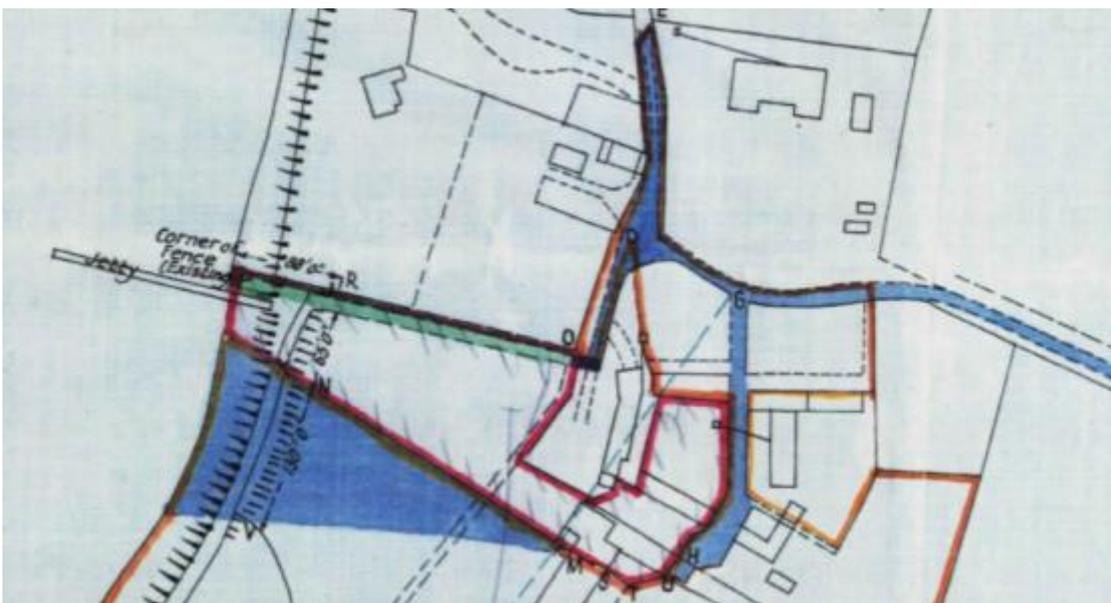


Review of previously alleged unauthorised works to foreshore and investigations by the Local Planning Authority

