

Parish: West Wittering	Ward: West Wittering
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WW/18/02708/DOM

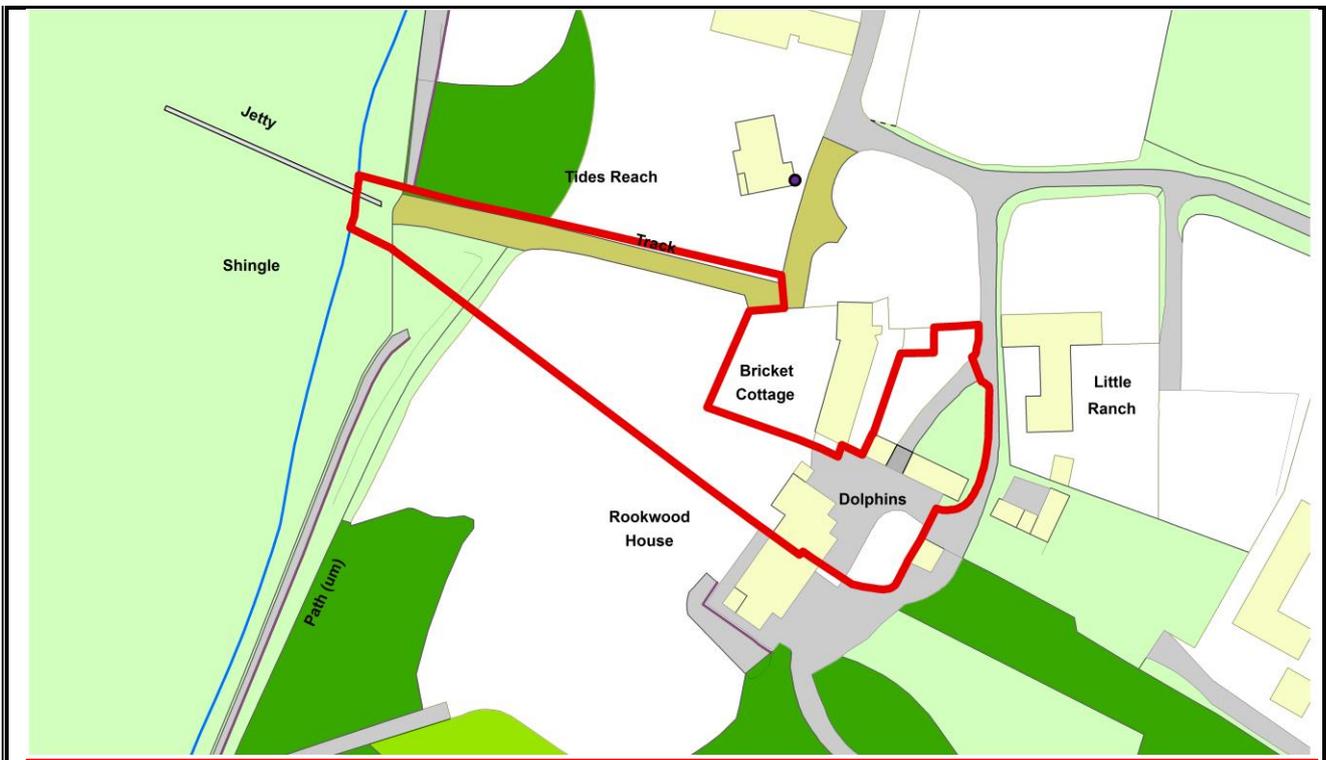
Proposal Proposed steps down through garden to a 1.5 metre long tunnel beneath public footpath rising through to another set of steps to the foreshore garden.

Site Dolphins Rookwood Lane West Wittering Chichester West Sussex PO20 8QH

Map Ref (E) 478221 (N) 99764

Applicant Mr George Chapman

RECOMMENDATION TO PERMIT



	<p>NOT TO SCALE</p>	<p>Note: Do not scale from map. For information only. Reproduced from the Ordnance Survey Mapping with the permission of the controller of Her Majesty's Stationery Office, Crown Copyright. License No. 100018803</p>
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1.0 Reason for Committee Referral

1.0 Red Card: Cllr Barrett - exceptional level of public interest.

1.1 This application was deferred at the meeting on 13 February 2019 for further information regarding the status of the land and impact on SSSI. Further information is provided in bold text throughout the report.

2.0 The Site and Surroundings

2.1 The application site is located to the northwest of a residential property known as Dolphins. The rear garden of Dolphins extends to the northwest and is intercepted by a raised ground which forms a public right of way (PROW) across the site. Beyond the PROW to the northwest is a further area of land covered in grass and vegetation to the boundary with the footpath. This land is open to the foreshore, to the northwest side, and there is an existing timber outbuilding located on this section of land.

2.2 Whilst there is raised ground either side of the public footpath it should be noted that the ground level of the footpath itself is lower than the ground levels of the garden.

3.0 The Proposal

3.1 This application proposes a 1m wide pedestrian tunnel connecting the garden to the foreshore land and underneath the PROW. The tunnel would provide a direct pathway for the occupants of Dolphins to have access from their garden to the land adjoining the foreshore (also within the applicant's ownership) which is in residential use, in connection with Dolphins.

4.0 History

04/00612/DOM	PER	Demolition of existing conservatory. Construction of new conservatory to side of house, conversion of existing outbuilding with covered link to new conservatory.
18/00623/DINPP	PPREQ	Steps down through garden to 1.5m long tunnel beneath footpath, then rising through another set of steps to the foreshore section of the garden.
18/00624/PREHH	PRE	Steps down through garden to 1.5m long tunnel beneath footpath, then rising through another set of steps to the foreshore garden.

Enforcement history:

2014 - The beach hut was reported to the enforcement team on 15.04.2014 (14/00108/CONHH). No breach was identified as it was found that a similar development had existed in this position prior to the hut being erected. As such no enforcement action was taken and the case was closed.

2017 – Enforcement case received on the 03.04.2017 (17/00108/CONENG) in respect of alleged earth movement on the site to raise ground level and the installation of a scaffold bridge. The soil had been imported from a source 100m from its present location to raise and level a small area of land. This operation did not amount to significant earth movement and so it was considered that planning permission was not required; also, no harm to the AONB was identified. For these reasons, no further action was taken. The bridge was removed voluntarily and so the case was closed.

