

Planning and Rights of Way Committee

19 March 2024 – At a meeting of the Planning and Rights of Way Committee held at 10.30 am at County Hall, Chichester, PO19 1RQ.

Present: Cllr Burrett (Chairman)

Cllr Atkins, Cllr Duncton, Cllr Gibson, Cllr N Jupp, Cllr McDonald, Cllr Mercer, Cllr Oakley, Cllr Patel, Cllr Quinn and Cllr Wild

Apologies were received from Cllr Montyn

Absent:

Also in attendance:

Part I

33. Declarations of Interest

33.1 In accordance with the County Council's Constitution, including the Code of Conduct as well as the Code of Practice on Probity and Protocol on Public Participation in Planning and Rights of Way Committees, the following declaration was made in relation to the lobbying of all members of the Committee:

- Item 4 – Planning Applications WSCC/046/23 and WSCC/047/23.
- Item 5 – Application for a Town or Village Green at Collingwood Road Green, Horsham.

33.2 In accordance with the County Council's Constitution, including the Code of Conduct, the following members made declarations of interest in the applications noted below:

- Cllr Gibson – a non-prejudicial Disclosable Pecuniary Interest, which has been confirmed by the Council's Monitoring Officer as non-prejudicial, in respect of Item 4 – Planning Applications: WSCC/046/23 and WSCC/047/23 in respect of a business owned by a family member.
- Cllr N Jupp – a Personal Interest in Item 4 – Planning Applications: WSCC/046/23 and WSCC/047/23 because he is married to Cllr Amanda Jupp, County Councillor for Billingshurst who was mentioned by Cllr Kenyon as having concerns about the impact of the applications on traffic in her electoral division. Cllr Jupp made it clear that his opinion on the applications is independent of his wife's.
- Cllr Atkins – a Personal Interest in Item 6 – DMMO 4/21 because he is known to the Goring family and the Wiston Estate, the landowners of the route in question.

33.3 No other declarations of interest were made.

34. Minutes of the last two meetings of the Committee

34.1 The Committee resolved:

That the minutes of the meeting of the Committee held on 5 December 2023 be approved and that they be signed by the Chairman.

34.2 The Committee considered, and approved, the following requests for amendments to the minutes of the meeting of the Committee held on 9 January 2024 in relation to application: DMMO 2/19 - Definitive Map Modification Order. The Committee noted that the second amendment had not been referred to Cllr Payne because it is a factual amendment.

1) Request from Hilary Pierce, applicant of DMMO 2/19 in reference to her own submission to the Committee:

Minute 31.5:-

The applicant Hilary Pierce, on behalf of the British Horse Society, spoke in support of the application. It is felt that some pieces of evidence supporting the application had been overlooked by the case officer. ~~There were areas with~~ **No occupation roads show any** ownership in the Henfield Tithe records. The Woodmancote Tithe map had no apportionment numbers and the Henfield ~~Museum's Tithe map~~ **parish copy** marks the route as a 'Road'. Both Tithe maps show the route as 'to' and 'from' two places which ~~would~~ **PINS guidance says** suggest public rights were in place. It was inconceivable that all inter-connecting **occupation** roads as shown on Tithe maps would be private use. The Finance Act 1910 map shows Furners Lane as a "white road" excluded from the hereditaments, which ~~would~~ **PINS guidance says indicates** it was a vehicular public road. Legal documents dealing with the transfer of land either side of Furners Lane refer to the claimed route as a highway or lane. If there was no ownership then the ~~landlord~~ **adjacent landowner** had no authority to make the usage private. In 1949 Chanctonbury Rural District Council (RDC) conveyed part of the land indicating it was public if owned by the RDC. Horsham District Council had not supplied further information which would be required for a proper analysis. Gallagher 2002 and Fortune 2012 state there should be a proper analysis of the lane's appearance and width on old maps, considering what the lane connects to and its desirability for public use; such objective analysis is absent from the officer's report. Considering if the path was a footpath, the term highway pre-1835 was used for public vehicular roads. Old maps also show Furners Lane in the same manner as other roads in the area. It is more likely than not that the public used it both on horseback and with vehicles. Evidence demonstrates, on the balance of probability, that the proposed route along Furners Lane has restricted byway rights or at least bridleway status.

2) Request from Mrs Alison Short, supporter of DMMO 2/19 in relation to the minute of Cllr Sarah Payne's submission to the Committee:

Minute 31.7:-

Cllr Sarah Payne, as the local member for Henfield, thanked officers for their comprehensive research of the area. Cllr Payne had walked the route and noted that areas of the path had a chalk base, which supported the route being a footpath. Blocked ditches had been observed and **made** reference ~~had been made~~ to a local resident's mother historically ~~walking~~ **riding on horseback along** the route. In considering the application, Cllr Payne noted the legal tests required to support the application and felt that there had not been sufficient new evidence to support the application and, therefore, supported the officer's recommendation to decline the application.

34.3 The Committee resolved:

That the minutes of the meeting of the Committee held on 9 January 2024 including the amendments, as approved by the Committee, be approved and that they be signed by the Chairman.

