any future change use of the site will solely depend upon the outcome of the Application.

3.7 Furthermore the only reason the livestock left the catchment is the sale of the site to the applicant with a specific view to bettering the catchment ecologically. Border Oak Farms facilitates the destocking which is an advantage to the SAC and SSSI. This does not prevent Border Oak Farm from holding livestock in the future.

3.8 All of the farmland surrounding the site and around the other parts of Border Oak Farm are intensively farmed. It is therefore reasonable to assume that, [REDACTED] (because residential planning is not granted), the land will remain intensively farmed consistently with the surrounding and historic land use and lack of alternative land uses.

- 3.9 The Site has not been used for any purposes other than agricultural and so there is no basis upon which to suspect that the site would be used for any other purpose in the future, unless residential planning approval alters the current lawful land use
- 3.10 Since the time of the appropriate assessment, the Council has agreed that the Site has an agricultural use. The Council has not yet reached a view as to the baseline farm-type classification which should inform an updated appropriate assessment.
- 3.11 Furthermore, the Council has queried whether the demolition of farm buildings impacts the baseline farm-type classification. This Position Statement will seek to address those points.

4. Approach to Appropriate Assessment following the Wyatt case

Precautionary principle

- 4.1 It is well-established that the competent authority is to adopt a precautionary principle when carrying out an appropriate assessment.
- 4.2 It is the applicant's view that a precautionary approach has been applied through their nutrient calculations and the Phosphorous Strategy. The calculator used to assess the Phosphate loads and reduction are adopted by Herefordshire Council and Natural England as being suitably precautionous and that site specific data can be inputted. Natural England and the Council both agree that site specific data can be inputted where needed and supported by scientific evidence.
- 4.3 The Council has stated in its appropriate assessment that they believe a precautionary approach requires that the baseline land use must rely upon the lowest outputs and disregard the full extent of current designation, historic land use and buildings previously in use for agricultural purposes (see paragraphs 3.2 and 3.4 above).
- 4.4 Mr Justice Jay opined specifically on the application of the precautionary principle in the Wyatt case. The position had been advanced that *"because there was scientific uncertainty, no development could properly be permitted because deleterious impacts could not logically be excluded"*.
- 4.5 Mr Justice Jay held that this approach *"misunderstands the precautionary principle"* as *"we are in the realm of empirical sciences where uncertainty is inevitable. It is in order to meet this unavoidable uncertainty that the precautionary principle has been devised"*.
- 4.6 Therefore an absence of full and demonstrated certainty is not fatal to an appropriate assessment and indeed, that:
- "uncertainty is addressed by applying precautionary rates to variables, and in that manner reasonable scientific certainty as to the absence of a predicated adverse outcome will be achieved"*.

Precautionary principle: Observation

4.7 The threshold is therefore to achieve *reasonable scientific certainty*. The Council's approach in the current appropriate assessment of reaching a *"do nothing" position* is not consistent with that approach. The Council cannot be evidence that 'do nothing' is a likely future use.

4.8 In this instance, the Council has suggested that the precautionary principle has influenced the identification of the lowest baseline land use against which the phosphate calculations are conducted. It is also worth noting that the phosphate calculator provided by the Council has layers of mathematical precaution woven through each stage of the calculation (and against the final figure) and it is our understanding that any output figures from the Herefordshire Council calculator are considered to be appropriately precautionary by Natural England. The precautionary layers of the calculator have proven acceptable for other applications that have been successfully submitted mitigation requests.

Baseline land use

4.9 We have not detailed the facts of the Wyatt case but have included relevant extracts from the decision throughout this Position Statement. For present purposes, it is sufficient to say that Fareham Council had granted planning permission following a favourable appropriate assessment on the basis of advice from Natural England as to how baseline land use was to be ascertained. The evidence provided by the applicant to establish land use figures was challenged by Mr Wyatt.

4.10 The Council's decision was challenged by way of judicial review on a number of grounds, notably that *"the classification of part of the site as being in "lowland grazing" was irrational, unreasoned and contrary to the precautionary principle"*. The allegation being that had the land in question been classified as 'open grassland' rather than 'lowland grazing' then a lower phosphate value would be attributed to the land use and neutrality may not be achieved.