5.0 Constraints

Listed Building	No
Conservation Area	No
Countryside	Yes
AONB	Yes
Tree Preservation Order	No
EA Flood Zone	
- Flood Zone 2	Adjacent
- Flood Zone 3	Adjacent
Historic Parks and Gardens	No
Special Protection Area	Adjacent
SSSI	Adjacent
Ramsar	Adjacent
Coastal Footpath	Yes

6.0 Representations and Consultations

6.1 Parish Council

OBJECTION ON BEHALF OF WEST WITTERING PARISH COUNCIL TO APPLICATION FOR TUNNEL ONTO FORESHORE AT CHICHESTER HARBOUR – DOLPHINS ROOKWOOD LANE – WEST WITTERING WW/18/02708/DOM – LEGAL ISSUES

1. The Application Site includes land designated SSSI and SPA Confirmed by:
 - a. Natural England letter 9th January 2018
 - b. Chichester Harbour Conservancy use of Magic maps with underlay
No provenance for inaccurate map relied upon by CDC and applicant

Legal Implications – Wildlife and Countryside Act 1981, Conservation of Habitats and Species Regulations 2017 apply and:

- All operations/development or potentially harmful activities **MUST** be consented by reference to Natural England
- If not consented then a criminal offence is committed
- No permitted development rights exist for the site
- All existing activities on site to create garden need consent
- Change of use to garden requires consent

2. The Application Site does not have a lawful use as garden

There is no lawful certificate to confirm that the site has a 10 year use as garden. The Parish Council has photographic evidence that the change of use as garden has only taken place in the past three years. The Council should require an application for a Lawful Certificate under S191 T&CPA 1990 so all available evidence can be tested.

3. The Appropriate Assessment does not comply with Regulation 63 of the Conservation of Habitats and Species Regulations 2017 The Habitats Appropriate Assessment was not available for the committee. It must include all the non- consented activities for assessment of potential harm to the SSSI as part of the “in-combination” test required by the law. The unconsented activities which must be included in the Appropriate Assessment are:

- Change of Use to garden
- Erection of beach hut
- Erection of fence and gates
- Importation of soil
- Importation of grass seed
- Mowing of lawn
- Destruction of the path to the sea/jetty

The AA has not been completed in accordance with the law and Natural England must be reconsulted and informed of all the above activities on the site. 4. National Planning Policy Framework (Government Guidance) and Adopted Plan Policies The officer’s report is wrong. There is no presumption in favour of sustainable development for the site. The NPPF has protective policies for this site see paras 175 and 177 which specifically exclude these sensitive sites from the general presumption in favour of sustainable development.

Relevant adopted plan policies: The law (S38 Town and Country Planning Act 1990) states these policies are the starting point for any planning decision yet they were not analysed in the report:

- **Policy 43 – Chichester Harbour Area of Outstanding Natural Beauty (ANOB) – natural beauty are conserved and enhanced**
- **Policy 44 - Development around the Coast (not in report) – development must have no harmful effects or net loss of nature conservation, or character of ANOB and ensure public access is retained**
- **Policy 45 – Development in the Countryside – development must require a countryside location and local need exists**
- **Policy 48 – Natural Environment – development must have no adverse impact rural character, respect and enhance landscape character and public amenity**
- **Policy 49 – Biodiversity – development must avoid adverse impacts and safeguard biodiversity value**
- **Policy 50 – Development and Disturbance of Birds in Chichester and Langstone Harbours Special Protection Areas – confirms no presumption in favour of sustainable development for site**

22/01/2019

Further to my email of 22/1/19 the Council would like to add that paras 174 and 175 of the NPPF together with CDC's own Local Plan policies (both adopted and emerging) - all protect these sites and are material when looking at the application. This material evidence should be added to the Parish Councils objection statements and provide your reasons for refusal.

22/01/2019

Following the Parish Council objection to the proposed tunnel onto the foreshore from the garden of Dolphins in Rookwood Lane, we understand that the District Council has now accepted that the foreshore is either part of the SPA (as the citation for the designation would suggest) or in any event is within the zone of influence for the European designated site. The Parish Council therefore wishes to make additional representation regarding this application and to ask you to reconsider the enforcement case regarding the recreational use of the foreshore.

We understand that as a result the applicant has been asked to prepare an Appropriate Assessment which is required by the Habitats Regulations if any plan or project is being considered which may have a significant effect on the flora or fauna of the European designated site. In some areas of the country, including, the Thames Basin Heaths, areas of Dorset and Ashdown Forest all now recognise a zone of influence of five or more kilometres around these protected areas so that the Habitats regulations are engaged despite the development being a considerable distance away. This is, in part, because of the risk from recreational disturbance, predation and disturbance by domestic dogs and cats on the ground nesting birds. Whilst the ecology of these heathland sites are different from the foreshore, the rules protecting them are the same and must be adhered to.

Whilst the strict tests in the Habitats Regulations have not to date been adhered to by Councils whose statutory duty is to protect the European designated sites in Chichester Harbour and the rest of the south coast, the rules are just as applicable as they are to other areas with the same designations. As these areas are also all SSSIs they are subject to similar protection under the Wildlife and Countryside Act 1981. These areas should be subject to management plans to ensure they are managed in a manner that protects their conservation objectives.

The Habitats Regulations adopt a precautionary approach to the granting of consents, before a Council can grant planning permission it has to be satisfied that the proposal, either on its own or in combination with other plans or projects, will not "have an adverse effect" either the habitat or the birds that feed, roost or breed there. This is a very high bar as experience has shown that the "in combination" part of the test is almost impossible to prove. The effect is that any proposal that could cause any harm will not be permitted.

The relevant tests which have to be applied by the Council or Inspector on appeal are set out in Regulation 63 which is set out below:

Assessment of implications for European sites and European offshore marine sites

63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

There are some exceptions to this rule, but they apply to project of Overriding Public Interest (Reg 64).

You will see that the "in combination rule" is set out in Regulation 63(1)(a). The Parish Council is advised that in applying the precautionary principle to a development which will undoubtedly cause recreational disturbance and a risk of increase use by domestic animals using the tunnel, the test is failed. To grant planning permission would be ultra vires and challengeable in the courts.

The Parish Council does not understand how a proposal such as the tunnel could be granted planning permission by the District Council or an Inspector without that decision being ultra vires.

The Parish Council is also advised that the District Council has recently closed the Enforcement case regarding the land on the foreshore being used for a domestic garden - the grass is mown and there is a beach chalet which has changed the use of the land. The recreational use including mowing the grass to form a lawn is deemed to cause disturbance and the Parish Council respectfully requests that this is looked at again in light of the evidence above.

08/12/2018

The Parish Council objects to this application.

