
Site Address:	Verner Common, Copse Lane, Hayling Island		
Proposal:	Application for Certificate of Lawful Development for existing use relating to taking off and landing of model helicopters and parking for members.		
Application No:	APP/13/00749	Expiry Date:	20/09/2013
Applicant:	Mr J Barrett	Team:	Team 1
	Hayling Heli's		
Agent:	Mrs Stockley	Case Officer:	David Eaves
	Hayling Heli's		
Ward:	Hayling East		

Recommendation: **GRANT A CERTIFICATE OF LAWFUL USE**

1 Site Description

- 1.1 The site is located within the Chichester Harbour AONB, the Chichester Harbour SSSI, Chichester and Langstone Harbour RAMSAR and Special Protection Area and borders a Special Area of Conservation.
- 1.2 The area is located on an area of land which juts out into Chichester Harbour with an inlet on either side. The land consists of two large open fields with a public footpath which goes around the perimeters of the fields. The fields are generally open with some hedges around the boundaries. The site is accessed via the adjacent Fleet Farm Camping and Caravan site.

2 Planning History

- 2.1 There are no planning applications of relevance to the consideration of this application. The applicant and third parties have submitted information regarding the use of the land over the 10 year period relevant to the consideration of this Certificate of Lawful Development. This evidence is summarised in part 7 of this report.

3 Proposal

Application for a Certificate of Lawful Development for existing use relating to taking off and landing of model helicopters and parking for members.

4 Policy Considerations

National Policies (statutory background)

National Planning Policy Framework

Town and Country Planning Act 1990 (Part VII)

The Planning and Compensation Act 1991

Lawful Development Certificates A Users Guide 2007

There are no policy considerations in the determination of a Certificate of Lawful Development for an existing use and the application must be determined on the balance of probability based on the evidence provided.

Listed Building Grade: Not applicable.

Conservation Area: Not applicable.

5 Statutory and Non Statutory Consultations

Hampshire Biodiversity Information Centre

On Site - Wader and Brent Goose Strategy - Solent Wader and Brent Goose Strategy Sites

On Site - SPA - Chichester and Langstone Harbours

On Site - RAMSAR - Chichester and Langstone Harbours

On Site - SSSI - Chichester Harbour

Royal Society for the Protection of Birds

(Further Comments)

We have carefully considered the legal opinion you reference in your letter, in addition to the further advice of both Natural England and the Wildlife Trust; and we are satisfied that the issues in respect of disturbance to designated wintering bird populations can be addressed between Natural England and the landowner/applicant under section 28 of the Wildlife and Countryside Act. This approach is in line with David Elvin's legal opinion.

However, we support the advice of Natural England and the Wildlife Trust recommending that the Council issues an informative with the permission to outline the applicant's responsibility for seeking separate consent from Natural England under the Wildlife and Countryside Act. Subject to this, we have no further comments to make in respect of the Certificate of Lawful Development application.

(Original Comments)

Object to the proposal to legitimise the use of model helicopters at this extremely sensitive site.

We have seen the response from the Hampshire and Isle of Wight Wildlife Trust (letter of 21 August 2013), and fully support their concerns regarding the disturbance of the activities to roosting and feeding waders and wildfowl which form part of the Chichester and Langstone Harbours Special Protection Area (SPA). Our own observations confirm the Trust's view that the activity does certainly appear to displace wintering and passage waterbirds from the high tide roost at Verner Common.

While we understand the limitations of the Council's consideration of a Certificate of Lawful Development application, as the activity is likely to be causing disturbance to the SPA interest features, we consider that the tests of the Habitats Regulations should apply. We recommend that Natural England's advice should be sought on this matter.

Should the Council be minded to issue a Certificate of Lawful Development, we would strongly recommend that options are explored to secure restrictions on the activity in order to minimise future impacts on the SPA. For example, a restriction to prevent the use of the site during the core winter period (November to February inclusive), or to prevent the activity taking place 1 hour either side of high tide, when the site will be most sensitive to disturbance. As a minimum, such measures could be implemented via a voluntary Code of Conduct.