4.11 In reaching a decision as to the land use classification to inform the appropriate assessment the Council had had regard to 'Natural England's Advice on Achieving Nutrient Neutrality for New Development in the Solent Region' ("the Advice Note"). The Advice Note incorporated a table of outputs attributable to different farm types and further stated:

"4.51 It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will have appropriate knowledge of existing land uses to help inform this process.

4.52 There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline of nitrogen leaching value of 5kg/ha should be used. This figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes."

4.12 The facts of the case were such that:

“The site was formerly a busy commercial nursery but that activity ceased over twenty years ago. Simplifying the matter somewhat, 0.87 ha comprises derelict glasshouses and other buildings. The remainder, approximately 1.10 ha, is open grassland with a small Nissen hut occupying a small part of it. There is some controversy as to the use of this grassland area.”

4.13 The High Court held as follows:

“Objectors were saying that there was a complete paucity of evidence that any part of the land had been put to grazing use – on the facts of this case, grazing by horses. Mrs Valerie Wyatt, for example, contended that no area of the site was currently in use as a horse paddock and the Hanslips' planning agent had submitted no evidence to support the claim of current use. The photographs were not probative of this, and no other documentary evidence had been presented. Other objectors made similar points, and it must not be overlooked that as local residents they were in a position to give direct evidence on this issue.

On the other hand, as Mr Mould draws to my attention, there was evidence pointing the other way. For example, the planning statement referred to the existence of a horse paddock, there was in evidence a copy licence agreement giving a horse owner the right to graze on the land between 2016-19, and there was also reasonably clear photograph evidence depicting the presence of horses and a horse box in 2017. I was less impressed by Mr Mould's submission that there was evidence of haymaking in 2018, given the dates on the photographs.

It is correct that the planning officer's reasons for concluding that the north-west paddock should be allocated a lowland grazing value are not particularly expansive. Yet he correctly and fairly summarised the objectors' cases, and accurately directed himself on the law. The challenge for him was to exercise professional judgment and reach a conclusion as to what use the land would be put if planning permission were refused. There was no evidence of grazing by horses since 2017, but – as Mr Mould submitted with only a molecule of cynicism - this was more or less at the stage that this development was under contemplation. If planning permission were refused, it does rather defy common sense to suggest, at least in the particular circumstances of this case, that the land would lie fallow.

The question for me is whether the planning officer's advice was perverse. Plainly it was not, and Ground 2 must fail.” (emphasis added).

Baseline Land Use: Observations

4.14 It is clear from the above that the Court was satisfied with the planning officer's depth of investigation and their conclusion as to the baseline land use. This was so notwithstanding that the evidence pertaining to the land use over the 10 year period leading to the consideration of the application (as per paragraph 4.51 of the Advice Note) was not exhaustive.

4.15 The Court also emphasises that their remit in this regard is limited to consideration as to whether the authority's conclusion was perverse.