35. Urgent Matters

35.1 There were no urgent matters.

36. Planning Application: Minerals

WSCC/046/23 - The siting and development of a temporary borehole, well site compound and access road including all ancillary infrastructure and equipment (Variation of condition 1 of planning permission WSCC/002/22 extending the permission by 24 months to enable the completion of phase 4 site retention and restoration)

WSCC/047/23 - Temporary installation of a security fence, gates, and cabins (Variation of condition 1 of planning permission WSCC/001/22 to enable the retention of security fencing, gates & cabins for a further 24 months)

at Wood Barn Farm, Adversane Lane, Broadford Bridge, Billingshurst, West Sussex, RH14 9ED

36.1 The Committee considered a report by the Head of Planning Services (copy appended to the signed minutes). The report was introduced by James Neave, Principal Planner, who outlined the application and the key points. The Committee was advised that the following should also be noted:

- On 15 March an additional representation was received from Protect Dunsfold, a group linked to the Loxley oil site in Surrey, suggesting that a bond should be sought for restoration. Bonds are addressed at paragraph 9.26 of the Committee report. The representation does not change the substantive recommendation.

- The fire water tank and cabins shown on the plan at Appendix 4 are not currently on site, but may be required for the restoration stage.

36.2 Philip Maber, an interested party spoke in objection to the application. Several councillors voiced concerns when the third extension application came before the Committee. The site should be reinstated and made safe as per the conditions in place. The borehole suffered several serious integrity issues and didn't find commercial oil. Assets used in the drilling and testing phase, including well casings, have a short life. Is UKOG simply trying to avoid the expense of reinstating the site to a proper and safe condition, whilst keeping the site to shore up support from investors? UKOG's accounts show that their restoration asset has disappeared. The substance of the claims of generation of geothermal heat was queried. The legal challenges in relation to Horse Hill, Surrey and Loxley may have global implications, inspiring similar legal challenges in other countries. The Environment Agency is not fit for purpose and there are issues of permits without limit across the UK for the onshore oil and gas industry, which rely upon self-regulation and reporting. The Committee should consider the WSCC climate motion of 2019 and the strategy and commitment publication of 2021. Net Zero is impossible with further new fossil fuel exploration.

36.3 Ann Stewart, on behalf of the Weald Action Group, spoke in objection to the application. The International Energy Agency in 2021 stated there should be no new oil and gas developments. The well should now be plugged and the site restored. It is acknowledged that the complex policies sometime conflict, e.g. the three overarching policies of the NPPF, which includes an environmental objective to mitigate climate change. The Committee report gives great weight to the Energy White Paper and Energy Security Strategy, seemingly greater weight than to NPPF policy. These documents are mostly concerned with offshore oil and gas. On shore oil amounted to just under 2% of all UK production last year, with three quarters being from Wytch Farm in Dorset. Much of the UK's oil is sold for export. It is inaccurate to state this site would support UK energy security. Wood Barn Farm has never produced commercial levels of oil. The company stopped work there in 2018. Concerns were raised about the company's poor financial performance, and it was questioned if these repeated extensions are a way of avoiding the cost of restoration, potentially leaving the County Council responsible.

36.4 A written statement in objection to the application was read out by Nicola Peel, an interested party, on behalf of Dr Jill Sutcliffe, Chair of Keep Kirdford and Wisborough Green (a local group) and Trustee for the Campaign for the Protection of Rural England. The IPPC in 2022 was quoted regarding the need to limit global warming to 1.5⁰C, requiring global greenhouse gas emissions to peak before 2025 and be reduced by 43% by 2030. The UK Government's commitment to Net Zero by 2050 should be reflected in the NPPF. Concerns about planning legislation were raised, including that the planning system is not delivering sufficiently to align to wider climate change objectives; lack of clarity and absence of detail in national policy impacting on spatial planning, and the general obligation to consider climate change not being applicable to decision making. Cllr Duncton and Cllr Oakley were quoted from comments made on an earlier extension application for this site in 2018. Policy M24 of the

WSSC/SDNP Joint Minerals Local Plan 2019 states that sites should be restored at the earliest opportunity. Well integrity from issues in 2018 were raised and there were concerns that toxic liquids could get into drinking water via fractured rocks, and also that the borehole would not be suitable for geothermal use. A restoration bond should be secured.

36.5 Mr Nigel Moore, Planning Manager, Zetland Group Ltd, agent for the applicant and responsible for planning compliance at the Wood Barn Farm site, spoke in support of the application. An additional 24 months is needed for review of data from similar sites, e.g. pressure and flow rates followed by site restoration. It makes economic and environmental sense to ensure that all the available data is interrogated before restoration, which would be to agriculture. UKOG is exploring new methods of recovery at Horse Hill in Surrey and plans to continue the approach at Loxley in Surrey. Any future oil recovery from Wood Barn Farm could be made more efficient with shorter drilling durations and less environmental impact. The need for an extension is justified. There would be no new drilling and no new impacts, including landscape impact. The site is remote and officers find the screening of woodland to be acceptable. Site restoration has been frustrated by lengthy legal challenges. In January 2024, the courts dismissed the challenge at Loxley; there is now a real prospect of data recovery that could unlock the potential of Wood Barn Farm for the benefit of energy resilience and security. There is no evidence to support claims of a pollution risk from a well site that has been sealed, using tried and tested oilfield practices in compliance with an active Environment Agency permit. There are no novel, unusual or exceptional risks that would justify a bond. The UK advocates a power supply that is made in Britain and makes better use of the oil and gas in our own backyard; it signals that our energy policy is not solely about the achievement of Net Zero in 2050 but must also secure energy independence in 2024.