The Inset Map 37 for West Wittering shows the boundary of the SSSI, SPA and SAC going right up to the coastal path covering the foreshore. Please can the CDC officers confirm that the foreshore in front of Dolphins, which is a continuation of the same foreshore edging the coastal path is also covered by these designations? This is an important point as, if this is (as the Parish Council believes) the case then the Habitats Regulations are engaged as are the adopted planning policies protecting these important habitats and birds. If the foreshore is so protected then a Habitats Appropriate Assessment is required, whereby it needs to be shown that the proposal would not have a significant effect on the habitat or the birds. The Parish Council does not believe that this project is one which falls within the type that could be acceptable under the terms of the Habitats Regulations and therefore must be refused.

Further, if the foreshore is covered by these designations then it does not attract PD rights or immunity from enforcement and the dumping of imported soil to create grass and change the use of the foreshore to garden would require licence and planning permission. The fact that it is within the ownership of Dolphins does not create "garden" as suggested by the application. As you know recent changes to this site were the subject of Enforcement action. The Parish Council argument regarding the definition of curtilage was important here and still relevant and requests that Ms Nicola Golding of CDC is also consulted regarding the legal requirement for an HA.

The ecologist for the owner has conceded that there will be some temporary harm to the birds but that mitigation will reduce the harm. Since the European Court case of People over the Wind it is not acceptable to screen out the need for an appropriate assessment with the potential effects of mitigation. The harm to the birds must be assessed on its own.

The ecologist has not considered any long term impacts of the tunnel which will provide a new thoroughfare for domestic pets, dogs cats and rodents to gain easy access to the foreshore which is not possible at present. There is therefore potential for an increase in predation and disturbance. These impacts need to be assessed and any harm to the birds and habitat also included in a Habitats Assessment.

Whether the Proposal falls within the designated land or not it is in very close proximity. Very recent case law (7th November 2018) relating to an Irish matter, Holohan, Guilfoyle and others v An Bord Pleanala from the European Courts has confirmed that proposals on these adjacent sites are of such potential harm to the habitats and birds that they should also be subject to a full Habitats Assessment.

The introduction of this tunnel onto the foreshore should be assessed not as a link from one part of a residential garden to another, but a new link from residential land to foreshore and all the risks to the birds should be fully assessed.

Further, the site is in the AONB.

The Parish Council would be happy to meet with you to explain its objections further with Cllr Barrett.

6.2 Natural England

13/03/2019

I have been investigating the boundary of the Chichester Harbour SSSI in the vicinity of Dolphins, Rookwood Lane.

A scanned copy of the original SSSI master map (1985) is attached. As you will hopefully be able to see from this, the scale of the map and the thickness of the line means that the foreshore garden is underneath the line. Therefore, it is difficult to tell whether the intention of the original SSSI was to include this piece of foreshore or not.

When the site was first digitised, the background map would have been the latest OS master map. This may have changed since the version of OS map that was used for the original SSSI mapping. Therefore, the person digitising the site would have used features that were obvious boundaries on the latest OS master map.

As shown on the map submitted by the applicant, the SPA boundary (which would have aligned with the SSSI boundary, and is the same as the SAC boundary) as defined in 1997 does not include the foreshore garden. Therefore, this indicates that the tunnel would not directly impact the SPA/SAC as originally mapped and designated.

The change between that version of the boundary and the current one on MAGIC, may be because the OS master map gets regularly updated. Therefore, it could be that the feature to which the SSSI boundary was digitally aligned has moved as OS has updated their master map.

However, as far as the determination of the application for the tunnel is concerned, Natural England's view is that, even if the boundary feature to which the designated sites are digitally aligned has moved and the foreshore garden were included in the designated site boundary, the application would not have an adverse effect. As set out in our letter of 9 January, the nature and design of the proposal and the small scale of any loss, in this specific location would not adversely impact the designated sites.

23/01/2019

No objection – subject to appropriate mitigation being secured. In our previous letter dated 9 January 2019, Natural England stated that the proposal would result in a small area of loss of Chichester Harbour SSSI (and overlapping internationally designated sites). Following this, the applicant supplied further information, and I understand that you have been able to check the measurements on a map. Based on this, Natural England is satisfied that the proposal would not, in fact, lead to the direct loss of any designated nature conservation sites. For the avoidance of doubt, Natural England's other comments on this proposal remain, ie that mitigation measures are necessary to avoid impacts on the adjacent designated sites during construction. Therefore, a Construction Environmental Management Plan, including measures to minimise dust, noise and visual disturbance, silt and water quality impact, should be secured.

Natural England does not wish to provide detailed comment on impacts on the Chichester Harbour AONB, however, this should not be taken as implying that there are no impacts. We recommend taking the advice of the Chichester Harbour Conservancy as they will have more detailed knowledge of the site and its wider setting.

09/01/2019

Apologies for taking longer than I'd intended to respond to this one - the issue of the designated site boundary took longer to sort out as I needed to check with colleagues. The MAGIC map has the correct boundary, so there will be a small loss. But as stated in the attached letter, we don't think this will lead to an adverse impact. However, this will still have to go through an Appropriate Assessment - due to the loss, and the fact that mitigation measures are proposed to avoid construction impacts.

6.3 CDC Environment Officer

30/10/2019

Due to the location to Chichester and Langstone Harbour SPA as detailed within the Preliminary Ecological Appraisal Survey (Sept 2018) considerations for dust, fencing, noise, lighting, and chemical and fuel storage. We are satisfied that the recommendations made within table 7 of the Preliminary Ecological Appraisal Survey (Sept 2018) for each of these issues is suitable and a condition should be used to ensure these take place.

Overwintering birds

Due to the risk of disturbance to overwintering birds, construction works must avoid the winter months (October - Feb) to ensure they are not disturbed by any increase in noise and dust.

Nesting Birds

Due to requirement to avoid the winter months because of the over wintering birds, there may be a need to undertake vegetation clearance during the bird nesting season (1st March - 1st October). If works are required during this time an ecologist will need to check to ensure there are no nesting birds present on the site before any works take place (max 24 hours prior to any works commencing).

6.4 Chichester Harbour Conservancy

06/03/2019 (summarised)

The harbour conservancy has submitted a document detailing how the proposal would conflict with specific paragraphs of the NPPF and policies of the Local Plan.

NPPF (2018) [Officer note: Please be aware this has been superseded by the NPPF published February 2019]

Para. 170 - 18/02708/DOM is developing the coastline.

Para. 172 - 18/02708/DOM does not conserve and enhance the AONB. 18/02708/DOM does not conserve and enhance wildlife and cultural heritage.