- 4.16 Focussing upon the words of paragraph 4.51 of the Advice Note the land use classification should be “*appropriately precautionary*” and Natural England recommends a review of activities over a period of 10 years and the exercise of professional judgement thereafter. We have already established that the precautionary principle does not require absolute certainty.
- 4.17 It is apparent that the case officer did not have evidence relating to the use of the land for the entirety of the 10 year period, as one might expect in an application under section 191 of the Town and Country Planning Act 1990, but it is also clear that this was not necessary. The evidence threshold for establishing the baseline land use in the application is therefore lower than assumed by Herefordshire Council and is clearly construed more holistically than is otherwise expected in the planning regime. Indeed, it can be concluded that had a higher threshold been necessary to meet the precautionary principle (or otherwise) this would be expressly required by Natural England in the Advice Note, or indeed by the Court in the Wyatt case.
- 4.18 In addition, the test includes an acquiescence of potential ‘gaps’ in the land use history which the challenging parties had relied upon to undermine the baseline land use. For present purposes, the Site has a demonstrable and uninterrupted commercial agricultural/livestock use, well evidenced and without gaps. In this regard, please also refer to paragraph 3 of this Position Statement.
- 4.19 Therefore the evidence available to demonstrate the use of the Site over the last 10 years is far more robust than Fareham Council was able to rely upon to reach a positive appropriate assessment in the Wyatt case. Nevertheless, in Wyatt it was held that the officer had directed himself correctly as to those objections and had exercised professional judgement when considering the land use type classification. As a result the assessment was beyond the realms of judicial interference as it was not perverse.
- 4.20 The Wyatt case also shows that there is a tolerance around cessation of a baseline land use at or around the time of conception of the development proposals and that this will not, as a matter of course, impact the baseline land use figures:
- “There was no evidence of grazing by horses since 2017, but ..this was more or less at the stage that this development was under contemplation. If planning permission were refused, it does rather defy common sense to suggest, at least in the particular circumstances of this case, that the land would lie fallow.”* (emphasis added)
- 4.21 This indicates a ‘common sense’ view in light of the knowledge of the circumstances of the land in question. This is consistent with the recommendation in the Advice Note that local planning authority’s knowledge of sites and their existing land uses can “*help inform this process*”.
- 4.22 It is noted that the Advice Note applicable in the Wyatt case expressly refers to the ‘Solent region’ in its title. However, Border Oak have approached Natural England for a steer as to whether the guidance offered in paragraphs 4.51 of the Advice Note would apply more generally as a national approach.
- 4.23 Natural England’s National Lead on Nutrient Neutrality has replied to advise that:

“NE consider that 10 years of evidence of farm type is a robust timeframe for determining land use type for the purposes of a nutrient budget calculation, as supported in the High Court in Wyatt. However, we also recognise that LPAs have to take account of the individual circumstances and information in each case. Therefore there could be legitimate reasons why an LPA would determine that land would not revert to its former use in the absence of a planning proposal.

Such decisions are for the LPA as Competent Authority to consider in the Appropriate Assessment of a plan or project, informed by local information and advice from Statutory Consultees such as Natural England.”

4.24 This is considered to be a notable endorsement of the approach adopted in paragraph 4.51 of the Advice Note on a national scale. We can therefore be sure that Natural England support an assessment of baseline land use on the basis of evidence of farm type over a 10 year period unless there are legitimate reasons to conclude that land could not revert to a former use (the latter could apply in a manner akin in abandonment in planning terms and would therefore only be made where there are circumstances which would frustrate entirely the reversion of land to a former farm use). This advice has withstood legal challenge and so preserves the necessary precautionary approach.

4.25 It is noted that the competent authority need to undertake the assessment, but that the views of statutory consultees play a key role in guiding authorities in so doing.

Judicial observations in view of the legal framework

4.26 In the Wyatt case the High Court made a number of additional relevant points which it may be helpful to abstract, as follows:

4.26.1 It is *“necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body”*. This is consistent with paragraph 4.18 above;

4.26.2 *“appropriate assessments must be based on “the best scientific knowledge in the field” (Holohan v An Bord Pleanála (Case C-461/17) [2019] PTSR 1054 at para 33) which is both up-to-date and not based on the bare assertion of an expert (on the latter point, see Smyth v SSCLG [2015] EWCA Civ 174”*;

4.26.3 *“the absence of adverse effects must be established at the point of consent, which in the present context means the date the appropriate assessment is made (Cooperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg (Case C-293/17) [2019] Env LR 27 (the “Dutch Nitrogen case”), at para 94 of the opinion of Advocate General Kokott)”*;

4.26.4 *“a high standard of investigation is demanded in line with the precautionary principle. This has been stated and reiterated in a large number of cases, including in particular Waddenzee (Case C-127/02) [2004] Env LR 14 and the Dutch Nitrogen case. In Waddenzee, Advocate General Kokott stated that the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty but to being “at least satisfied that there is no reasonable doubt as to the*

absence of adverse effects on the integrity of the site concerned". A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate (see paras 99, 104, 107 and 108)...I read these paragraphs as requiring a case-specific assessment by the competent authority applying rigorous scientific principles to the endeavour" (emphasis added). This is consistent with paragraph 4.16 above;