36.6 Mr Matt Cartwright, Commercial Director, UK Oil & Gas PLC, the applicant, spoke in support of the application. The oil below the Broadford Bridge site could extend across the whole of the south-east, but further data is needed to confirm this. The outcome of the legal challenge to Horse Hill in Surrey is awaiting the ruling of the Supreme Court. The legal challenge to Loxley was finally dismissed in January this year, but there is a nine-month programme of data recovery and a wait of up to 24 months before there would be meaningful data. The Government and the Committee on Climate Change both say we do need oil and gas, both now and in 2050, whilst needing to be more efficient, responsible and independent. This means not outsourcing to other countries with poorer environmental standards, and avoiding the carbon emissions of international transport. Recent events of COVID-19 and the war in Ukraine show the need to reassert the UK's energy independence, which can help stabilise the economy and manage energy shocks. The transition to Net Zero is not as fast as we would like it. Supply chains for large scale electrification and decarbonisation are not yet in place. The green energy transition is unpredictable and costs are high. Wood Barn Farm has significant potential in energy terms as a domestic source of oil and gas. It could also become a geothermal heat source to enhance food production. The UK will need indigenous oil and gas production for decades to come.

36.7 Cllr Charlotte Kenyon, Member for Pulborough, spoke on the application. The continued judicious use of fossil fuels will be needed for some time. Energy security is also needed in a volatile world. However, the justification for this application feels weak, increasingly speculative and open-ended. It is against the wishes and concerns of the local community. Policies do provide for a justified extension to time limited mineral operations, but the original 2013 planning permission was for a temporary borehole. What is the definition of temporary and what's the end game? Condition 1 of the previous permission states that permission shall be "for a limited period, expiring on the 31 March 2024". Previous applications seemed to have been granted on the basis that the impact on the locality has not increased and it's not a protected landscape. How long should it be reasonable to keep a site because the company has been beset by obstacles at other sites? The Committee report brushes aside existing concerns and plays down the implications of possible future development, focusing instead on the off-site appraisal. UKOG says it does not wish to prematurely restore a site where future hydrocarbon extraction may still be viable; it has made a significant investment in drilling this borehole and wants to see a return on its investment. Does that justify continued extension? Granting permission might create a presumption in favour of consent for subsequent phases, including for further appraisal or production. Nothing has happened at Loxley yet, and Horse Hill continues to be locked by legal challenges. This fifth request for an extension undermines confidence in the planning system and WSCC must enforce the restoration to maintain public confidence. The report states such extensions may be acceptable, provided there is a need for the activity and they do not result in unacceptable impacts on the environment and communities; this should read sufficient and compelling need. The Committee has previously made comments that suggest further extensions will be given consideration but that patience is wearing thin. Paragraph 9.22 refers to restoration and aftercare at the earliest opportunity. Residents have concerns about the UKOG's commitment to the seriousness and costs of this. A bond has not been proposed. The Parish Council has repeated its objections of 2022. Generation of geothermal heat sounds like clutching at straws and is not substantiated. If hydrocarbons are found they will need to be extracted, and this would lead to increased HGV traffic on the B2133 with implications for road safety; Cllr Amanda Jupp, who represents Billingshurst, shares these concerns. Further extension of permission at least requires new information with a stronger justification.

36.8 The Committee made comments including those that follow and responses were provided by the Planning and Legal Officers, as relevant:

Points made – Clarification was sought regarding the applicant's financial viability and the requests for a bond in relation to restoration work that were made, and the following linked points were also made:

- Have any hydrocarbon sites in West Sussex ever required a bond?
- The financial stability of companies exploring mineral resources should be checked.
- Would responsibility for restoration fall back on the County Council in the event of financial failure of the applicant?

Response – The following responses to the above linked points were made:

- Planning Practice Guidance states that bonds are only justified in exceptional circumstances, such as: for long term new projects where progressive reclamation is not practical, e.g. an extremely large limestone quarry; where a novel approach or technique is being used; or where there is reliable evidence of the likelihood of either financial or technical failure. This is not a new long-term project and it does not use novel approaches. The Council has no reliable evidence of a financial failure or technical failure to warrant a bond. Restoration of this site has not previously been the subject of a bond. Other similar sites around the country and recent decisions don't have bonds, albeit they have been used in some circumstances. No hydrocarbon sites in West Sussex have ever required a bond for restoration.
- The North Sea Transition Authority does review the financial capabilities of an applicant when granting a licence. If the applicant could not meet the condition, responsibility for restoration of the site would fall back to the landowner; this is standard practice. Cllr Oakley clarified that the County Council could step in as a last resort using direct action and seek costs back.
- Plugging and abandonment of the well is likely to attract the greatest cost, but otherwise, in this case site restoration should be relatively simple as it is a case of removal of stone and aggregate and structures and then replacing the soil on the site.

Points made – Clarification was sought regarding claims of failures in the construction of the existing borehole.

Response –The construction and design of the well as now suspended is regulated by the Health and Safety Executive and has been reviewed and verified. An Environmental Permit from the Environment Agency covers any emissions.

Points made – In terms of landscape and amenity impacts the following points were made:

- The report states that “the proposals would result in the continued retention of a site, not wholly in keeping with countryside location for a further two years”.
- There have already been four extensions at this site and a fifth extension to this site should not be allowed and seems unreasonable. The planning applications for Wood Barn Farm have now covered a period of over 11 years, meaning the site has been dormant for 6 of them and another 2 years will make that a total of 8 years. The timescale expectation has been badly managed.
- How long must the local residents live their lives in limbo and how is stress on the community measured, which is not addressed in the Committee report?
- Extraction for UK energy independence push and the insignificance of the effect of the site currently on the landscape and on residents appear to be contradictory arguments.
- Residents may feel the site and this application have an impact on the value of their houses, can this be given any weight?