Para. 175 - 18/02708/DOM is in the SSSI. 18/02708/DOM development benefits do not outweigh the impacts. 18/02708/DOM would result in the loss of irreplaceable foreshore habitat.

Chichester Local Plan 2014

Para. 10.5 - 18/02708/DOM is inside the AONB and does not protect scenic beauty. Views to the site from the water have changed from a natural foreshore to a developed garden (in 2017); and views to the water from the footpath are hindered by excessive fencing.

Para. 19.58 - 18/02708/DOM is inside the SPA and will adversely affect its integrity.

Para. 19.67 - 18/02708/DOM is on the foreshore, of biodiversity and landscape value.

Policy 22 - 18/02708/DOM is a private application with no community benefits.

Policy 43 - 18/02708/DOM breaches Policy 43.

Policy 44 - 18/02708/DOM breaches Policy 44.

Policy 48 - 18/02708/DOM breaches Policy 48.

Policy 49 - 18/02708/DOM breaches Policy 49. In particular, the Council are asked to note the reasonable alternative to the development – simply walking across the footpath.

Policy 50 - 18/02708/DOM is likely to increase recreational disturbance in the SPA and therefore requires an Appropriate Assessment.

Chichester Harbour AONB Management Plan (2014-2019)

Ref.	Policy and Comment
Special Qualities	<p>The unique blend of land sea – especially the combination of large open water areas, narrow inlets and intimate creeks. Threatened by climate change, rising sea levels and inappropriate development.</p> <ul style="list-style-type: none">• 18/02708/DOM is inappropriate development. <p>An overall sense of wilderness within the seascape. The naturalness that creates this sense is very dependent on maintain natural processes and avoiding the dominance of man-made influences and structures.</p> <ul style="list-style-type: none">• 18/02708/DOM is a man-made influence and structure.

	<p>Picturesque harbourside settlements. Careful control of development is required if these harbourside villages are to retain their character.</p> <ul style="list-style-type: none"> • 18/02708/DOM will damage the character of West Wittering. <p>Wealth of flora and fauna, notably the vast flocks of wading birds, adds to the richness and diversity of the landscape. Chichester Harbour is internationally important for its many species and habitats and these must be given priority for protection. The health of the landscape is measured by the biodiversity the Harbour offers.</p> <ul style="list-style-type: none"> • 18/02708/DOM is inside the internationally important Ramsar, Special Protection Area and Special Area of Conservation. <p>The Harbour offers a very special sense of peace and tranquillity, largely engendered by the gentle way it is used and the closeness of nature that is experienced. People pressure, inappropriate development and pollution, particularly light and noise, can easily destroy this fragile value as can inappropriate activities.</p> <ul style="list-style-type: none"> • 18/02708/DOM is inappropriate development.
S1	<p>Promote the conservation and enhancement of the special qualities of the AONB and its setting, and raise awareness of the AONB designation.</p> <ul style="list-style-type: none"> • 18/02708/DOM is a breach of policy LS1
S2	<p>Promote and protect the importance of tranquillity in the natural landscape of the AONB.</p> <ul style="list-style-type: none"> • 18/02708/DOM does not protect tranquillity.
C1	<p>Conserve and enhance habitats and species to achieve favourable condition of the SSSI and favourable conservation status of the European sites and species.</p> <ul style="list-style-type: none"> • 18/02708/DOM will have a detrimental impact on the SSSI and the conservation status of European sites and species.
C5 / EL5	<p>Minimise the impact of recreational disturbance on the designated habitats and sites.</p> <ul style="list-style-type: none"> • 18/02708/DOM will provide a new access private access point to the foreshore in the designated habitats and sites, thereby increasing the impact of recreational disturbance.
D1	<p>Ensure that all development is appropriate and conserves and enhances the landscape, wildlife and historic environment of the AONB.</p>

	<ul style="list-style-type: none"> • 18/02708/DOM does not conserve or enhance the landscape of wildlife of the AONB.
D2	<p>Ensure that development complies with the protective framework for sites designated for nature conservation and that where appropriate, mitigation measures are incorporated.</p> <ul style="list-style-type: none"> • 18/02708/DOM does not comply with the protective framework for sites designated for nature conservation.
L2	<p>Improve access for people with restructure mobility and socially excluded groups.</p> <ul style="list-style-type: none"> • 18/02708/DOM would be inaccessible for people with restricted mobility.

10.12.2018

Objection: would allow passage of wildlife onto the beach which has SPA designation and thus have potential to disturb birds nesting on the ground.

Members also resolved that were the council minded to grant planning permission, this should be subject to

- (1) Any pump being fitted to drain the tunnel of surface water run-off to be silent to preserve the tranquillity of the area; and,
- (2) That the structural integrity of the public footpath is not compromised, that the public footpath remains open during the works. The method statement and recommendations of the ecological report shall be fully observed. And also that the applicant enters into a planning legal agreement to assume liability for any substantial defect resulting to the public footpath from failure of the structural support to the proposed tunnel, including a regular (at least annual) inspection regime, the results of which to be reported to the Chichester District Council and West Sussex County Council, with any identified defect to be repaired within an agreed timescale.

6.5 Environment Agency

07/11/2018

We have no objection to the proposed development as submitted.

Advice to Applicant

We recommend that the owner/occupants sign up to the Environment Agency Flood Warning Service and have a flood evacuation plan.

Please note that it is not our role to assess any details on flood evacuation or emergency plans, as we do not carry out these roles during a flood. Our involvement with this development during an emergency will be limited to delivering flood warnings to occupants/ users covered by our flood warning network.

07/11/2018

Thank you for your clarifying advice below. In light of this and after talking to our flooding specialists we have no comments to make, and in fact we do not require an FRA. We recommend that you check with the Lead Local Flood Authority (West Sussex County Council) as groundwater flooding is within their remit. The only advice we would offer the applicant is to sign up to our flood warning system.

05/11/2018

Thank you for consulting the Environment Agency on the above application. We are unable to see a Flood Risk Assessment (FRA) in the documents available online. If one has been submitted, please can you make it available to us within 7 days. Please note that if the FRA is not made available to us within one week we will object due to lack of FRA. Please re-consult us once it is available.

6.6 CDC Land and Coastal Drainage Officer

Thank you for consulting us. We have the following observations and advisory comments:

-The proposed tunnel base is located approximately 1m below ground water levels, it is likely the tunnel will fill with groundwater, especially during winter months.

-Rain water will also get within the tunnel.