4.26.5 *"the application of common sense and authority that competent authorities must give condign weight to the expert advice of Natural England, and if minded to deviate from that advice furnish cogent reasons for doing so: see, in particular, Baroness Hale JSC in R (Morge) v Hampshire CC [2011] UKSC 2". This is a notable and helpful steer to prescribe the weight to be attached to expert advice. The point is considered further below;*

4.26.6 *"the judgment whether a proposal will adversely affect the integrity of the protected sites for the purposes of regulation 63(5) of the Habitats Regulations is one for the competent authority...It was common ground before me that if the expert advice of Natural England relied on by Fareham were flawed for public law reasons, then the latter's decision would be impugnable even though the former is not the subject of this application for judicial review. I said as much in Wealden at para 109 albeit in the different context of Natural England advice that was quite plainly wrong: "... if expert advice induces a decision-maker into error in carrying out the judgments mandated by article 6(3), I consider that it would be artificial and wrong to hold that the court should not characterise what has occurred as irrational. The Wednesbury error in the underlying advice creates, without more, an equivalent Wednesbury error in the evaluative assessments carried out in formulating the HRA"; and*

4.26.7 *"the approach of this court in the exercise of its supervisory function is standard Wednesbury, albeit one which accords appropriate cognisance to the nature of the subject-matter and the expertise of the decision-maker". This is consistent with paragraph 4.23 above.*

Judicial observations in view of the legal framework: Observations

4.27 The points listed above are all consistent with legal principles and case law. In particular by reiterating the approach to the precautionary principle and the nature of reliance on expert advice. They also serve as a useful reminder that the Courts will only interfere with a decision where it crosses the threshold of Wednesbury unreasonableness. This is a high bar and so the Council can be confident that their discretion will not be interfered with unless the decision reached is legally flawed. This is consistent with the usual approach of the Court when considering planning matter which seeks to ensure that the merits of the decision remain with the decision-maker.

4.28 There is an acknowledgement that absolute certainty is not achievable and that this is not expected in carrying out an appropriate assessment.

4.29 In addition, there is a reiteration of the importance of expert advice from Natural England which should not be deviated from unless there are cogent reasons for doing so, including that referred to in paragraphs 4.22 to 4.23 above. Therefore deviations from Natural England advice should be uncommon.

- 4.30 These points bring a sense of realism to the task that befalls competent authorities in carrying out appropriate assessments. While authorities are required to adopt the precautionary principle when undertaking appropriate assessments, the Court of Appeal has upheld Natural England's advice in embodying a precautionary approach. This sets the benchmark for competent authorities in carrying out appropriate assessments nationally.

5. Approach to the Application

- 5.1 The Council's appropriate assessment states that:

"The applicant places a heavy weight on the earlier part of [paragraph 4.51 of the Advice Note] and seeks for the phosphate output from the former land use to be that of the beef farming enterprise which was previously operated out of the site.

The Council, however, considers that the second part of the paragraph is most relevant here. Given that the buildings and infrastructure have been removed from the site and that the supporting documentation sets out that vast majority of the previously 90ha holding were sold separately it is not reasonably possible for the site to revert back to its former livestock farming use both because a separate planning permission would be required for the reinstatement of farm buildings and infrastructure because the required grazing land is no longer intact and in one ownership"

- 5.2 It is understood that the Council's appropriate assessment was undertaken before the appeal against the decision of the Court of Appeal in Wyatt had been handed down. The Council cannot therefore have conducted the appropriate assessment in accordance with the findings in the Wyatt case or the advice that Border Oak has subsequently obtained from Natural England as to the status of paragraph 4.51 of the Advice Note, both of which significantly alter the landscape against which competent authorities are to carry out appropriate assessments. The Wyatt Case naturally offers a good opportunity to revisit the Appropriate Assessment.
- 5.3 The response from Natural England as to the status of paragraph 4.51 assists in demonstrating the overall support given to the approach of assessing baseline land use and making clear that this approach preserves the precautionary principle. Clearly, had Natural England intended their advice to favour one part of the wording over another (as has been suggested in the appropriate assessment) then Natural England would have expressly stated this, or otherwise caveated their position. As can be seen, there are no such reservations and the approach has been endorsed on a national level.
- 5.4 It is therefore reasonable to anticipate that the Council's current approach to and conclusion on an appropriate assessment is now likely to be very different following the Court of Appeal's decision in Wyatt and further guidance from Natural England.
- 5.5 In this regard it is noteworthy that the Chief Planner in her letter to Chief Planning Officers on 21 July 2022 stated:

"the Court of Appeal recently handed down its judgment on an appeal against the High Court decision in Wyatt v Fareham BC. The Court of Appeal dismissed the case on all grounds and concluded that the planning permission had been lawfully granted. This positive outcome

should give all those involved confidence in the approach and methodology that Natural England has proposed to help LPAs to address nutrient impacts from new development. Natural England, when developing its nutrient neutrality methodology, guidance, and tools, incorporated the recommendations provided by Jay J. in his High Court judgment.” (emphasis added)

- 5.6 Similarly, on 22 July 2022 Natural England issued a statement in response to the Court of Appeal’s decision stating:

“This positive outcome at the Court of Appeal should give all those involved confidence in the approach and methodology that Natural England has proposed to help LPAs to address nutrient impacts from new development.” (emphasis added)

- 5.7 On this basis, the Wyatt case represents a stable footing against which to reassess the baseline land use in line with the Advice Note.

6. Appropriate assessment of the Application

The ‘project’

- 6.1 Regulation 63 of the Habitats Regulations is engaged in respect of “...a plan or project which - (a) is likely to have a significant effect on a European Site...). The term ‘project’ is not defined. However, it is generally accepted that a project should be defined broadly.

- 6.2 Advice obtained on this point by the Planning Advisory Service (and available here: <https://www.local.gov.uk/sites/default/files/documents/PAS%20Briefing%20Note%20NN%2015%20November%2022.pdf>) states that:

““Plan or project” has a broad meaning, covering most proposals that might have an impact, including development plan documents, development proposals, and licensing, permitting or regulating an activity”

- 6.3 The Government Guidance ‘Habitats regulations assessments: protecting a European site’ (available here <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>) states:

“When a proposal is a project

A project can be any activity or a number of activities that either needs a new or renewed permission from a competent authority before it goes ahead, or that a competent authority proposes to carry out itself. It can include proposals to change an existing project.

Examples of projects include:

...

- *Licensing, permitting or regulating an activity, for example, applications for planning permission, licences, consents or permits issued under byelaws and other legislation, and activities under permitted development rights”*

- 6.4 The absence of a definition when taken against the advice available indicates that there is a level of fluidity here, it is clear that a project can include a “number of activities” and a literal/dictionary definition acknowledges that there is some element of collaboration of

different aspects. Indeed, many of the examples referred to could be expected to draw upon a number of consents and perhaps a number of permissions (as mentioned in the second bullet point of the Government guidance).

- 6.5 In our view it is possible for the term 'project' to connote a composition of consents to allow a particular scheme/project to be delivered. In this case, those consents comprise 2 planning permissions (the 2017 permission, reference 162256, as varied by reference 193900, in relation to the demolition of some of the agricultural buildings and the Application, if granted).
- 6.6 The demolition of the buildings has always been a necessary part of the development of the Site for the construction of housing and it is not uncommon for schemes to evolve over a series of permissions but nevertheless to remain fundamentally the same development. The Council has observed that the Application is *"broadly the same as the 2017 permission"*.
- 6.7 Of course at the time of the grant of the 2017 permission (and variation to it), the 'project' was the development proposed by those permissions. As time has moved on and the circumstances have changed, the project has evolved, such that the 'project' now incorporates both permissions.
- 6.8 There is nothing in the Habitats Regulations of guidance to indicate that this approach is not permissible. Indeed, the Regulations required consideration of the *"in combination effects"* of all aspects of the project (as per regulation 63(1)(a)), i.e. the combined effect of the development under the 2017 permission/variation to it + the Application). In the interests of certainty and if needed, Border Oak Farms would be willing to agree in a section 106 agreement with obligations not to proceed with any further development under the 2017 permission and/or the variation to it.
- 6.9 Furthermore, if it would assist to reference the demolition pursuant to the 2017 permission (as varied) in some way in the Application, to make this link as part of the 'project' entirely clear, then Border Oak Farms can consider that.
- 6.10 Looking at this another way, even if the Council took the view that the demolition of some of the farm buildings was part of an earlier project, does it matter? As the Council is required to consider the 'in combination effects' between projects then the Council would still need to consider the historic use of the site when carrying out the appropriate assessment. Therefore, the pre-existing mitigation arising from the demolition is an unavoidable consideration in the appropriate assessment.
- 6.11 Consequently, it is our view that whichever position is taken on the 'project', the Habitats Regulations require the history of the use of the Site to be considered pursuant to the appropriate assessment because of the in combination effects of the development of the Site.