Land at Dolphins, Rookwood Lane, West Wittering

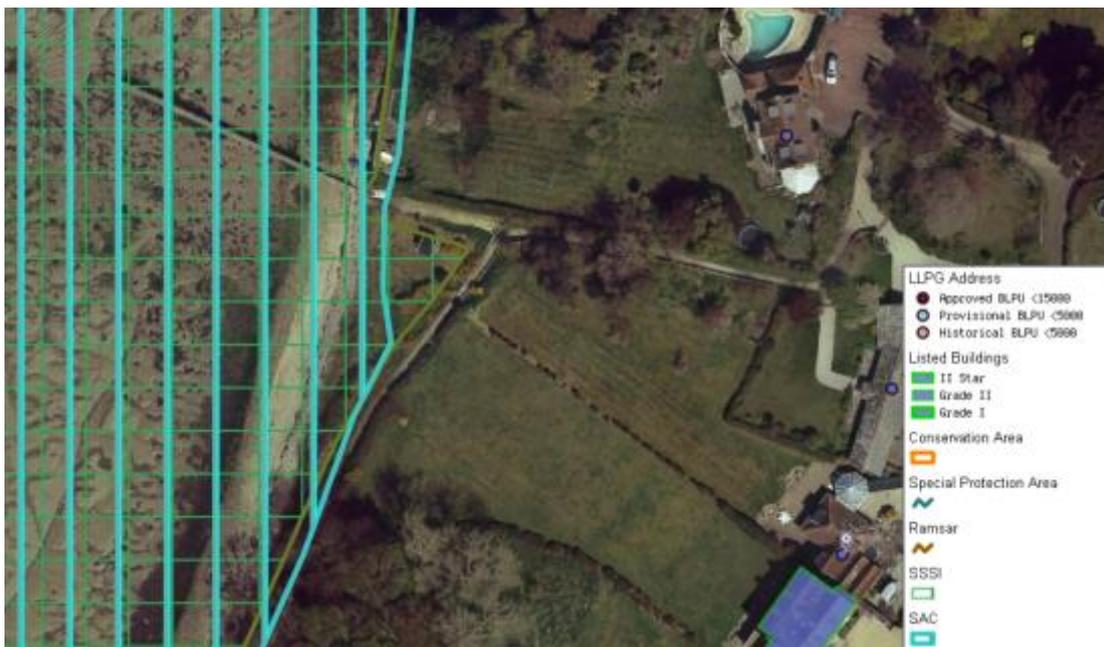
1.0 Site Description and History

- 1.1 Dolphins is a large semi-detached dwelling located at the end of Rookwood Lane. The semi-detached pair comprising Rookwood House and Dolphins each have large garden areas leading down to the harbour shore. The development in question has taken place on land immediately adjacent to the foreshore of the Chichester Harbour Area of Outstanding Natural Beauty (AONB). The land is separated from the main rear garden of Dolphins by a public right of way (PROW).
- 1.2 Chichester Harbour is designated as a Special Protection Area (SPA), a Ramsar Site, Special Area of Conservation (SAC), all European designations, and a Site of Special Scientific Interest (SSSI), a national designation.
- 1.3 Historically Dolphins was part of the listed building, Rookwood House. According to the 1846 Tithe Map the curtilage associated with the property lay to the east of the site and did not rundown to the foreshore.
- 1.4 The property was sold at auction in 1954 when the land was described as including “a grass area which slopes down to the edge of Chichester Harbour to which this Lot has a frontage of about 600 feet”.
- 1.5 Following the sale of the property works took place to divide it into two separate dwellinghouses. A Land Registry map dated 1956 (as set out below) shows the foreshore land, the subject of this report, as forming part of the land attached to the property known as Dolphins.



Map 1: Land registry extract 1956

- 1.6 There has been some dispute as to whether the foreshore land is within the designated European sites listed above. Natural England (NE) has confirmed that there is some discrepancy between the digitised and paper maps and has been unable to establish the definitive line of the Special Protection Area (SPA) boundary due to changes in the mapping systems over time. The digitised maps show the foreshore land within the designated sites (as above) but due to the scale of the maps, it cannot be determined definitively if the land is within the black line boundary of the SPA. Copies of definitive maps of the three designations is included at Appendix 1.
- 1.7 Nonetheless, it is the view of officers that whether the land is within the designated boundary or adjacent to it, the implications on the wider designated sites are the same, in that there is the potential for impacts to occur on the nature conservation interests of the sites through development of the land. NE concurs with this view. As such any development off the foreshore land should be assessed for the potential for, and severity of, such impacts, as part the assessment of any application for planning permission or as part of the assessment as to whether to take further action in relation to unauthorised development.



Map 2: GIS Mapping overlay of designations

2.0 Alleged development

- 2.1 The following works/use of land are alleged to have taken place;
- i) Erection of gates and fencing
 - ii) Engineering works and soil importation
 - iii) Erection of beach hut/shed
 - iv) Use of the land as 'garden' in association with Dolphins

Each of these matters are addressed in turn below.

i) ERECTION OF GATES AND FENCING

- 2.2 Replacement gates and chestnut paling fencing were erected to the eastern boundary of the foreshore land in 2017. A PROW runs adjacent to the boundary and the area in which the gates are located provides an access point from the PROW to the foreshore. The land is within private ownership and the access to the foreshore does not form part of the PROW.



Photo 1 [CDC Officer]: View of gates and fencing from public right of way (07/11/2018)



Photo 2 [Third party]: Previous gate and fence (circa 2011/2012)

Assessment

- 2.3 Where a means of enclosure does not exceed 2m in height from the ground level permission is normally given by the Town and Country (General Permitted Development) Order 2015 - as amended (GPDO), also known as 'permitted development', and does not require approval from the Local Planning Authority (LPA) through the making of an application. However, permission is only granted by the GPDO if in compliance with regulations 73 to 76 of the Conservation of Habitats and Species Regulations 2010 (CHSR). These regulations require development which is not directly connected with, or necessary to, the management of a European site or a European offshore marine site, and which is likely to have a significant effect on the site (either alone or in combination with other plans or projects), to first seek approval of the LPA prior to the work beginning.
- 2.3 As part of a current application for a tunnel under the PROW, connecting the foreshore with the curtilage of Dolphins (reference 18/02708/DOM) a Habitat Regulation Assessment (HRA) Screening Matrix and Appropriate Assessment was undertaken. In respect of the gates it concluded that;
- 'The LPA have considered the gates and beach hut/shed that has been implemented to the foreshore garden. The foreshore garden is not a common nesting site for birds and has formed residential garden for a long time - with short manicured grass and maintained shrubs/hedges that has a graduated integration with the shingle beach. The building of the beach hut and gates with small section of fence on each side would have caused some disturbance at the time of the event however the impact would not have been likely to be significant given the makeup and historic garden activities/use of the land.'*
- 2.4 Having regard to the above assessment, whilst the development is adjacent to Chichester Harbour AONB and has visual impact on this landscape designation, it is not considered that the gates and fence have a 'significant effect' on the adjacent designated European Sites, for the reasons outlined above, but also as the enclosure of the land provided for by the gates is across a limited frontage and there remains opportunities for wildlife to cross the boundary between the foreshore and the PROW. Therefore, there was no requirement for those parties carrying out the development to seek the prior approval of the LPA prior to commencing works on site. The gates are therefore considered to constitute 'permitted development' as defined within the GPDO. As planning permission from the LPA is not required and private access path to the foreshore is not part of a PROW, the effect that the installation of that gates have in providing a physical barrier to public access to the foreshore is not a planning matter.
- 2.5 Notwithstanding the above conclusion in relation to the impact of the European designated sites, the gates are constructed from timber and are of a louvered vertical design set within a wooden frame. The combination of the framing with the bulk of the timber posts and heavy duty hinges is considered

to have a detrimental impact on the visual amenity of the AONB due to their overbearing appearance being in a prominent position along the PROW.