-It appears unlikely from the flood map for planning that coastal inundation will occur.

-Consideration should be given to either keeping the tunnel water tight or provision of some form of positive drainage, i.e. french drains and pumps.

6.7 WSCC Public Right of Way

19/12/2018

The applicant has been in contact as requested with our Engineers and PROW is now in a position to remove its holding objection. The removal of our holding objection is subject to the applicant meeting the following requirements.

Subject to the planning application being given consent, Technical Approval is required from the County Council as the Highway Authority, as the works directly affect a public right of way/highway. The applicant must ensure a detailed design is submitted to our Highway Structures Engineers for their approval before any works take place. Meetings with our Engineers and the applicants' contractor and/or designer to discuss the design may be required.

In order to protect the right of way and the County Councils maintenance liability into the future, we require a legal agreement with the current landowner which is also tied to any future property successors covering liability. Work will start on the legal agreement once the applicant's technical specification has satisfied our Engineers.

28/11/2018

Thank you for the opportunity to comment on the above application which affects a public right of way (PROW). Firstly we would like to clarify that this PROW has the public status of being a definitive public footpath for pedestrians only and is known as FP1.

Having considered the information available, PROW West Sussex County Council will submit a holding objection as we require further clarification from the applicant. On plan Proposed Site Cross Section View and Concrete Culvert Profiles (paper 3) there appears to be height difference between the profile section A and B levels which seems considerable, can the applicant clarify?

If planning consent is granted by the District we would need to see and approve a specification for the block culvert and for the reinstatement of the surface of the right of way. If planning consent is granted by the District and the application proceeds, the public right of way would, in the interests of public safety need to be temporarily closed during works by way of a TTRO.

In order to protect the right of way and the County Councils maintenance liability into the future, we require an agreement with the current landowner which is also tied to any future property successors covering liability in the unfortunate event of either a failure or collapse of the block culvert under the right of way.

6.8 Third Party Representations

14 x Third Party letters of objection have been received (from 12 households) concerning:

- a) Foreshore becoming extension of the garden,
- b) Sets a precedent,
- c) Visually incongruous,
- d) Harmful to wildlife,
- e) Increased flood risk,
- f) Weakens sea defences in the area.

6.9 Applicant/Agent's Supporting Information

The plans show the tunnel and the steps up and down to the underpass are all located below garden level, including the embankments and therefore should not be visible from outside the subject site.

The proposed underpass beneath the footpath would be very discrete and not visible from: the Harbour; Footpath or anyone walking, as they have a right to do, along the mean high water mark.

Leachate and rainwater run-off from within the tunnel will be controlled by 2 submersible pumps discharging water into an adjacent and existing land drain. The dB rating of the pumps is so small the manufacturers don't even bother to publish it for it amounts to a very quiet hum and nothing more.

The applicant will enter into a legal agreement [with WSCC], on a continuing basis, regarding tunnel maintenance and preservation of the safety of the PROW.

Various concerns expressed regarding Wildlife, Vermin and Household Pets accessing the beach/foreshore can be resolved by a gate within the tunnel.

The ecologist who has conducted a detailed survey of the site believes " it will be no less or more accessible to cats/dogs/rats as it ever has been and there is virtually free access along the coastline anyway" this seems a more accurate interpretation of the facts as they relate to this specific site.

There is no intention to change the foreshore habitats as the land is already turfed and used as garden, therefore there will be no direct impact on or loss of the foreshore habitats associated with the designated sites. For small scale projects such as this, simple mitigation measures in consultation with Natural England and the Planning Department can/have been, agreed to ensure no short or long term impact.

Submersible pump/s used within the tunnel to control water ingress will be silent to the outside to preserve the tranquillity of the area and the PROW.

Any of the above points can be included as conditions of planning approval, if you think this would be appropriate.

Additional information has been submitted by the applicant including;

- a) Submission of an aerial photograph of Dolphins and its gardens dated from 1951 that shows the foreshore garden as cultivated garden and the position of the original footpath when it was closer to the house.**

- b) Copies of correspondence (28 November 1997) and plans (17 November 1997) from English Nature [now known as Natural England] to the occupiers of the property known as Dolphins informing the occupiers of the revisions to the boundary of the Solent Maritime proposed Special Area of Conservation (pSAC) and SSSI as it would affect the land owners of Dolphins. The plan from Natural England shows the foreshore garden of Dolphins as not being included within their proposed revisions for the Solent Maritime pSAC nor the SSSI.**
- c) Confirmation regarding drainage; the tunnel would be drained via a connection to the existing piped drainage system that is linked to an existing soakaway. This existing drainage system is located close to the proposed tunnel and would not require significant further ground works.**
- d) Additional information has also been submitted regarding the boundary of the SPA which discussed the consultation process with NE and the landowners. Photographic evidence has also been submitted to support the use of the foreshore garden as a private domestic garden in excess of 10 years.**

7.0 Planning Policy

The Development Plan

- 7.1 The Development Plan for the area comprises the Chichester Local Plan: Key Policies 2014-2029 and all made neighbourhood plans. There is no made neighbourhood plan for West Wittering at this time.
- 7.2 The principal planning policies relevant to the consideration of this application are as follows:

Chichester Local Plan: Key Policies 2014-2029

- Policy 1: Presumption in Favour of Sustainable Development
- Policy 2: Development Strategy and Settlement Hierarchy
- Policy 3: The Economy and Employment Provision
- Policy 6: Neighbourhood Development Plans
- Policy 8: Transport and Accessibility
- Policy 39: Transport, Accessibility and Parking
- Policy 40: Sustainable Design and Construction
- Policy 42: Flood Risk and Water Management
- Policy 43: Chichester Harbour Area of Outstanding Natural Beauty (AONB)
- Policy 44: Development around the Coast
- Policy 45: Development in the Countryside
- Policy 47: Heritage and Design
- Policy 48: Natural Environment
- Policy 49: Biodiversity
- Policy 50: Development and Disturbance of Birds in Chichester and Langstone Harbours Special Protection Areas

National Policy and Guidance

- 7.3 Government planning policy now comprises the 2018 National Planning Policy Framework (NPPF), paragraph 11 of which states:

At the heart of the NPPF is a presumption in favour of sustainable development, For decision-taking this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date⁷, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

- 7.4 Consideration should also be given to Sections 4 (Decision-Making), 9 (Promoting Sustainable Transport), 12 (Achieving well-designed places), 14 (Meeting the challenge of climate change, flooding and coastal change), 15 (Conserving and enhancing the natural environment) and 16 (Conserving and Enhancing the Historic Environment).