Response – The points about landscape and amenity made by the Committee were noted. Officers clarified that the impact on house values is not a material consideration.

Points made – Cllr Oakley referred to the comments attributed to him by Dr Sutcliffe, and clarified that he has approached this application in its own context on the information available.

Response – None required.

Points made – In terms of the need for the site, the following points were made:

- The justification for need is called into question because although the applicant claims that the site is dependent on the legal outcomes at other sites – Loxley for exploration and testing and Horse Hill for oil production – Wood Barn Farm is an independent site where further need has not been demonstrated. It is also questioned if the Surrey sites are also dependent on Wood Barn Farm.
- Policy M24 of the Joint Minerals Local Plan refers to restoration at the earliest opportunity.
- Policy 26 of the Horsham District Planning Framework states that the proposal must be essential to its countryside location and, additionally, one of the following criteria must apply: 1) support the use of agriculture and forestry; 2) enable the extraction of minerals or the disposal of waste; 3) provide for quiet informal recreational use and 4) enable the sustainable development of rural areas. Numbers 1 and 3 do not apply. Number 2 applies, and the retention of the site/this development would not specifically provide for extraction of minerals, as that would require further permission. As to Number 4, the clear direction of travel from Government policy statements is that in the long term, oil and gas are not sustainable.
- Whilst indigenous oil and gas production is currently needed for transition and because of the tax, onshore oil sites provide only a very negligible contribution to UK production. Therefore, it is questioned whether the continuance of this site can be considered essential.
- If the applicant actually thought there was going to be a good supply of oil or other hydrocarbons they would have got on with production a long time ago.

Response – The outcomes from Loxley and Horse Hill, which include both production and exploration, would give further information on the target geological formation including; best extraction methods; potential productivity; flows, etc, and this is all relevant to the future potential and viability of the application site. This proposal is for further appraisal, albeit at other sites, and is a precursor to extraction (production). The site would be held in stasis and no further exploration would be permitted under this application. Any further development (whether for further exploration and appraisal or production) would require a new application. Appraisal is given significant weight by Planning Inspectors, as being a precursor in terms of need, linking to oil production.

Points made – Is the site now required to provide for biodiversity net gain in its restoration?

Response – The application was submitted before 12 February 2024, so is not subject to the mandatory biodiversity net gain requirement. It is also a Section 73 application for a variation of a permission granted before this date, and thus is exempt from this requirement.

Points made – Could the Council's latest standard version of the condition on replacement planting apply in terms of replacement planting?

Response – Conditions require the gapping up of hedgerows, the majority of which was carried out some time ago and has been largely successful. Some further tidying up would be required at the access point onto Adversane Lane. Replacement planting remains a requirement and would be part of the required aftercare scheme/provisions.

36.9 The substantive recommendation for Planning Application WSCC/046/23 including Conditions and Informatives as set out in Appendix 1 of the Committee report was proposed by Cllr Jupp and seconded by Cllr McDonald and voted on by the Committee with four in favour and seven against. On that basis, given the numbers, the substantive recommendation fell.

36.10 Resolved:

That Planning Application WSCC/046/23 be refused.

36.11 The substantive recommendation for Planning Application WSCC/047/23 including Conditions and Informatives as set out in Appendix 2 of the Committee report was proposed by Cllr Jupp and seconded by Cllr McDonald and voted on by the Committee with four in favour and seven against. On that basis, given the numbers, the substantive recommendation fell.

36.12 Resolved:

That Planning Application WSCC/047/23 be refused.

36.13 Cllr Oakley proposed that a motion be laid before the Committee providing reasons for refusal of both Planning Applications WSCC/046/23 and WSCC/047/23 on the basis that neither application accords with Policies M23 and M24 of the West Sussex Joint Minerals Local Plan (July 2018 - Partial review), Paragraph 217 of the National Planning Policy Framework and Policy 26 of the Horsham District Planning Framework (2015).

36.14 The Committee paused at 12.36 pm for a break in order to allow officers to formulate the correct form of wording for the reasons for refusal in support of Cllr Oakley's proposal. The Committee reconvened at 12.37 pm.

36.15 Cllr Oakley proposed the following motion in relation to both Planning Applications WSCC/046/23 and WSCC/047/23:

That planning permission be refused for the following reasons, with the final form of words to be delegated to the Head of Planning Services, in consultation with the Chairman of the Planning and Rights of Way Committee.

There is no demonstrable need to retain [the site/security fencing, gates, and cabins] for the appraisal of hydrocarbons.

The significant period of time that has elapsed since active exploration and testing on the site, and the lack of justification for a further extension of time.

The retention of the site is not essential to its countryside location and the application does not enable the extraction of minerals.

The proposals are therefore contrary to Policies M23 and M24 of the West Sussex Joint Minerals Local Plan (July 2018 - Partial review), Paragraph 217 of the National Planning Policy Framework, and Policy 26 of the Horsham District Planning Framework (2015).

36.16 In relation to Planning Application WSCC/046/23, the motion laid out in Minute 36.15 above was proposed by Cllr Oakley and seconded by Cllr Patel, and voted on by the Committee, and approved with 7 in favour and 4 against.

36.17 In relation to Planning Application WSCC/047/23, the motion laid out in Minute 36.15 above was proposed by Cllr Oakley and seconded by Cllr Patel, and voted on by the Committee, and approved with 7 in favour and 4 against.

36.18 The Committee recessed at 12.39 pm for a short break and reconvened at 12.44 pm.

37. Registration of Land as a Town or Village Green

Application under S.15 of the Commons Act 2006 for the registration of land claimed to have become a town or village green.