Farm-type classification

- 6.12 In light of the established position that baseline land use can be determined by evidence of the *"farm type for the last 10 years and professional judgement...as to what the land would revert to in the absence of a planning application"*, it is worth noting that there

are a number of circumstantial inaccuracies and assumptions in the appropriate assessment which may have impacted the exercise of professional judgement.

- 6.13 For ease of reference, extracts of the Council's appropriate assessment have been inserted below with comments alongside:

"The site, both at the time when the planning application made, was no long in use for farming"

- 6.14 Border Oak Farms fundamentally disagree with this statement and we refer to paragraph 3 of this Position Statement in relation to the use of the Site.

- 6.15 In any event, as noted in paragraphs 4.17 to 4.20 above, the assumption that the site was not in use for farming at the time when the Application was made does not frustrate the finding of a farming baseline land. Indeed, in the Wyatt case *"there was no evidence of grazing by horses since 2017...this was more or less at the stage that the development was under contemplation"*. Fareham Council's Planning Committee considered the application on 12 December 2019 and the case officer attributed a lowland grazing farm type classification. This was upheld by the High Court and the Court of Appeal.

- 6.16 On this basis and in view of paragraph 3 of this Position Statement, there is more than sufficient evidence that the Site has been and remains in agricultural use. That remains the case notwithstanding the removal of some agricultural buildings.

- 6.17 While it is accepted that the phosphate output from this Site (in the same way as any other site and indeed with other agricultural sites) will fluctuate on a daily basis, the case law and guidance from Natural England (the latter of which is to be adhered to unless cogent reasons permit otherwise) require the 10 year history of the site to be reviewed in identifying the baseline land use. In this instance, Border Pak Farms has demonstrated that the primary and evidenced purpose of the land over that 10 year period has been to house livestock.

- 6.18 While it is noted that the removal of some buildings was undertaken following Border Oak's purchase of the site, the Application has been delayed by the lengthy moratorium in response to Natural England advising of the unfavourable conservation status of the River Wye. The delay was further compounded by the delay relating to the published phosphate calculator by Herefordshire Council. This is of course beyond the control of Border Oak, who have nevertheless, remain committed to the overall scheme, advised the Council of their proposal and have continued to demonstrate that they are in a position to honour the obligations that they have offered to permanently destock the farm and close the livestock units.

- 6.19 It was of course not apparent to Border Oak that the moratorium would last for as long or be as complicated as it has. The intention to destock the catchment and cease phosphate output in perpetuity has been delivered by the applicant pursuant to their proposals with certainty as to the betterment secured for the catchment.

- 6.20 More than three of the last ten years have been subsumed by the moratorium. These three years were not *"more or less at the stage that this development was under*

contemplation” the development proposals were at the forefront of Border Oak’s actions which sought to realise a phosphate credit bank that had been discussed with the Council for some time. Therefore, once again, the position was more favourable than that which found favour in the n that which found favour in the Wyatt case.