Comment: An informative has been added in relation to minimising impact on the SPA.

Chichester Harbour Conservancy

Further Comments:

On the basis of the legal opinion, I am happy to accept the findings and advise that the Conservancy has no further information to counter the claims of the applicant and removes its' previous recommendation that a Certificate is not issued.

Original Comments:

Insufficient evidence has been submitted to demonstrate that the taking off and landing of model helicopters has been carried out continuously for a period of at least ten years. It has not been demonstrated that on the balance of probabilities the use of the land as described in the application has been carried out continuously and uninterrupted and the Conservancy consequently recommends that a Certificate is NOT issued. Furthermore, having regard to the site's location to designated sites of nature and ecological conservation, it would be necessary to undertake an Appropriate Assessment before a Certificate were issued if the Authority were minded to issue one.

RECOMMENDATIONS

Recommend that a certificate is NOT issued

Hampshire & Isle of Wight Wildlife Trust

Further Comments:

Given the complexity of this issue we have also sought external legal advice and unfortunately have no alternative but to agree with yourselves and David Elvin QC's legal advice. Our advisors have confirmed that this opinion is consistent with more recent case law and also how they have interpreted the term 'plan or project' in other situations. We would like to add that this advice is contrary to other information we were provided with prior to our initial response.

The Wildlife Trust is extremely disappointed and concerned by this outcome and the legal opinions, which would appear to identify a significant flaw in our planning system, and how the Habitats Directive has been transposed into UK law. It is extremely concerning that such a disturbing activity can be carried out on a site which is protected under European law and forms part of an important network of sites (Natura 2000). As you will be aware Verner Common itself forms part of the Chichester and Langstone Harbours Ramsar/SPA due to the internationally important numbers of waterfowl which use the site for feeding and roosting during the winter months. Two of these species, brent goose *Branta bernicla* and black-tailed godwit *Limosa limosa*, are component features of the SPA and are significantly impacted by the act of flying model helicopters over the site. We consider this to be an unacceptable level of disturbance on such a highly designated site and contrary to the reasons why the site was initially designated. We would also like to draw your attention to the extensive work that has been carried out in relation to disturbance issues along the length of The Solent, and the proposals aimed at trying to mitigate these impacts. The granting this certificate would be yet another example of unreasonable levels disturbance on the SPA which is exactly what the SDMP seeks to mitigate.

In this instance we unfortunately have no choice but to accept this decision, but we have been advised that should the Local Planning Authority be minded to issue a Lawful Development Certificate, an informative will be required to inform the applicant that the Lawful Development Certificate does not confer consent under the Wildlife and Countryside Act 1981 (as amended). This will need to be sought from Natural England. We trust that this

informative will be provided.

Original Comments:

The site is located in a highly designated area and is included within the Chichester Harbour SSSI, Chichester and Langstone Harbours SPA and Ramsar and immediately borders the Solent Maritime SAC. The Local Nature Reserve (LNR) of Gutner Point is located approximately 350m to the east of the site. In addition, both the site, an adjacent piece of saltmarsh habitat and Gutner Point are included within the Solent Waders and Brent Goose Strategy as important for both brent goose *Branta bernicla* and waders as feeding and roosting sites.

We strongly object to these proposals due to the potential impacts that the activity will and is probably already having, on wading birds and wildfowl associated with the designated sites. We understand that with regard to an application for a Certificate of Lawful Development for existing use, the applicant only has to demonstrate that the activity has been carried out for the last 10 years, and that we are not able to officially comment. However we would like to draw your attention to the following point.

The site is located in a highly sensitive area due to the internationally important populations of wintering and passage wildfowl and waders that it supports. The site is a known important feeding site for brent geese and the surrounding intertidal and saltmarsh habitat is used by wading birds for feeding and roosting. These populations of birds are highly susceptible to disturbance and we consider that the proposals for the site will have a significant impact on them. Due to the importance of these sites, they are designated under European law, the Conservation of Habitats and Species Regulations 2010, as amended (hereafter referred to as the Conservation Regulations). Given that the proposed activity will be carried out on a European designated site, the potential impacts will need to be considered under the Conservation Regulations, irrespective of the requirements of the planning process.