Conclusion

- 2.6 Given identified landscape harm that the gates presented to the AONB it was considered important for the LPA to attempt to negotiate further works to mitigate this impact. As such the owner was requested to undertake remedial works to the gates lowering the height of the gates to a similar level to that of the adjoining paling fence, in order to reduce the impact on the visual amenities of the area to an acceptable level.
- 2.7 These steps were carried out, including re-positioning the metal hinges to the inside of the gates and applying a dark stain, as shown in the photograph below:



Photo 3 [Landowner]: View of amended gates and fencing from public right of way (10/10/2019)

- 2.8 It is considered by the Local Planning Authority that planning permission would not have been required for the gates, nonetheless, remedial works have reduced the detrimental impact on the visual amenity of the area and no further action can be taken.

ii) ENGINEERING WORKS AND SOIL IMPORTATION

- 2.9 Engineering works were carried out in 2017 to import soil onto the foreshore land. The soil was spread over the area of the shingle track/path to raise and level this area of the ground; resulting in the made path being reduced to a narrow pedestrian track beside the boundary hedge. Timber planks retain the soil along the track. These works were carried out immediately prior to the gates being erected.

2.10 The importation of the soil and the scale of engineering works to landscape the area are beyond what could be considered to be de minimis and no permitted development rights exist for such an operation. When officers enquired about these works, the owner advised the soil had been imported from a source 100m from the foreshore land i.e. from neighbouring land.



Photos 4-7 [Third party]: View of the soil importation, from the PROW (2017)



Photo 8 [CDC Officer]: View of the soil importation, from the shore (2017)

Assessment

- 2.11 Due to the proximity of the works to the European designated sites, the soil importation had the potential to have a significant impact on the conservation interests of these designations (either on their own or in combination with other 'projects'). The party undertaking the works should therefore have applied for prior approval from the LPA. This would have allowed NE the opportunity to comment on whether a HRA should be carried out in relation to any identified disturbance of the land that could have had a significant effect on the European designated sites.
- 2.12 Whilst the importation of soil did not correctly follow the procedure required by the CHSR the LPA must now determine whether or not formal enforcement action is proportionate and in the public interest.
- 2.13 Similar to the gates considered above, the engineering works have been assessed as part of the HRA Screening Matrix and Appropriate Assessment in connection with application 18/02708/DOM. This concluded;

'The LPA have also considered the impacts on the reported retrospective soil importation and levelling works to the foreshore garden that is reported to have taken place in winter 2016. To this regard the land is not a common nesting site for birds and has formed residential garden for a long time. With short manicured grass and maintained shrubs/hedges that has a graduated integration with the shingle beach and applicant's jetty beyond and integrated with the shingle and sea bed. The soil importing to the foreshore garden would have caused some disturbance at the time of the event however the impact would not have been likely to be significant given the makeup and historic garden activities/use of the land.'

- 2.14 Furthermore, advice has been provided on this matter by NE, which advises as follows;

'A potential impact from the soil importation could have been run off of soil into the water. However, again, this impact would have been temporary during construction – once the soil had compacted and grassed over, siltation would no longer be a risk.'

- 2.15 Based on these comments, it is concluded that the engineering works consisting of importing the soil and landscaping the area does not now result in lasting long-term significant harm to the local habitat. Any restorative action would likely have greater potential for further impact than leaving the imported soil in situ.
- 2.16 With regard to the impact of the imported soil on the visual amenities of the area, the soil was grass seeded which has now established to blend in with the rest of the land. In addition, the area of raised ground is relatively small and follows the form of the existing land level and so appears natural in the context of its immediate surroundings. Now that the soil has been compacted and landscaped it derives a similar appearance to the land surrounding it. It is

therefore considered that the works carried out have not had a detrimental impact on the visual amenity of the AONB and not “incongruous”. In addition the timber retaining ‘wall’ is sympathetic to the sensitive location and will naturally weather into the landscape of the harbour.