Land known as Collingwood Road Green, Horsham.

37.1 The Committee considered a report by the Director of Law and Assurance, as amended by the information provided in the Agenda Update Sheet (copies appended to the signed minutes). The report was introduced by Laura Floodgate, Senior Solicitor, who outlined the application and the key points including the evidence and legal tests, and clarified the following:

- The Agenda Update Sheet contains comments from the Horsham Society. The representation does not change the substantive recommendation.
- Signatures to the plans submitted with the application (Appendices 3a and 3b) have been redacted for the purposes of data protection.

- A letter has been received this week from Jeremy Quin, MP, supporting the application [this was tabled for the Committee members].

37.2 Felicity Harrington, the applicant, spoke in support of the application. This matter has been hanging over the residents for two years. Residents did not know that the land was privately owned, but since finding out did try to buy it; however, at auction it was sold to a developer who has threatened to put fences round the green, which has caused a lot of concern. Residents' children play on the green because it is an area of family housing. The closest park is a 10 minute walk away for a small child and across a busy road. Open spaces where children can play are needed. Without town or village green status, the developer may apply to have the highways status removed and the land blocked up so that she can develop it. There would be nowhere for the children to play and families would also not be able to come together for community events. It is questioned how Orbis [the County Council's Legal Services] conducted their inquiries because a barrister's opinion has had to be sought twice. Two other TVG applications went through in virtually identical circumstances; although it has been stated records have been lost in a flood, they must have been signed off by Council officers and there may still be staff who can comment. Natural justice is asked for because it is a slight legal technicality that says there can't be village green status. Whether or not the amenities have been enjoyed by right or as of right for the last 60 years, it was always intended that that green should be a green, it was never intended that it should be built on. Town or village green status is the only way to secure this, including for future generations.

37.3 A statement, submitted by Rhoda Hatton on behalf of the Horsham Trafalgar Neighbourhood Council in support of the Collingwood Road residents, was read out by the Clerk to the Committee. The green has, in the past, been used as an open green space for recreational and community activities and is valued by immediate residents and those local to the ward. It should be extended to future generations, rather than risk seeing it lost and developed by a subsequent landowner. The space has been recognised in the Horsham Neighbourhood Plan which lists the area as an asset of community value.

37.4 A statement on behalf of Cllr Dr Nigel Dennis, County Councillor for Horsham Hurst for over 30 years, was read out by the Chairman. The area known as the Collingwood Road Green has been valued and used by residents as an open green space for recreational and community activities for many years. It provides a pleasant vista for the houses. The Horsham Neighbourhood Plan lists it as an asset of community value. Residents' evidence documents its use as a public open space ever since these houses were built. It is very similar to a town or village green application that was successful for Cootes Green, which also had highway rights over it. It would be inconsistent not to grant similar status to the Collingwood Road Green. The Committee was urged to use its discretion and preserve this green space as it was intended to be for future generations rather than risk it being stopped up and developed by a current or future landowner.

37.5 In responses to points made by speakers, the Legal Officer clarified the following:

- The landowner has been informed that they cannot fence highway land.
- Regarding historical inconsistency of registration of highways land as TVGs, it should be noted that in determining these applications the law is not akin to planning legislation and does not require a consistency of application of planning policy, rather an application of the statutory tests to the facts of the case. In relation to the decisions made for Birch Green in September 2006 and Cootes Green in May 2008, the officer concerned is no longer with the Council and the papers for one application were lost in the recent flooding of Durban House. The decisions may have been made in error. Common law has moved on since the decisions were made, especially in relation to an 'as of right' decision made by the House of Lords *R v Barkas*, as noted in paragraph 4.5.3 of the Committee report.
- The Committee is required to apply the legal tests for TVG applications to the facts of the case.

37.6 The Committee made comments including those that follow and responses were provided by the Legal Officer, as relevant:

Points made – How does somebody apply for a stopping up order and what would be the likelihood of success on this type of land?

Response – The application would be made to the Highways Department. It is not possible to comment on the likelihood of success. Any activity that might conceivably cause an obstruction to someone using a highway verge to pass and repass is not allowed.

Points made – An explanation of the trigger event and the terminating event was requested, noting that Horsham District Council stated on 20 December 2022 that a trigger event and a corresponding terminating event had both occurred.

Response – The Growth and Infrastructure Act 2013 sets these out in detail. One trigger event might be an application for planning permission in relation to the land which would be determined under Section 70 of the Town and Country Planning Act 1990. This means there couldn't be an application for registration of a TVG. A corresponding terminating event could be that the application is withdrawn or a decision to decline the application is made. Regarding this application it is not known what the trigger event or corresponding terminating event were, only that they occurred.

Points made – Clarification was sought regarding the details of Collingwood Road Green being an Asset of Community Value, which would need to be recorded by Horsham District Council in a register and be renewed on a five-year basis with a case presented. It also means that there is a moratorium period in any sale and the organisation which has registered it would have the first refusal on any purchase.

Response – The land is understood to be registered as an Asset of Community Value; however, the sale of the land is not relevant to the legal tests for registration as a TVG.

Points made – Clarification was sought regarding whether the land is in the Horsham District Council's Neighbourhood Plan. It is possible to designate green spaces in the labelled plan, which then gives them some protection against future development.

Response – Unfortunately, matters relating to whether or not a planning application might be submitted by the landowner and also the designating of green spaces are not relevant to the statutory tests in the Commons Act that must be applied in this application for a TVG.