- 6.21 In any event, the delay resulting from the moratorium does not undermine the fact that prior to this there was a long, continuous and active beef farming enterprise on the Site. This has been communicated and evidenced to the Council. For greater reassurance Border Oak Farm has retained the agricultural use over the intervening three years whilst maintaining a commitment to not hold livestock or slurry/manure on site should residential planning approval be granted. There can be no argument that the intensive holding of livestock was generating a significant amount of phosphate within the catchment and that residential planning approval prevents this.
- 6.22 While the timings are explicable in this instance, on the basis of the Wyatt case it is noted that timings are unnecessary in any event, as the *development was more or less under contemplation at this time*.
- 6.23 The sale of livestock is not of itself determinative of the use of land, particularly in light of the recommendation that the baseline land use is determined in light of the farm type for the last 10 years. Within agricultural businesses, livestock is often sold and purchased (or otherwise removed and replenished). It is the prevention of livestock being held on site through a permanent change of land use (as offered by this Application) that delivers the nutrient betterment with certainty.
- 6.24 As stated, Border Oak Farm is an established and active agricultural enterprise and the Site is part of that registered holding. Livestock could be reintroduced or manure from livestock elsewhere could be housed on the site in the event that the Application is not granted. These steps, and other agricultural activities, could be taken without the need for any further planning permission.
- 6.25 The fact that the Site is now smaller than the original larger agricultural holding at Brook House Farm is not relevant as the Application pertains to the Site and so the baseline use of the Site falls to be considered. The surrounding land was never part of the Application or Phosphorous Strategy and does not need to be.
- 6.26 In any event, Border Oak Farm has additional agricultural landholdings, [REDACTED], which could be operated in conjunction with the site (although, as stated, we do not consider the wider circumstances to be determinative and this additional land is not part of the Phosphate Strategy submitted). Therefore it is not the case that the circumstances pertaining to the sale of the Site or the removal of some buildings on the Site constitute a tacit abandonment of the livestock supporting use of the site. And so it does not prevent a reasonable professional judgement from being reached as to the use to which the site would revert in the absence of a planning permission.
- 6.27 This is particularly so when viewed against the consistent and established 10-year history beef farming use of the site, which is known to the Council, and the continuing agricultural use of the site and the surrounding land being in active agricultural use. Any use other than intensive agriculture would be unlikely.

- 6.28 As it stands, the appropriate assessment seeks an unattainable certainty which the Wyatt case has confirmed the precautionary principle does not demand.
- 6.29 Returning to the wording of the Advice Note, this is backwards-looking in terms of the farm type over the last 10 years, that is the clear (and express) starting point. We are not aware that this is non-contentious in terms of the approach to be taken, but also evidentially but would add that Border Oak Farms can of course provide more information as needed in terms of the historic land use.
- 6.30 The next paragraph of the Advice Note imposes a professional judgement upon the factual 10 year position, i.e. the Council's judgement as to the use to which the land would revert in the absence of a planning application. It appears that the Council are weighting this part of the advice to import the forward-looking element. However, this is not, in our view, appropriate as there is no basis to justify this approach in the advice, which (as Wyatt says) the Council is to adhere to unless there are *cogent* reasons for doing so.
- 6.31 As a matter of principle, a forward-looking view on the potential use of the Site introduces far more uncertainty than a backwards-looking analysis in view of the particular circumstances of the application, landowner, etc.
- 6.32 The task for the Council under paragraph 4.52 of the Advice Note is to decide how the Site would be used if the Site was not to be developed in line with the Application. Border Oak Farms have given the answer to that question in their Statement of Intent – it is unequivocally an agricultural use.
- 6.33 The situation therefore seems to me to be that we have a site that has been retained as farmland by a farming business with other operational farm holdings, absent livestock (as it stands, but that could (lawfully) change) to demonstrate to the Council that betterment has been and will continue to be preserved (all pursuant to a single project), to support of the project and a positive appropriate assessment based upon betterment.
- 6.34 That betterment would of course come to fruition with certainty upon the delivery of the project for housing, i.e. the grant and implementation of the planning application. Such that, the certainty as to the generation of credits arises from the residential development and so, goes one step further from taking the land out of agricultural production whereby the baseline agricultural use of the land remains.
- 6.35 The approach to establishing baseline land use is to accord with the Advice Note and Natural England has endorsed this approach on a national scale. Mr Justice Jay noted in Wyatt that competent authorities “*must give condign weight to the expert advice of Natural England, and if minded to deviate from the advice furnish cogent reasons for doing so*”. No such reasons have been advanced in this instance, but the appropriate assessment was of course conducted before the Court of Appeal had upheld the High Court's approach in Wyatt.
- 6.36 On that basis, the appropriate assessment is out of sync with the current advice (including NHBC advice on phosphate calculations) and case law and should be carried out afresh in light of the current advice and case law.