Conclusion

2.17 No further action is proposed by the Local Planning Authority in respect of these works as it would not be expedient to do so having regard to the provisions of the development plan and advice received from Natural England.

iii) ERECTION OF BEACH HUT/SHED

2.18 A beach hut/summerhouse style building has been previously erected on the foreshore land. The development was reported to the LPA on the 15 April 2014 and registered as an enforcement investigation case (reference 14/00108/CONHH). As a development on land outside the curtilage of the dwellinghouse, and in close proximity to the European designated sites, the structure would have necessitated the making of a planning application to the LPA, seeking planning permission.



Photos 9-10 [CDC Officer]: View of the structure from; the waters edge (left - 2015) and PROW (right – 2014)

2.19 However, evidence was provided by the owner, at the time of the enforcement investigation that supported their claim that the development was undertaken in 2010. A photograph was provided by the owner taken on 4 November 2010 showing a timber hardstanding with posts and rail to the rear of the hardstanding. Excavation works had taken place to create the level surface. The owner provided a further photo showing the completed beach hut dated 29 April 2011. In light of this evidence, the investigation was closed on 27 January 2015 as it was considered that the operational development was immune from enforcement action.

2.20 Concern has since been raised by third parties that the enforcement case should not have been closed in 2015 on the basis they consider that there was insufficient evidence to support the owners claim and that the LPA should have formally interviewed the owner of the land, under caution. Breaches of

planning control are only unlawful once the contravener has failed to comply with a formal notice. In this case the breach was unauthorised but not illegal and so an interview under caution would have been inappropriate.

- 2.21 The investigating planning enforcement officer stated in emails at the time, that the occupiers of neighbouring properties thought that the beach hut had been on the land for two years at the time of the investigation. However no evidence was advanced to contradict the owners claim that the beach hut had been in situ for four years. A third party has more recently provided an aerial photograph, dated 7th October 2010 showing that there was no beach hut on the land at that time; this however does not contradict the owners claim that the base was constructed in November 2010. The structure could have been substantially complete any-time after this date and whilst the earlier photograph of the completed structure is dated 29 April 2011, this does not prove that the structure was not completed earlier than this date. Therefore, at that time the LPA considered that, on the balance of probabilities, that the development had likely been in situ in a completed form for four years before the case was closed on 27 January 2015.



Photo 11 [Landowner]: Structure viewed from the PROW (29/04/2011)

Assessment

- 2.22 Notwithstanding the history of enforcement investigations on this site set out above, the LPA can only now take action on operational development which has occurred in the last 4 years. There is clear independent evidence that the 'beach hut' was substantially completed by 2013 as it appears, with a roof, on the 2013 aerial photograph held by CDC. See below:



Aerial Photo 1 [CDC] (2013)

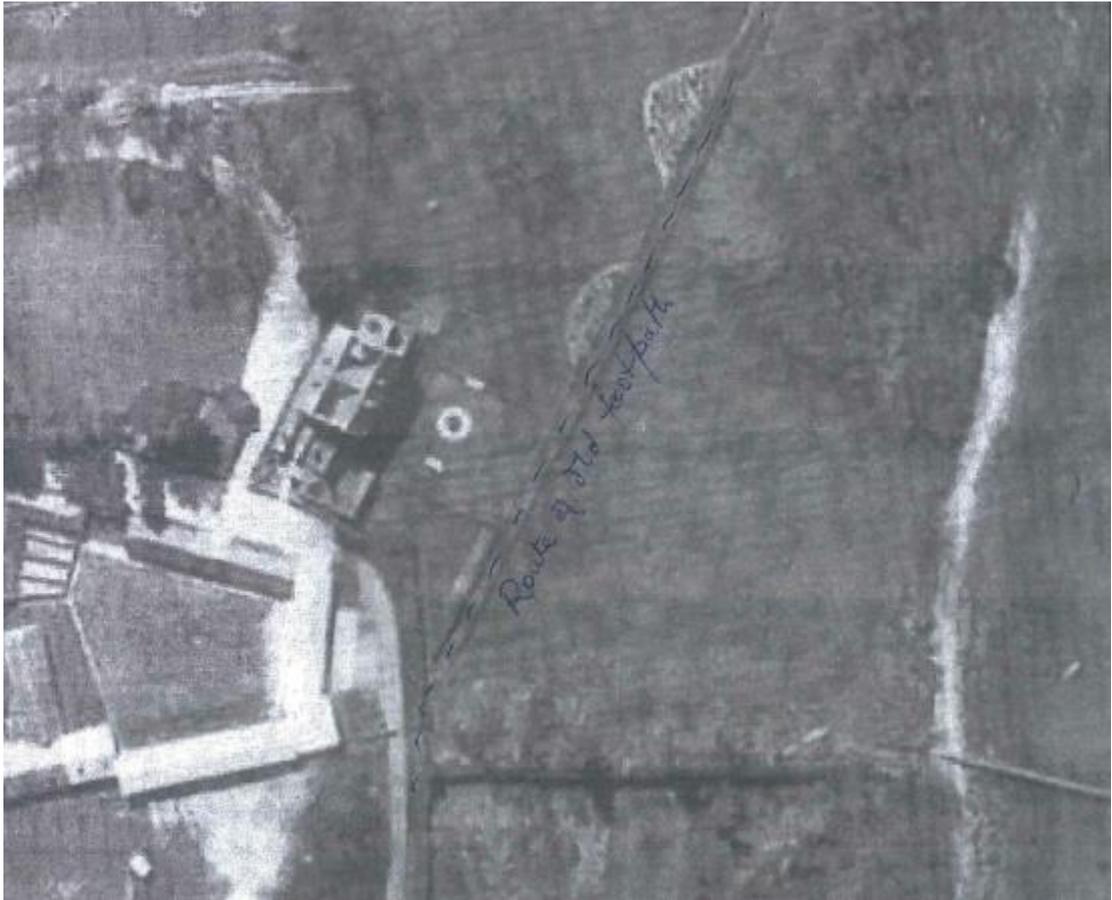
- 2.23 In the absence of evidence to the contrary it is therefore reasonable to conclude, on the balance of probabilities, that the beach hut currently on the site has been in situ for more than 4 years and is therefore immune from enforcement action by the LPA.