Other Local Policy and Guidance

- 7.5 The following documents are material to the determination of this planning application:
West Wittering Village Design Statement
The Chichester Harbour Management Plan (2014-2019)

Other Local Policy and Guidance

- 7.6 The following Supplementary Planning Documents are material to the determination of this planning application:

The aims and objectives of the Chichester in Partnership Community Strategy 2016-2029 which are relevant and material to the determination of this planning application are:

- Influence local policies in order to conserve and enhance the qualities and distinctiveness of our area

8.0 Planning Comments

Assessment

The main considerations are:

- i. Principle of the development
- ii. Impact on visual amenity, character of site and surroundings and AONB
- iii. Impact on Special Protection Area
- iv. Flood risk
- v. Impact on neighbouring amenities
- vi. Impact on Public Right of Way (PROW)

i. Principle of the development

8.1 The application site is located within the countryside as defined within the Chichester Local Plan (CLP) policy 2. Development in the countryside is limited to that which is sustainable, essential for agriculture, requires a countryside location, where there is demonstrated need/demand and is small scale, structurally sound, of traditional or architectural merit and connected to existing buildings and whilst supporting the local rural economy.

8.2 **The principle of the provision of a tunnel does not contravene principles or policies within the Development Plan, subject to assessment against other detailed policies within the plan and those other considerations material to the case. The land adjoining the foreshore has been used as private amenity land in association with the residential use of the dwellinghouse Dolphins for many years and the land to the east of the proposed tunnel lies within the curtilage of Dolphins; and the proposed tunnel would facilitate uninterrupted movement between these two parcels of land.**

ii. Impact on visual amenity, character of site and surroundings and AONB

8.3 The proposed tunnel would be positioned within an area located close to the foreshore which has a rural character. **The tunnel, once completed, would be landscaped in a manner that would result in the majority of the development being below ground level thereby reducing any visual impact that the tunnel may have within this sensitive landscape setting.** The PROW is vegetated on both sides of the path and users of the PROW would largely be unaware of the visual presence of tunnel beneath the PROW.

- 8.4 The Chichester Harbour Conservancy has submitted further comments explaining its concerns about the impact of the development upon the landscape and the designated Special Protection Area, and these have been taken into consideration. Officers are satisfied that the development would not have a harmful landscape impact in terms of the visual amenity of the locality and the natural beauty of the wider AONB. The tunnel would be below the existing ground level with the entrances of the tunnel (on both sides) lying flat and level with the ground albeit small areas of balustrade would be visible above ground level. The proposed arrangement would result in the tunnel having very limited impact on the landscape, and it would not be particularly visible from either the harbour or the public footpath adjacent to the site.
- 8.5 Given the nature of the development there would be ground disturbance during construction. Therefore, a condition requiring the submission of a Construction Environmental Management Plan is considered necessary. The condition would control measures to minimise dust, noise and visual disturbance, silt and water quality impacts in order to protect the designated sites and landscape.
- 8.6 It is proposed to retain the existing hedges along the footpath which will ensure physical features, such as the steps to the tunnel and balustrade would not be prominently visible. Also, soil from the excavation would be spread onto the tops of the box culvert profiles, covered in vegetation and blended into the adjacent embankments. A condition securing a landscaping scheme would ensure this approach is implemented and the disturbance caused to the ground during construction made good.
- 8.7 Concerns have been raised regarding the impact of the tunnel on the visual amenities of the locality **and whether the development would be able to conserve and enhance the natural beauty of the AONB**. In this case the tunnel, its steps and timber balustrade would be located primarily below ground level and the impact on the visual amenities of the area, particularly from the PROW, which has a **lower ground level than the ground level where the mouths of the tunnel would be located (on both sides)** would be minimal. Furthermore, the proposed landscaping scheme would help to soften the impact of the proposed development on the character and appearance of the rural area **and natural beauty of the AONB landscape**. On this basis it is considered that there would be limited impact on the natural beauty of the countryside and the protected qualities of the AONB would be conserved **and enhanced**. Materials for the steps and balustrade could be secured through a suitably worded planning condition. Subject to compliance with these conditions the proposals would comply with Policies 33, **43**, 45 and 48 of the Local Plan.

iii) Impact on Special Protection Area

- 8.8 The tunnel would be located approximately 1m to the northeast of the designated boundary of the Special Protection Area, RAMSAR site and SSSI. During the application process there have been a number of queries with regard to the position of the tunnel in relation to the boundary of these areas. A further site plan has been submitted by the applicant to clarify the position of the proposed tunnel. The proposals have been checked against this plan and it is considered to be located outside these designated areas.
- 8.9 Due to the proximity to Chichester and Langstone Harbour SPA as detailed within the Preliminary Ecological Appraisal Survey (Sept 2018) considerations for dust, fencing, noise, lighting, and chemical and fuel storage are necessary. The Environmental Protection Team is satisfied that the recommendations made within table 7 of the Preliminary Ecological Appraisal Survey (Sept 2018) for each of these issues is suitable and a condition is recommended to ensure these take place.
- 8.10 Due to the risk of disturbance to overwintering birds, construction works must avoid the winter months (October - Feb) to ensure they are not disturbed by any increase in noise and dust. However, due to this requirement there is likely to be a need to undertake vegetation clearance during the bird nesting season (1st March - 1st October). If works are required during this time an ecologist will need to check to ensure there are no nesting birds present on the site before any works take place (max 24 hours prior to any works commencing).
- 8.11 Natural England have been consulted during the application process and have advised that; 'Natural England is satisfied that the proposal would not, in fact, lead to the direct loss of any designated nature conservation sites. For the avoidance of doubt, Natural England's other comments on this proposal remain, ie that mitigation measures are necessary to avoid impacts on the adjacent designated sites during construction. Therefore, a Construction Environmental Management Plan, including measures to minimise dust, noise and visual disturbance, silt and water quality impacts, should be secured'.
- 8.12 Objections have been raised regarding the link that the tunnel would provide for pets to access the foreshore at any time. The applicant has advised that a pedestrian gate could be included within the tunnel to ensure pets cannot escape without supervision. Such a condition is included within this recommendation.