We draw your attention to the relevant legal tests set out under the Habitats Regulations that must be fulfilled before an application such as this can be granted.

Given the highly sensitive nature of the area the Trust considers that it is likely that the proposals will have a significant effect on the European designated site. Therefore before making a decision on this application, we urge the council, as the competent authority, to consult with Natural England (as the appropriate nature conservation body)

Natural England

Further Comments:

Our previous response requested that a Habitats Regulations Assessment be carried out prior to the issuing of a Lawful Development Certificate. However, following the receipt of your letter setting out the legal opinion you have received on this matter, we accept the conclusion that a Habitats Regulations Assessment does not apply to this matter.

However, we would clarify that if a Lawful Development Certificate is to be granted this would not constitute consent under SSSI legislation. Therefore, should the Local Planning Authority be minded to issue a Lawful Development Certificate, we would request that an informative be attached informing the applicant that the Lawful Development Certificate does not confer consent under the Wildlife and Countryside Act 1981 (as amended). This consent will need to be applied for from Natural England.

Original Comments

The application site is within Chichester Harbour Site of Special Scientific Interest (SSSI).

This SSSI is part of the Chichester and Langstone Harbours Special Protection Area (SPA)/Ramsar.

Whilst Natural England has no specific information to add with regard to the application for a Lawful Development Certificate, we would highlight that an LDC does not constitute consent under the Habitats Regulations. We would therefore advise that due to the location of this activity in a sensitive area designated for its bird interest, that a Habitats Regulations Assessment is required for this activity. Furthermore, we would clarify that if a LDC were to be granted this would not constitute consent under SSSI legislation.

6 Community Involvement

This application was publicised in accordance with the Council's Code of Practice for Publicity of Planning Applications approved at minute 207/6/92 (as amended), as a result of which the following publicity was undertaken:

Number of neighbour notification letters sent: 1

Number of site notices: 0

Statutory advertisement: Not applicable.

Number of representations received: 7

Objections

Summary:

NE Hayling Residents Association:

Although outside NEHRA area on map, by its aerial nature the effect will be felt on the adjacent land and houses, therefore feel need to comment.

Noise to residents in Woodgaston Lane. Flying times very noticeable and seem to ignore the birdlife, brent geese and other winter waders. Not sure if membership numbers restricted to 28 as suggested, but failing all else, a restriction on the numbers using the site at any one time, and the total number of flying days per year needs to be agreed and carefully monitored.

Verner Common in a special area, protected by SSSI, RAMSAR, SINC etc and these should indicate a protection from noise element. Suspect it was seen as a useful open space, and used in a small way with a few enthusiasts initially and has now built up to much more noticeable element with ever increasing affect on wild life we are trying to protect and needs to be restricted at an agreed level, if we can not legally restrict its use entirely.

Does not seem logical to permit this development in wake of all the protection the site and its surrounding area has been

given. Application needs to be carefully considered, together with NE, RSPB and CHC before decision made.

Summary:

Have lived (nearby) for 23 years.

Frequency of flying less than in past but occurred both last weekend and this weekend and lasted 4 hours on the Sundays.

Make an annoying whining noise . Flying less than 250m from some houses on north side of the creek. Club rule stipulating should not fly within 250m of seasonal campsite but not so for permanent residents.

Volume of smoke pollution can be seen on Hayling Helis website. Surely this is not acceptable in such a sensitive environmental area.

Summary:

Site within AONB, SSSI, SINC, SPA and RAMSAR. In each of these designations there are statutory obligations on the relevant authorities (HBC is one) who are obliged to have regard in all actions they take to preservation of the amenity, enjoyment, wildlife, tranquility thereof. The granting of permission to fly helicopters would be unconscionable derogation of such duty and result in the creation of a public nuisance to users of the designated areas and surrounding property.