Conclusion

- 2.24 As the structure has been on the land for a period in excess of 4 years the LPA is unable to take any formal enforcement action in relation to its presence on the land. The lawful use of the building would run with the prevailing use of the land, which is considered later in this report.
- 2.25 No further action can therefore be taken with regard to the structure.

iv) USE OF THE LAND AS 'GARDEN' IN ASSOCIATION WITH DOLPHINS

- 2.26 The development that has taken place on the land, as described above and in association with the way the landscape is managed, has given rise to concerns that the character of the foreshore has been changed from wild foreshore land to domestic garden land; and that its use as garden is unlawful.
- 2.27 The owner claims that the land has always been garden land associated with Dolphins since the subdivision of the house in 1956. When the PROW was diverted to a new route closer to the harbour in 1959 (see photo below for previous route of the footpath) it had the effect of severing the foreshore land from what is now the principal garden associated with 'Dolphins', and which forms the curtilage to this dwelling.



Aerial Photo 2 [Landowner]: Route of old footpath (1951)

- 2.28 What is unclear from the 1951 aerial photograph is what status the land west of the previous route of the footpath had prior to the footpath realignment in 1959. However it is clear from CDC aerial photography that in 1991 the land to the east of the footpath's new route was managed in the same way as the land directly adjacent to Dolphins, and likely formed part of its formal garden.
- 2.29 By the time the current owner purchased the property in 1995, the harbour side garden, as he refers to it, was overgrown which he has subsequently cleared. It is the lawful use of this land, west of the current footpath alignment, which is in question.

Assessment

- 2.30 Over the years the land has appeared as a grassed area, with varying degrees of vegetation, and with a shingle track to one side (now predominantly covered over/ in-filled). The land extends to the west where the grass intertwines with the shingle shore. It is noted that the jetty has been a feature in this location for a number of years, appearing in the CDC 2001 aerial photograph.
- 2.31 The LPA's assessment involves whether the land has been in use as 'garden' land, as the owner states, for a period in excess of 10 years. Rather than a criminal test of 'beyond reasonable doubt' the LPA must only satisfy itself of the lawful use of the land on 'the balance of probabilities'.

- 2.32 In addition to the written evidence of case officers, the owner of the land and third parties (including sworn affidavits), the LPA has collated a great deal of photographic evidence (both aerial and from ground level) which are a helpful reference when considering the use and development of the land since 1991. These include CDC owned licensed aerial photography (1991, 2001, 2007 & 2013), photographs taken by CDC officers, photographs provided by the owner of the land and those submitted by third parties.
- 2.33 The following photographs are considered to be the most relevant to the examination of the historic use of the land. They are listed in date order starting from 1991 and ending at the date of the Case Officer's site visit on the 07/11/2019.



Aerial Photo 3 [CDC] (1991)

- 2.34 In the above image there is a clear difference in the way the land is managed between the foreshore land to the west of the footpath and the garden associated with Dolphins to the east. In the absence of any further evidence it is likely that the land was not used as 'garden land' in association with Dolphins, at that time. The nature of the vegetation is consistent across the length of the foreshore.



Photo 12 [Third Party]: Photograph of the foreshore, the land in question is in the foreground of the trees to the top right of the photo (1996)

- 2.35 Photograph 12 only shows the first few metres of the foreshore land, but it appears unkempt and not domesticated in any way. On the balance of probabilities it is unlikely that the land was used for any domestic purpose at this time.