6.37 In terms of betterment and again not wishing to stray into the technicalities of the scientific calculations, Border Oak Farms are content that this should reflect the history of land use which they are prepared to concede will attribute a lower P output in the last 3 years than the 7 years prior, i.e. 7 years of use for cattle and 3 years for farmland. But, even if a baseline general farmyard use is applied then the Application would achieve betterment and a surplus would arise.

6.38 While Border Oak Farms do not agree that this is the basis upon which the baseline farm-type classification must be determined, they are willing to offer this suggestion in the interests of reaching a positive appropriate assessment without delay.

7. Legal certainty

7.1 Appropriate assessment also requires legal certainty. In this instance, the certainty can be secured through the permanent destocking of the site, removal of all other livestock infrastructure and closure of livestock units and the residential use of the site going forward.

7.2 It is proposed that the necessary legal certainty can be further secured by way of a section 106 agreement or unilateral undertaking preventing the holding of agricultural livestock on the Site. The applicant is very willing to do this. The site has not been encumbered and so there are no obstacles to such an agreement or undertaking being entered into. The content would of course be agreed by the Council. We trust that the draft legal agreement will not need to be provided until such time as the Council is content with the scientific certainty but the draft can of course be provided for consideration as soon as it is required.

7.3 If the Application is granted, in order for credit trading to take place, additional legal agreements would need to be entered to enable the allocation of the phosphate credits to developments. The form and content of each of these agreements would be approved by the Council and the Council would be joined as a party to the same, as appropriate.

7.4 Assuming the updated appropriate assessment is positive, it is suggested that the applicant follow the trading arrangements implemented by the Council with regard to their own credit trading mechanisms.

8. Support for private nutrient mitigation schemes

8.1 For completeness, it is noted that there is expressed support for private nutrient mitigation schemes by the Nutrient Management Board, elected Local Members, and Senior Officers at the Council. There appears to be an acceptance that while local authority mitigation schemes make a valuable contribution to the problem, they cannot solve it alone and that private delivery proposals such as the Application are needed.

8.2 This is in part reflected in the desire to support a private market for nutrient mitigation at a National level. At the time of announcing the Nutrient Mitigation Scheme to be brought forward by Natural England on 21 July 2022, the Chief Planner in her letter to Chief Planning Officers stated:

“We recognise there are a number of private markets and LPA-led nutrient mitigation schemes that are already being established, and Natural England will be working closely with these providers to ensure they do not crowd out private markets, and will ensure that the national scheme dovetails with these markets and provides additional support as needed.
(emphasis added)

8.3 Furthermore, The University of Lancaster (RePhokus) have produced a thorough scientific research paper in which recommended actions to reduce phosphate in the catchment are presented. Rephokus is widely regarded to be the best available scientific evidence and the recommendations scientifically founded.

8.4 The Application scheme will achieve the following of those recommendations:

*“Policies to mitigate river P pollution from agriculture should change emphasis and seek to **reduce the P input pressure on catchments in addition to the current emphasis on mitigating***

...

***Reduce livestock manure P loading through a reduction in animal numbers and by processing manure to produce renewable fertilisers** to replace imported fertiliser, and by exporting manure to other regions. Research is needed to support technological development of safe and effective recovered P fertilisers and feed supplements”*

9. Conclusion

On the basis identified in detail above, it is considered that the nutrient mitigation proposed by the Application is of the highest standard and demonstrates significant phosphate reduction, which can be achieved and maintained in a manner which secures the necessary scientific rigour and legal certainty. As such we suggest the appropriate assessment is revisited and a supportive assessment delivered.

02 August 2023

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