Points made – It was suggested that a non-statutory public enquiry be held.

Response – The purpose of such an inquiry would be to hear and test oral evidence. Counsel's clear opinion is that because there is no dispute of fact on the evidence of use of the land here, that there would be no purpose served by having oral evidence at a non-statutory public inquiry tested. Under the Commons Act 2006 the facts of the case regarding the user evidence are not disputed, it has been used. Because the land is highway people have the ability to use it 'by right' and have not done so 'as of right'. The evidence of use does not meet the test of 'as of right for lawful sports and pastimes'.

Points made – Clarification was sought on the highway status of the land and whether the Highways Authority has been maintaining the land since the 1960s.

Response – Counsel stated that she had not seen any evidence than an actual adoption of the land as public highway took place - see the supplementary note that is at Appendix 7, Paragraph 2 of the Committee report. The Adoption Agreement set out the agreement between the developer and the Council to construct the highway to the requisite standard so that the Council could adopt the relevant area of land, amongst other areas, as 'Highway to be maintainable thereafter at the public expense'. The Agreement is not the actual evidence of adoption, which would take the form of a minute or other record. However, together with the fact that the land has since been maintained at public expense, the agreement represents clear evidence that the adoption did take place.

Points made – How can highways land be owned privately and what does this mean, including whether residents could be excluded under civil law for trespass? Also, how many TVGs in West Sussex are privately owned?

Response – The details of the number of TVGs in West Sussex was not to hand, but most are probably privately owned, some of them by parish councils or district councils. Collingwood Green is maintained by the County Council as highway land (it is highway verge); this is not uncommon. Land can be privately owned but also have highway access

rights over it. As already mentioned, there is a right to pass and repass on highways land.

Points made – The Committee made it clear that it empathised with the residents, but understood the need to apply the legal tests. The Committee sought to understand if it is possible for the Committee to make a statement about how it would wish to see this highway land used in the future, or at least that it would wish to see it protected. Also, if the Council is able to do something to avoid similar circumstances occurring in the future?

Response – There is nothing in legislation that precludes highway land from being registered as a TVG, rather it must meet the statutory tests for registration. The Committee must determine whether the land should be registered and was not advised to make a statement on how the highway should be used in the future.

37.7 The substantive recommendation, as set out in the Committee report, was proposed by Cllr Atkins and seconded by Cllr Patel, and voted on by the Committee and approved with seven in favour and two against and one abstention. On that basis, given the numbers, the substantive recommendation was approved.

37.8 Resolved:

That the land known as Collingwood Road Green, Horsham and as shown cross-hatched black on the application plan attached at Appendix 1a of the Committee report be not registered as a town or village green.7.9 The Committee recessed for lunch at 1.43 pm. During the break Cllr Quinn gave his apologies for the afternoon session and left.

37.10 The Committee reconvened at 2.17 pm.

38. Definitive Map Modification Order

DMMO 4/21 Definitive Map Modification Order Application for the addition of a footpath from Mouse Lane to footpath 2715 with an extension to bridleway 2714 and an extension to the historic Rifle Range Targets in the Parish of Steyning CP to the Definitive Map for Chanctonbury.

38.1 The Committee considered a report by the Director of Law and Assurance (copy appended to the signed minutes). The report was introduced by Gemma Penfold, Legal Assistant, who outlined the application and the key points.

38.2 Cllr Christine Young, representing Steyning Parish Council, the applicant, and a Steyning resident of 39 years and a user of the Rifle Range area along with her family since the 1990s for activities including walking and sledging, spoke in support of the application. Steyning Parish Council's Community Committee unanimously approved an updated resolution of support for this application on 5 September 2023. The Rifle Range is a very important historical area of natural countryside for the

local community as demonstrated by the user forms in support of this application for the years between 1989 - 2009. The Rifle Range continues to be well used by people and walkers today, especially evidenced in 2020 during lockdown when many people and families could be seen walking there each day. The Rifle Range is easily accessible both from the Memorial Playing Field in the centre of Steyning and from Mouse Lane via the Nightingale Lane path, which also gives flat access and caters for those with limited mobility. The Steyning Downland Scheme Charity (SDS) has established a Community Orchard at the far end of Nightingale Lane where it meets the first field, ensuring future unrestricted access to this area. The stated aims of the SDS include "to enable and encourage conservation of the natural resources and habitants for the benefit of the public" and "to educate and encourage the public, and young people, in particular, to understand the natural environment". The historical nature of the Target area was cited. Work is currently underway to further improve this area for visitors. The application includes two links to already established Public Rights of Way (FP 2715 and the Beeches bridleway 2714) on opposite sides of the Rifle Range area. These two link paths are shown to have been well trodden over the Rifle Range, during the relevant years (1989 - 2009) by the aerial views of Google Maps. Establishing these links as Public Rights of Way will improve the access to other footpaths across the South Downs. Evidence provided in the user forms and the aerial views strongly support the fact that the Rifle Range appears to have been used "as of right" from 1989, and in many cases, before this.