Aerial Photo 4 [CDC] (2001)

- 2.36 Aerial Photo 4 provides the first photographic evidence of a change in the way in which the land is being managed. The previous brush has been mostly cleared and the appearance of the land is evidently different to the part of the foreshore to the south in separate ownership.



Photo 13 [Landowner]: Photograph of the foreshore during low tide, viewed from the waters edge (2004).

- 2.37 The above photo supports the conclusions regarding Aerial Photo 4. Much of the previous vegetation has clearly gone and there is a marked difference in the way the site looks to that of the neighbouring foreshore to the south (right of the photo), which is much more overgrown and in a more 'natural' and unmanaged state. Whilst no human activity is taking place in the photo the land is being used for the storage of boats and there is a cable reel visible, presumably from the installation of the services connection to the main house that occurred around that time.



Photo 14 [Landowner]: Photograph of the foreshore, viewed from Jetty (2005)

- 2.38 The photo above clearly shows the triangular foreshore land which visibly appears more tended and manicured appearance, starkly different to the foreshore to the south (right of the photo). The image also shows some use of the land for private recreational purposes/dog walking.



Aerial Photo 5 [CDC] (2007)

2.39 Aerial photo 5 further supports the preceding landowner's photo. The land takes on a similar appearance to the curtilage of Dolphins and it is reasonable to assume that the grass continues to be maintained in a manner that is consistent with recreational 'garden use'. Third parties have reported using the land in 2007 for a party of 30 people, hiring kayaks for a local event and using the land to provide access to the sea for boating activities. Whilst no substantive evidence to support this claim has been submitted it is considered that the use described supports the owner's contention that this is garden land; and that the garden has been used for private recreational activities consistent with other parcels of private land that adjoin the waters edge within the fingers of Chichester Harbour.



Photo 15 [Third Party]: Photo of the foreshore, viewed from the water (2010)

2.40 The above photograph has been presented to the LPA as it is considered to demonstrate that the land was in an unmanaged state in May 2010. To the contrary the photograph is taken at such an angle that the 'unmanaged' foreshore in the foreground is that of the area of foreshore to the south in another ownership. It is considered that the image shows cultivation and management of the land; in particular, there is a low level post and rail fence visible along the boundary between the two areas of foreshore and there is nothing to suggest that the grass on northern part of the foreshore is not managed in the same way as shown in photos 13 (2004) and 14 (2005). This is supported by Aerial Photo 6 (dated 7th October 2010), which shows the outline of what is likely to be the boat shown in Photo 15. It is clear that at on this date there was no building on the land.



Aerial Photo 6 [Third Party] (2010)



Photo 16 [Third Party]: Photo of the foreshore, from the water (13/04/2012)

- 2.41 The above photo is not clear enough to determine whether the ground continues to be managed in the same manicured way as previously shown. However it us the first 'ground level' photo of the 'beach hut'/shed which indicates that a domestic level of use continued. The aerial photo below indicates the continued and keeping of the land in a manner similar to that previously. It is the first aerial photo which shows the building on the land. The foreshore to the south appears to have been the subject of some clearance of brush, although the photograph suggests the grass is not maintained in the same manicured way as the northern section of foreshore.



Aerial Photo 7 [CDC] (2013)

2.42 More recent photographs in 2018 (below demonstrate the continued keeping of the land in a domestic manner, which would suggest a similarly conferred use.



Photos 17-19 [Third Party]: Photos of the foreshore (13/02/2018)

- 2.43 However, to fully understand the use of land it is necessary to have an appreciation for what constitutes a 'material change of use' - in planning terms. The fact that land changes ownership or a building or fence is erected and ground levels are changed does not necessarily result in a material change of use. Similarly, crossing the land to access to the sea and shore or using it for recreational activities does not in itself indicate a change of use. As set out at sec.55 of the 1990 Act, "the making of any material change in the use of any buildings or other land" is development.
- 2.44 National Planning Practice Guidance states that "there is no statutory definition of 'material change of use; however, it is linked to the significance of a change and the resulting impact on the use of land and buildings. Whether a material change of use has taken place is a matter of fact and degree and this will be determined on the individual merits of a case". Identification of a land use therefore needs careful consideration of the facts.



Photo 20 [CDC Officer]: Photo of the foreshore from the jetty (07/11/2018)

- 2.45 The most recent photo above reinforces the evidence before the LPA with regard to the previously demonstrated use of the land. It is a matter of record that the triangular foreshore section of land was formed when the position of the footpath was moved and that the land has had varying degrees of vegetation upon it over the subsequent years. Aerial photographs show that the land has had a different character to the neighbouring foreshore land as a result of grass cutting and this notable difference has been present for decades. Whilst it is apparent that the land was 'wilder' in character up until the late 1990s the appearance of the land does not mean that it was not used as a garden. Garden land does not need to conform to a 'norm' and can be uncultivated in nature. Since the late 1990s the land has been manicured and the garden use became more apparent, under the control of the new landowner, and consistent with that of other land connected to a residential property adjoining the shoreline. In addition to the above photographs a number of statutory declarations and correspondence has been received, setting out how third parties have observed/used the land over the past 10 years. Nothing detailed within these documents outweighs the evidence

above in establishing that, on the balance of probabilities, the site has been used as part of the same planning unity as that of Dolphins and for recreational 'garden use' for a period greater than 10 years.