8.13 Natural England has provided further commentary regarding the SPA boundary which is detailed within paragraph 6.2 above. It is acknowledged that there is ambiguity regarding the definitive line of the SPA boundary as digital maps have progressed. However, despite the uncertainty about whether the proposed development would fall within, or to the north, of the designated SPA Natural England are clear that the proposed development would not result in harm to the SPA. Natural England has expressly advised that “As set out in our letter of 9 January, the nature and design of the proposal and the small scale of any loss, in this specific location would not adversely impact the designated sites.” On the basis of the advice received from Natural England, and the Council’s own Environment Officer it is considered that the proposal would not result in an adverse impact upon any designated sites, and therefore it would be unreasonable to refuse the application on the basis of its impact upon the designated sites.

8.14 Furthermore, the Local Planning Authority (LPA), as the responsible authority, have carried out an Appropriate Assessment which has concluded that the likely impacts could be mitigated appropriately via suitable conditions (securing amongst others the mitigation proposed within the Preliminary Ecological Appraisal Survey - Sept 2018) and therefore the size scale and location of the development and impact on the SPA would not be considered harmful. Additionally, the timing of the works would need to be the subject of a condition given the sensitive location of the site and to ensure minimal impact on overwintering birds and their habitats. **The Appropriate Assessment has been updated to include an assessment of the cumulative impact of the current proposal and the previous earthworks that took place on the site, namely the importation and levelling of soil on the site in winter 2016. It is concluded that the cumulative impact of the proposal and the earthworks undertaken would not have an adverse effect on the integrity of the designated sites.**

8.15 Based on the additional information received, and having fully considered all of the representations received officers remain to the view that subject to appropriate mitigation and conditions securing such it is considered that the impact on these designated areas would not be significant, either on its own or cumulatively, and therefore officers consider that the proposed development would not be harmful.

iv) Flood risk

8.16 The site is within Flood Risk Zone 1 as identified on the Flood Risk Zone of the Environment Agencies mapping, it lies above the Mean High Water Mark, close to Flood Risk Zones 2 & 3. A Flood Risk Assessment is not required for this development and the EA have been consulted and have not raised an objection. That said the tunnel would include a pump at its base so that rain water can be extracted.

8.17 Sea Defences; the CDC Land and Coastal Drainage Officer have been consulted and no objection has been raised. It has been stated that; The proposed tunnel base is located approximately 1m below ground water levels, it is likely the tunnel will fill with groundwater, especially during winter months and rain water will also get within the tunnel. However, it appears unlikely from the flood map for planning that coastal inundation will occur. Consideration has been given to using waterproofing paint and provision of a positive drainage, i.e. french drains and pumps.

8.18 There are no sea defences to this section of the foreshore. Sea level rise is a concern for coastal properties and gardens and the EA have recommended that the applicant would be well advised to join the EA's flood warning scheme. On this basis the proposals are considered to be acceptable within regards to avoiding and mitigating flood risk and therefore the proposals comply with Policy 42 of the Local Plan.

v) Impact on neighbouring amenities

8.19 The NPPF states in paragraph 127 that planning should ensure a good quality of amenity for existing and future users (of places). The tunnel would be significantly distanced from neighbouring properties and gardens, would be below ground and would have limited impact on neighbouring amenities in terms of their living conditions and privacy.

8.20 The tunnel would include a pump to extract ground water. The applicant has advised that the pump would be at the base of the tunnel which is 2m below ground in a French drain style. The pump would be used to pump out rain water. To ensure the noise from the pump does not cause disturbance for residence and wildlife appropriate noise levels and timings of use would need to be achieved. A condition regarding details of the pump and its noise levels would be necessary.

8.21 Therefore, on balance of the details of this case, it is considered that the development would comply with paragraph 127 of the 2018 NPPF.

vi) Impact on PROW

8.22 The PROW would not be diverted as a result of this development. WSCC PROW team has been consulted and has advised that a licence would be required for the proposed works. Guidance for the applicant has also been provided. The applicant has stated their intention to enter a legal liability agreement with WSCC to safeguard the structure and public use of the PROW. This would be required as part of a license required from the County Council, outside of the planning process.

8.23 There would be a disturbance to the footpath during construction which will need to be managed by the contractors to ensure pedestrians are given a safe right of way. In this regard the application details confirm that work will not commence until the ground and water table conditions are favourable and soil will not be removed from within close proximity to the footpath if there is any possibility of trench collapse due to sodden soil or heavy rains. Boarding to protect the continuing use of the footpath whilst excavation is carried out will be provided to ensure public safety and suitable warning signage would inform users of the footpath to proceed with care.

Other Matters

Established use of the foreshore land

- 8.24 Concerns have been raised regarding the lawful use of the land and development that has been built in the north western triangular section of land within the site, abutting the foreshore. In this regard the Council's Planning Enforcement team have previously investigated the use of the land for residential purposes and have concluded that the land has a lawful use as residential garden, although it does not form part of the curtilage to the dwelling.
- 8.25 Since the February committee meeting, Officers have investigated the use of the land further and additional information provided by the applicant and Parish Council has been considered.
- 8.26 The applicant has provided photographic evidence of the land being used as, and having the character of, a domestic residential garden for a period in excess of 10 years. The earliest photo provided since the previous Planning Committee dates from 2004 although available documentary evidence indicates that the land has been used in connection with the dwellinghouse known as Dolphins since the 1950s. The evidence suggests a grassed area of land has been maintained as a manicured lawn and used for family events and garden activities that would be indicative of activities one would expect with a residential use over a significant time period. Given the character of the land, the activities and the length of time this has taken place Officers are satisfied that the use of the land has been residential garden for in excess of 10 years. This assessment accords with the decision made by the Council's Planning Enforcement team in 2017 following a full assessment of the use of the land.
- 8.27 In conclusion, Officers are satisfied that based on the information available, the foreshore land which forms part of the application site has an established and lawful residential garden use.

Works to ground levels

- 8.28 The Parish Council has provided photographic evidence of engineering works taking place to the foreshore garden. The works comprise the importation of top soil to a section of the land within the foreshore garden to raise its level, and these works appear to have taken place in 2017. Although these works do not form part of this application it is noted that planning enforcement records show that soil was imported and spread over a 'depressed' area of ground which had previously appeared in the landscape as a private gravelled footway in active use by the landowner and their visitors and not a PROW. It did not therefore represent undisturbed habitat or natural landscape. For these reasons, officers considered that the works undertaken in 2017 did not give rise to any identified harm and being of limited scope they were not held to be engineering operations that required planning permission. However as detailed within paragraph 8.14 above the works have been considered as part of the Appropriate Assessment undertaken in connection with the current application, as required by the Habitat Regulations (2017).