Site abuts a Hampshire County designated bird sanctuary. Permission to fly and consequent encouragement implied thereby for more to do the same, would utterly contravene the purpose of the creation of such sanctuary.

Dereliction of statutory duty to preserve the designated areas would render it more difficult and perhaps impossible for the Council to enforce any other restriction in those areas resulting from estoppel thereby created.

Council imposes restrictions on any development abutting, leave alone within, such designated areas that might have an impact on nesting, roosting or visiting birds and wildfowl to grant this permission would be wholly against former policy.

To grant permission would be an act of maladministration.

Summary:

At times peaceful enjoyment of garden impossible due to irritating whine from model aircraft. Prevailing SW wind puts us in the direct line from these models with noise and sometimes smell.

Planning consents for building activity along Gutner Creek are heavily conditioned to respect over wintering birds.

Hayling Helis rules permit flying every day between 1st Oct and 1st May between 10am and 9pm. Exactly the period you

seek to protect in all other perceived nuisance activities.

Verner Common not the right location for activity.

My family having lived here since 1962 have a very good awareness of activity around Gutner Creek and none of us would agree that there has been continuous activity of model aircraft flying for the last 10 years and would suggest that the club be put to the burden of proof of such activity.

Summary:

Lived at Woodgaston Cottage since 1977.

During this period whenever we have heard them, they produce an annoying whining noise.

Their flying has not been consistent during the 10 year period that you would look at and justify a Certificate of Lawfulness.

The distance from North edge of Verner Common is 213m.

Closest distance from North edge of Verner Common to one of our neighbours is 143m.

Suggest the possibility of them using the Southern edge of Verner Common which is 663m from our property, with no residential property nearby.

Whenever flying has taken place weather is fine and fine enough for all house owners along here to be out in their gardens as well.

Flying causes havoc with the bird population in this area.

Common also regularly used for grazing horses. What disturbance caused to animals?

I am fully licensed Radio Amateur with OFCOM with permission to transmit at 400 Watts. This level of radio energy not easily tolerated by electronic/radio devices. If they choose to fly during a period I am transmitting, may lead to disastrous crash of the device. What this means in safety terms for you to decide.

Summary:

Site known for AONB/SSSI status and a piece of land jutting out on the peninsular that can under mismanagement cause extreme damage to adjacent neighbours., nesting birds and abundant wildlife as well as humans trying to appreciate the delicate surroundings.

Seems there is a dispute over the time in years the group who fly the very annoying toy planes say they have used the common.

Was of the understanding that the 10 year rule even when just frequented on a temporary basis is that you had no complaints. I have made complaints to Harbour Conservatory and HBC for the last 4 yrs in writing.

Last years dates when I was around:

Evidence of car parking in 2012 provided

Summary:

Unable to find any firm confirmation to say that the Club

hasn't been running from Verner Common for 10 years but I am sure it hasn't.

Certainly hasn't been working from the same area on the Common because I asked them to move in 2007. I also know it didn't take me 4 years before I complained.

Many complaints in the last 10 years. Many club members are not Hayling residents.

Supporting:

Summary: (British Model Flying Association)

Hayling Helis Model Helicopter Club - Affiliated to the British Model Flying Association every year since 2001, our records show the club have operated from current location on Verner common since that time.

Certificate requires activity to have been taking place for 10 or more years continuously. Our records show this to be the case and therefore with other evidence produced we consider the club have demonstrated beyond the balance of probabilities the use of the land as described and the Council should award the certificate.

Hampshire & Isle of Wight Wildlife Trust and RSPB are objecting based on potential impacts on wading birds and wildfowl associated with the designated sites. Not aware of any studies they have commissioned on this matter, however as a responsible national governing body for the sport of model aircraft flying we have commissioned a number of studies on the impact on birdlife. These studies clearly show no negative impacts and in some cases the stewardship and sympathetic maintenance of flying sites has shown to be beneficial and as such the Wildlife trust and RSPB need not be concerned. The club use a small area of Verner Common for flying and any disturbance will be localised to the immediate flying area. Going forward more model aircraft flyers are switching to electric powered models which are generally much quieter and have even less impact on the locality.