3.0 Conclusion

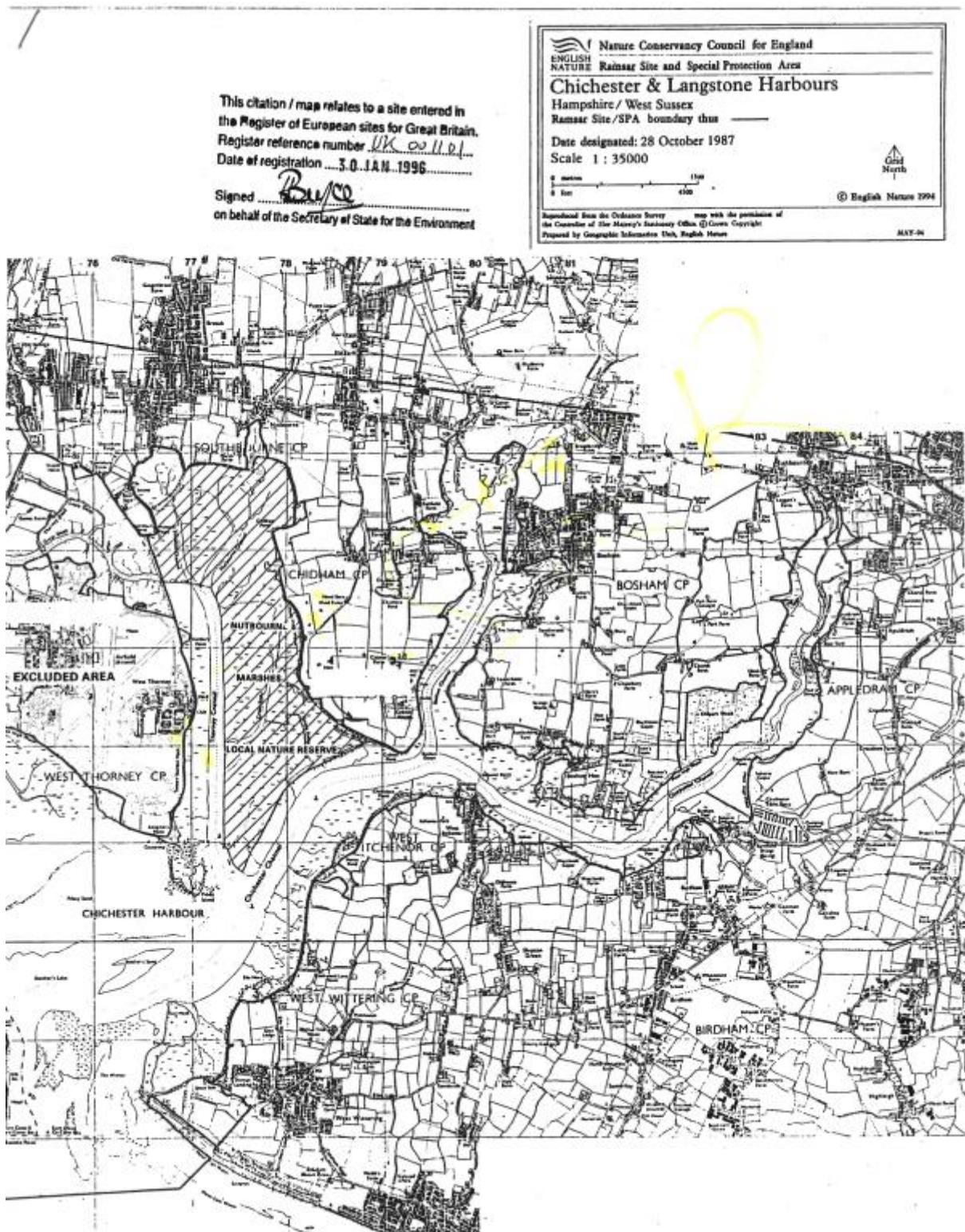
2.46 It has been concluded that the development of the land through the importation of soil does not have a harmful significant impact upon the specially designated areas, visual amenity or the amenities of neighbouring properties. For these reasons, no further action will be taken in relation to this matter. Remedial steps have been carried out to the replacement gates which have reduced the impact on the visual amenity to an acceptable level and the beach hut building has been in situ and substantially complete for four years or more and so it too is immune from enforcement action.