38.3 Gill Muncey, a local resident and a Steyning Parish Councillor from 2013 to 2019, spoke in support of the application. This application is based on the period 1989 to 2009. During the 1980s the land fell into disuse. In the 1990s Nightingale Lane, leading from Mouse Lane up to the Range was falling into disrepair and becoming very overgrown. In the late 1980s use as an active rifle range became more and more sporadic. The land was available for public use for the vast majority of the time. Mrs Muncey recalls in 1990 discovering the Rifle Range for dog walking and cannot recall any notices or signs, although there were old firing warning signs and flags on poles that were not used or any noise of shots. Flags may have raised for the final use of the range on 30 December 1989, but would not have covered a 24 hour period and walkers would most likely have used the paths on that day before and after the Gun Club booking. Reminiscences about ongoing public use of the Rifle Range are published in the book Reflections by Mark Emery include his father collecting used shells there dropped in World War II and the author using the area for sledging, as did Mrs Muncey's children in the early 1990s. It is 'the place to go' for sledging for local families. The 2001 and 2008 Google Earth images clearly show worn and defined paths following the claimed route. There are 30 completed evidence statements, where none of the individuals recall any signs being in place on the paths in question during the period 1989 to 2009. The popularity of the paths dating back to 1989 and earlier, when the range was not in use, means the landowners must have been aware of public use of the land for walking and yet took no action to restrict this. Mrs Muncey attended and has photos of a Live Lounge music event held in the Rifle Range on 31 May 2008 and has no recollection of receiving any literature or maps being handed out. This event did not prevent walkers from accessing the paths claimed because

the event was free to enter and there are several entrances to the Rifle Range. Signage was not in place until 2016.

38.4 Mr Richard John Goring, one of the landowners, spoke in objection to the application. The Wiston Estate's long term strategy for public rights of way is set out in their Whole Estate Plan, approved by the South Downs National Park in 2017. It shows 52km of public rights of way and other paths with permissive access. The Estate is fully supportive of public access on agreed routes where they do not come into conflict with nature, habitat or livestock management. The proposed routes are over an area of chalk grassland, a highly important rare habitat, requiring grazing to be kept in good condition. Approval of the application may cause conflict with the Estate and SDS's ability to manage the land, grazing and livestock, which at times requires changing routes and this is not possible if they are permanent public rights of way. There is insufficient evidence to establish that the claimed routes have been used continuously for a 20 year period. Regarding Common Law, the onus of proof is on the claimant to show the landowner intended to dedicate, and also that the use must be shown to be as of right and long enough to infer an intention to dedicate. The land has long been occupied by tenants of the Wiston Estate who do not have the right to dedicate public rights of way. The 1987 AHA tenancy agreement stated that the tenant must "do his best to prevent trespass on any part of the holding... and not allow any footpaths to be created". Courts have been reluctant to draw inference of an intention to dedicate in these circumstances. The submission of the 2013 public rights of way statement and map shows that the landowner had no intention to dedicate because these routes are not shown. From 2007 residents were invited to take part in activities on the land by permission. In 2009 a formal permissive route and permissive areas of access were granted by the Rural Payments Agency to the landlord for the period to 2019. The Wiston Estate has been happy to allow SDS to grant permissive access, but this must remain by permission rather than as of right.

38.5 A statement on behalf of Cllr Paul Linehan, local Member for Bramber Castle, was read out by the Chairman. The Committee report notes in paragraph 4.1 that "Cllr Linehan stated he was happy to support the application in its current form", but at the time of being asked to support the application no access to the results of the consultation was available. No discussion had taken place between Steyning Parish Council and the Wiston Estate. In only addressing the period from 1991 to 2007, the report overlooks legal and practical developments impacting the application during the last 17 years. Regarding the 20-year period, in *R (on the application of Trail Riders Fellowship) v Dorset County Council* [2015] EWCA Civ 175, the Court of Appeal emphasised the importance of considering all relevant evidence up to the date of the application or the relevant event. Such an approach ensures that decisions are made on the most complete information base possible, reflecting both historical use and current circumstances. It cannot be seen that this has been done. Significant actions taken by the landowner, as detailed in his evidence and that of the Steyning Downland Scheme, such as the granting of permissive use under a Higher Level Stewardship Agreement or the posting of signs indicating permission only access have served to interrupt the continuity of public use as of right, and clearly communicate his lack of intention to dedicate the route as a public right of way. The depositing of a statement

and map acknowledging existing public rights of way can be seen as a clear intention from the landowner that no further rights of way have been dedicated, effectively resetting the 20-year clock from the date of deposit. Mr. Goring's submission in April 2013 does not recognise the claimed route and effectively indicates his intention that no additional public rights of way have been dedicated across his land beyond those already recorded. It introduces a formal challenge to the presumption of dedication based on use "as of right" for the 20-year period leading up to the deposit of the statement. If the Committee relies solely on the period of 1991 – 2007, in relation to the Committee, it is considered that the report does not fully address the following:

1. Assumption of Continuous Use: The report assumes that user evidence from 1991 to 2007 demonstrates continuous, uninterrupted use "as of right" without critically examining the nature of this use or the possibility of interruptions.
2. Quality and Interpretation of User Evidence: The report relies heavily on user evidence forms but does not critically assess the credibility, consistency, or objectivity of these forms.
3. Overlooking Permissions Granted: The period in question includes times when the landowner had given permissions for access, which is important to establish whether use was "as of right".
4. Evidence of Landowner's Intent: The report insufficiently considers actions by the landowner, such as signage and the formation of the SDS, that indicate a lack of intent to dedicate the path for public use.
5. Lack of Context for User Claims: The report's analysis does not deeply engage with any legal implications of the users' claims of access "as of right." It does not critically evaluate how these claims stand up to scrutiny when considering the requirements for establishing a right of way at Common Law, particularly the need for the landowner's acquiescence to such use being understood as an intention to dedicate.
6. Misinterpretation of the "As of Right" Concept: the potential misinterpretation or oversimplification of what constitutes use "as of right." The presence of any permissions granted by the landowner, directly communicated or implied, challenges the premise that the use was "as of right" and without the landowner's consent. The report does not seem to fully address this.