Have visited the club at their site and reviewed their operating procedures, the club is very well organised and has excellent operating procedures and operate with a full awareness of their responsibilities to the locality. Model aircraft flying is a sport, recognised by all the UK sports councils and the BMFA are the national governing body recognised by those sports councils and also the CAA and other official bodies.

Requirements for issuing a certificate met.

7 Planning Considerations

- 7.1 Having regard to the relevant policies of the development plan it is considered that the main issues arising from this application are:
- (i) The Evidence Produced in relation to the matters applied for during the relevant 10 year period from the 26th July 2003 until 26th July 2013 This evidence includes both evidence in support of the Certificate being granted and third party evidence in opposition.
 - (ii) The impact of Environmental legislation on the consideration of this application for a Certificate of Lawful Use.
- (i) The Evidence Produced in relation to the matters applied for during the relevant 10 year period from the 26th July 2003 until 26th July 2013
- 7.2 The application seeks to prove an established lawful use for the taking off and landing of model helicopters and parking for members on land at Verner Common. The application is accompanied by plans of the land in question in relation to taking off and landing with an indication of parking areas.
- 7.3 The evidence produced has taken the form of 4 Affidavits (AF) from members and Chairman of Hayling Heli's, letters of support from 11 individuals submitted with the application and a further set of letters submitted during the course of the application following a request for any further evidence available to be provided.
- 7.4 This evidence has been summarised below. The evidence relates to the years 2001 - 2012 (the relevant period for the certificate being 26th July 2003 until 26th July 2013). In brief this evidence shows the following:

2001

Flying on Verner Common from 2001 (AF)
35-40 times/year (AF)
Foot and mouth disease restricted use of fields during this year
Alternative field in Emsworth
20 members
Affiliated to BMFA

2002

Flying at VC (AF)
40 times/year (AF)
Owner gave preliminary start to flying date 1.3.02 (weather/F&M)
Field in use
Members advised to park in entrance not in field for duration of winter (field soft)
Members follow guidelines

2003 (Start of Relevant period)

Members allowed to use field provided for model flying
Members follow guidelines

2004

Flying VC (AF)
30-40 times/year (AF)
Various times and on various days of week - weekends most common AF
20 members AF

2005

Flying VC (AF)
30 times/year (AF)
Field used for model flying
Members follow guidelines

2006

Hayling Heli's running since 2000
30 members
Field used by handful of enthusiasts majority of members never attend field
Field used for model flying

2007

Flying at VC (AF)
30 times year (AF)
Noise complaint received by Hayling Heli's
No. of members increased from 25 to 30
More members are using the field - complaints have increased proportionately
Moved to far side of field now and attended to silencers - not solved problem
continuous noise on some days
A lot of complaints weekends on nice days and especially on bank holidays
Changes to flying times introduced to break continuous noise:
Summer 28th -May -1st Oct Sat/Sun No flying 12.00-2pm
No flying after 6pm
Bank Holiday No flying
Winter:
Fly 7 days/week 10.00am to 9pm subject to good vis and wind conditions. No flying in half light or after dark
All engines silenced to comply with BMFA/DOE code of practice
All aircraft 7kgs and over comply with CAA rules
No more than 1 Helicopter airborne or running at same time.
28 Members
Noise complaints ban models that don't meet 82dB noise criteria until complaints rectified
Location of flying pit and flying patch move to far side of field.

Work to reduce noise.