2.47 Evidence has been submitted to the local planning authority and officers have considered all the information available in relation to the use of the land for the purpose of deciding whether the existing garden use is lawful in planning terms. From this careful and detailed examination of the use and all related information, the LPA is satisfied that the garden use is lawful. It must follow therefore that if an application for a certificate for existing lawful development was made, under section 191 of the 1990 Act, the information available would satisfy the LPA of the lawfulness of the use. Notwithstanding this consideration, as the use has been found to have existed for a period in excess of 10 years, it is immune from enforcement action by virtue of s171b of the 1990 Act.

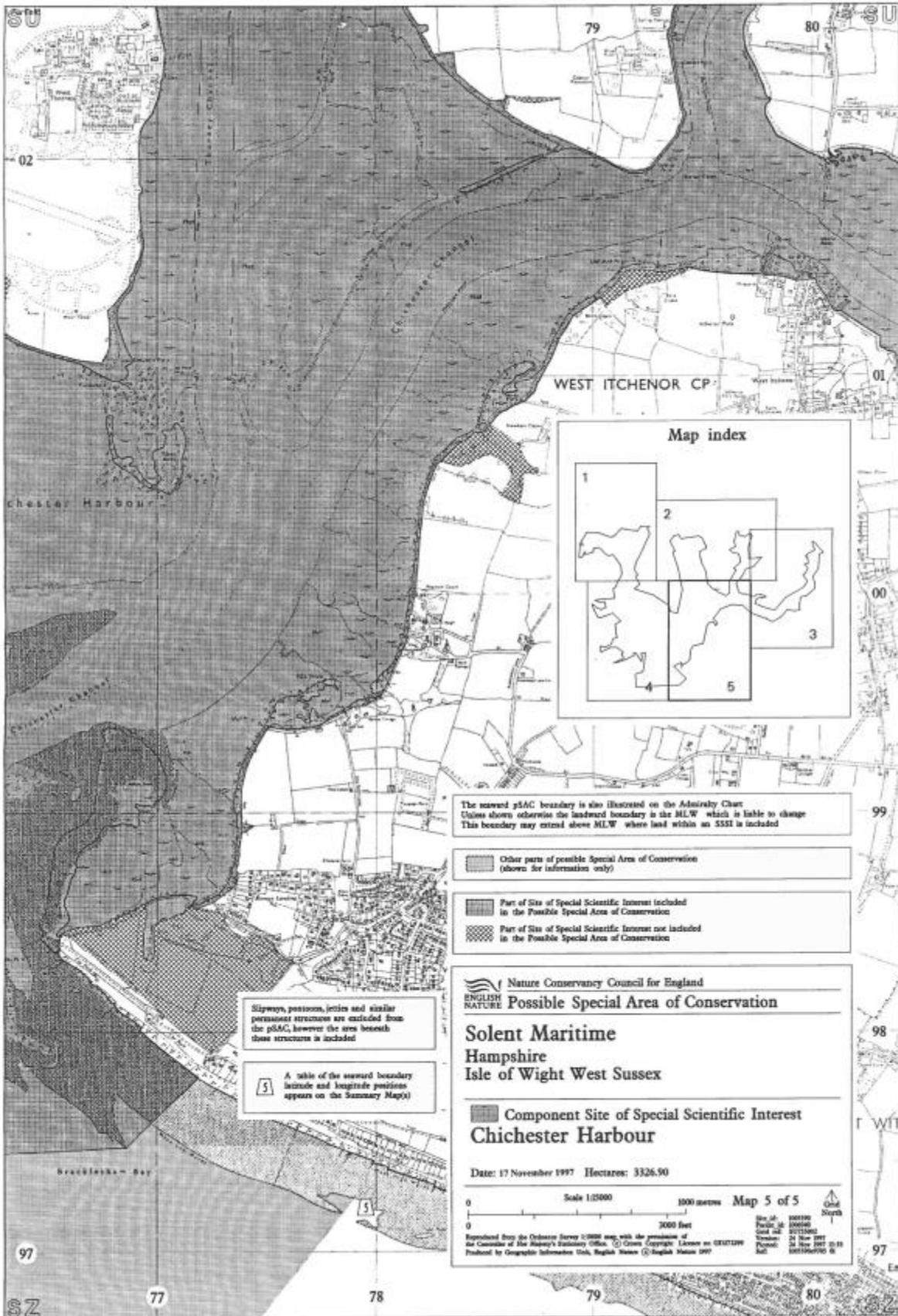
Signed  Date 24/10/2019
(Case Officer)

I hereby agree with the conclusion and recommendation set out above.
Signed  Date 24/10/2019
(Divisional Manager, Development Management)

Appendix 1
Definitive Maps



Chichester and Langstone Harbours SPA Master Map



Chichester Harbour SAC Master Map



Chichester Harbour SSSI Master Map