This application covers an area of chalk grassland, a highly important habitat and requires grazing to be kept in good condition. There is only 3% of this habitat left in the world. It can interfere with the ability of the land stewards.

38.6 In responses to points made by speakers, the Legal Officers clarified the following:

- The landowner's evidence infers that the route has been used by permission only since 2007, therefore, the relevant period must be taken back retrospectively prior to 2007. This is the relevant legal event that brought the public's use of the path into question.
- Prior to 1991, the land was used as an active rifle range, which suggests that the claimed route would not have been accessible to the public until after the last shooting on 30 December 1990.
- Any concerns of nature restoration and suitability are irrelevant to the legal tests.

38.7 The Committee made comments including those that follow and responses were provided by the Legal Officers, as relevant:

Points made – It is clear that the situation means the legal tests are limited to the Common Law grounds.

Response – None required.

Points made – It was mentioned that the tenants were not able to dedicate land, but irrespective of a tenant's compliance or not with their tenancy agreement, the freeholder should be monitoring what a tenant is doing, and a freeholder can still dedicate the land.

Response – On whether land is leased and whether there is still a capacity for the freeholder to be able to dedicate, which is a requirement for Common Law dedication, case law is conflicting. However, the general gist is that it depends on what is in the lease/tenancy agreement. Despite asking, the Council was not provided with any evidence of the tenancy agreements for the period 1991 to 2007, however, the Council's position is that a freeholder would still have the capacity to dedicate.

Points made – Is there any evidence of the landowner or any other party proactively giving permission or taking actions that would have interrupted that relevant period?

Response – The relevant period is 1991 to 2007. There is no evidence with regards to permission during the period, but there were two users who claimed to have permission in the 1980 and 1990s, and one user who claimed to have been given permission by Mr Richard Goring; clarification was sought on the date of when that permission was given but no response was received.

Points made – Can the actual lines of the claimed routes be evidenced? This is an open space and it is likely that many users have wandered all over the area. The evidence from Google Maps and aerial photography available on the County Council's Corporate Map system show an inconsistency over the period in the lines of the proposed routes; for example, on the southern side, at the eastern end of Path 2715 there is an indication that the proposed route has previously cut the corner of the field. How much weight should be given to the user statement when there are clear seasonal fluctuations?

Response – Each witness will have filled out a witness evidence form and attached a plan. These plans have marked exactly where the user claims to have walked, which then supports the application overall. The lines on maps are part of the background evidence. Seasonal fluctuations may not show exactly where the witnesses claimed to have walked but that doesn't undermine their evidence completely. All evidence would be tested at a public inquiry.

Points made – How many times per year has the usage been for the whole proposal? The proposal makes sense for Extension 1, which leads

to another route, but Extension 2 does not lead anywhere. What is the level of claimed use for the proposed extensions?

Response – The number of users and times used for the whole can be seen in Paragraphs 11.2 to 11.7 of the Committee report. Thirteen users claim to have used Extension One over 100 times a year, ten users claim between 15 and 100 times a year, six users under 15 times a year and one user claims not to have used this extension. Eleven users claim to have used Extension Two over 100 times a year, ten users claim between 15 and 100 times a year, eight users under 15 times a year and one user claims not to have used this extension.

Points made – SDS is a licensee of the Wiston Estate that came into being in 2009, as stated on their website. What weight should be given to the evidence of the SDS stewards, since that organisation has not been in existence for the full period in question?

Response – It is understood by the Council that SDS have promoted the land for conservation and the permissive paths on the land since 2007, through an informal consultation starting then. So that is when it was first brought to the attention of the public and is considered to be the challenge to as of right use in 2007.

Points made – Confirmation was sought that when dealing with a dedication at Common Law there is not a 20 year period.

Response – The 20 year period is set out under Section 31 of the Highways Act. For Common Law dedication, the period can be less; it is the quality and quantity of the user evidence and whether there has been an inference of dedication by the landowner who has the capacity to dedicate. That inference can be express or it can be implied, and the inference of dedication can be through actions or the absence of actions. The use needs to be of a sufficient quality and quantity that to the reasonable mind of a landowner it is as of right.

38.8 The substantive recommendation, as set out in the Committee report, was proposed by Cllr Mercer and seconded by Cllr Wild, and voted on by the Committee with seven in favour and one against and one abstention. On that basis, given the numbers, the substantive recommendation was approved.

38.9 Resolved:-

That a Definitive Map Modification Order, under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add a footpath from Mouse Lane to footpath 2715 with an extension to bridleway 2714 and an extension to the historic Rifle Range Targets in the Parish of Steyning be made.

39. Date of Next Meeting

39.1 The Committee noted that its next scheduled meeting would be held at 10.30 am on 24 April 2024 at County Hall, Chichester.

39.2 Members noted the report on 'Current Planning Applications, Current Definitive Map Modification Orders (DMMOs), Town and Village Green Applications (TVGs) and Public Path Orders (PPOs) under investigation' circulated via the Agenda Update Sheet but were advised that it contained an incomplete list of Planning Applications. A corrected list would be circulated to members after the meeting and a correct list made available at the next meeting. Items that may be scheduled for consideration at the next meeting of the Planning and Rights of Way Committee include Planning Application WSCC/045/23. All scheduling of items is subject to change.

The meeting ended at 3.00 pm

Chairman