Impact on heritage asset

8.29 Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires the Local Planning Authority (LPA) to have special regard to the desirability of preserving the building, its setting and any features of special architectural or historic interest which it possesses. In addition, Section 16 of the National Planning Policy Framework (NPPF) stresses the importance of protecting heritage assets, stating that Local Planning Authorities' should take account; of the desirability of sustaining and enhancing the significance of a heritage asset, the positive contribution that conservation of heritage assets can make to sustainable communities and to the desirability of new development making a positive contribution to local character and distinctiveness. Policy 47 of the Chichester Local Plan states that permission should only be granted where it can be demonstrated that the proposal conserves or enhances the special interest and settings of the designated heritage assets. Rookwood House, the neighbouring property to the south east of the application site, is a grade II listed building and it is located approximately 75m from the proposed tunnel. The tunnel would be below ground and would not be particularly visible from the wider area or from within the curtilage of the listed building. It is considered that due to the nature of the development combined with its scale, location and minimal visual impact that the tunnel would not have any significant impact upon the setting of the listed building and therefore the proposal would be acceptable in respect of its impact upon the significance of the designated heritage asset.

Conclusion

8.30 Based on the above it is considered that the proposal complies with the Development Plan and therefore the application is recommended for approval.

Human Rights

8.31 In reaching this conclusion the Human Rights of the applicants and nearby occupiers have been taken into account when reaching this recommendation and it is concluded that the recommendation to refuse/permit is justified and proportionate.

RECOMMENDATION PERMIT subject to the following conditions and informatives:-

1) The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

Reason: To comply with Section 91 of the Town and Country Planning Act 1990.

2) The development hereby permitted shall not be carried out other than in accordance with the approved plans: 10, 11, 8, 7, 4 and 3.

Reason: To ensure the development complies with the planning permission.

3) The development shall only be carried out in accordance with the recommendations within the Preliminary Ecological Appraisal Survey (Sept 2018). Unless otherwise agreed in writing by the Local Planning Authority.

Reason; to ensure appropriate mitigation concerning wildlife and their habitats.

4) Construction works must not be carried out in winter months i.e. from October to and including February.

Reason; to ensure the development does not disturb overwintering birds given the location of the site next to the SPA.

5) **No development shall commence**, including any works of demolition, until a Construction and Environmental Management Plan (CEMP) has been submitted to and approved in writing by the Local Planning Authority. Thereafter the approved CEMP shall be implemented and adhered to throughout the entire construction period unless any alternative is agreed in writing by the Local Planning Authority. The CEMP shall provide details of the following:

- (a) the anticipated number, frequency and types of vehicles used during construction,
- (b) the provision made for the parking of vehicles by contractors, site operatives and visitors,
- (c) the loading and unloading of plant, materials and waste,
- (d) the storage of plant and materials used in construction of the development,
- (e) the erection and maintenance of security hoarding,
- (f) waste management including prohibiting burning.

Reason: These details are necessary pre-commencement to ensure the development proceeds in the interests of highway safety and in the interests of protecting nearby residents from nuisance during all stages of development and to ensure the use of the site does not have a harmful environmental effect.

6) Prior to commencement of any works full details/specifications of the proposed pump including its noise levels shall be submitted to and agreed in writing by the local planning authority. The pump shall only be implemented in accordance with the agreed details and retained and maintain as agreed in perpetuity.

Reason: To ensure the development does not cause a unacceptable level of noise disturbance to neighbouring amenities and the tranquillity of the countryside. As the pump would be located underground this needs to be agreed prior to commencement.

7) The development hereby permitted shall not be first brought into use until; full details of the hard and soft landscaping have been submitted to and agreed in writing by the Local Planning Authority.

The details shall include;

a scaled site plan indicating the planting scheme for the site showing the; schedule of plants and positions, species, plant sizes (at time of planting) and proposed numbers/densities. In addition, the scheme shall include details of all existing trees and hedgerows on the land including details of any to be retained, together with measures for their protection during the course of the development. The scheme shall make particular provision for the conservation and enhancement of biodiversity on the application site.

The landscaping scheme shall also include full details of any proposed hard landscaping showing any external hardsurfaces and their positions, materials and finishes.

The works shall be carried out in full accordance with the approved details and in accordance with the recommendations of the appropriate British Standards or other recognised codes of good practice.

The approved scheme shall be carried out in the first planting season after practical completion or first occupation of the development, whichever is earlier, unless otherwise first agreed in writing by the Local Planning Authority. Any trees or plants which, within a period of 5 years after planting, are removed, die or become seriously damaged or defective, shall be replaced as soon as is reasonably practicable with others of species, size and number as originally approved unless otherwise first agreed in writing by the Local Planning Authority.

Reason: In the interests of the visual amenities of the locality and to enable proper consideration to be given to the impact of the proposed development on existing trees and to conserve and enhance biodiversity.

8) Prior to first use of the tunnel or completion of the works whichever is the sooner full details of a gate or barrier within the tunnel shall be submitted to and agreed in writing by the Local Planning Authority. The agreed gate shall be implemented prior to first use of the tunnel and only in accordance with the agreed details and retained/maintained as agreed in perpetuity.

Reason; in the interest of wildlife protection to ensure pets are contained within the garden of the host property.

INFORMATIVES

- 1) Please be aware of the following advice from WSCC PROW;

Subject to the planning application being given consent, Technical Approval is required from the County Council as the Highway Authority, as the works directly affect a public right of way/highway. The applicant must ensure a detailed design is submitted to the Highway Structures Engineers for their approval before any works take place. Meetings with our Engineers and the applicants' contractor and/or designer to discuss the design may be required.

In order to protect the right of way and the County Councils maintenance liability into the future, WSCC require a legal agreement with the current landowner which is also tied to any future property successors covering liability. Work will start on the legal agreement once the applicant's technical specification has satisfied our Engineers.

- 2) Due to requirement to avoid the winter months because of the over wintering birds, there may be a need to undertake vegetation clearance during the bird nesting season (1st March - 1st October). If works are required during this time an ecologist will need to check to ensure there are no nesting birds present on the site before any works take place (max 24 hours prior to any works commencing).
- 3) Advice form the EA;

We recommend that the owner/occupants sign up to the Environment Agency Flood Warning Service and have a flood evacuation plan.

Please note that it is not our role to assess any details on flood evacuation or emergency plans, as we do not carry out these roles during a flood. Our involvement with this development during an emergency will be limited to delivering flood warnings to occupants/ users covered by our flood warning network.

For further information on this application please contact Maria Tomlinson on 01243 534734

To view the application use the following link -

<https://publicaccess.chichester.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=PGQMHUERKTG00>