2008

Member fly's most weekends weather permitting (AF)
Noise testing
No Bank Holiday Monday flying
Noise complaints early in season
Talk to Campsite re no fly time 1pm-3pm
Discuss trial flying electric 450's for 1hr in no fly time - stop if complaint and assess after 1 month trial.
Guests max 4 times/year
Increase members to 30
2 helis in air at any one time
Flying times changes 1pm - 3pm. No electrics in no fly time
Used field for model flying
Summer no fly time 1pm-3pm
No noise complaints this year

2009

Member fly's 30 times/year (AF)
Member fly's 25-30 times/year (AF)
1 complaint in year
Flying of 450 sized helis during summer no fly time passed - if complaint no fly will be reinstated for all helis
Noise for 500 sized helis to be investigated
Field used for model flying
Summer no flying times 1pm-3pm
Summer no flying after 6pm Saturdays and Sundays
No flying Bank Holiday Mondays

2010

No noise complaints
Same guests max 4 x /year
Summer no-fly rule amended to allow 450 sized Heli's to fly in no fly time. 500 deemed too noisy.
Fences are boundaries must not fly over fence of the field you are in - remain well within boundaries of field.
Field used for model flying
Summer flying times 1pm - 3pm
No flying after 6pm Saturdays and Sundays
No flying Bank Holiday Mondays
No noise complaints this year.

2011

Member fly's 30 times/yr (AF)
No noise complaints
Trial period for electric fixed wing planes
Field used for model flying
Summer no flying 1pm - 3pm
No flying after 6pm on Saturdays and Sundays
No flying Bank Holiday Mondays
No noise complaints this year

2012

Member fly's 30 times/yr (AF)
Fixed wing not had fair test due to weather - opened up to weekend flying and increased to 4ft wingspan. Helis still to take priority
No noise complaints
Field used for model flying
Summer no flying 1pm -3pm
No noise complaints this year

- 7.5 The applicants have submitted a considerable volume of evidence for the use of the area for the taking off and landing of model helicopters. In addition there is a supporting letter from the British Model Flying Association which confirms that the Club have been *Affiliated to the British Model Flying Association every year since 2001, our records show the club have operated from current location on Verner common since that time. Certificate requires activity to have been taking place for 10 or more years continuously. Our records show this to be case and therefore with other evidence produced we consider the club have demonstrated beyond the balance of probabilities the use of the land as described and the Council should award the certificate.* This evidence confirms the use of the site by the club over the 10 year period.
- 7.6 Third parties have raised a number of planning merit concerns about the use, however, in determining a Certificate of Lawful Use a planning merit assessment cannot be taken into account. The third party comments which relate to the history of the use and are therefore relevant to the consideration of the application are considered below.
- 7.7 Comment has been made that it is suspected that the land *was seen as a useful open space, and used in a small way with a few enthusiasts initially and has now built up to much more noticeable element.* This comment does not dispute the claim that the use has taken place over the 10 year period. From the evidence produced by the applicants membership appears to have fluctuated between 20-30 members.
- 7.8 Comment has been made that *Frequency of flying less than in past but occurred both last weekend and this weekend and lasted 4 hours on the Sundays.* This comment contradicts the view above that activity has been increasing.
- 7.9 A further representation states *My family having lived here since 1962 have a very good awareness of activity around Gutner Creek and none of us would agree that there has been continuous activity of model aircraft flying for the last 10 years and would suggest that the club be put to the burden of proof of such activity.* The applicants have provided a substantial body of evidence in relation to the use

for the taking off and landing of model helicopters as outlined above.

- 7.10 A comment has been made from a nearby resident since 1977 who states *During this period whenever we have heard them, they produce an annoying whining noise. Their flying has not been consistent during the 10 year period that you would look at and justify a Certificate of Lawfulness.* The use over the 10 year period does not appear to be disputed. The lack of consistency is to a degree confirmed by the applicants evidence which details limited interruptions resulting from weather conditions and the condition of the fields, however, there are no breaks in activity evident during the relevant 10 year period which would appear to be significant enough to dispute the use for the taking off and landing of model helicopters.
- 7.11 A comment has been made that it was understood *that the 10 year rule for trying to obtain planning even when just frequented on a temporary basis is that you have had no complaints. I have made complaints to Harbour Conservatory and HBC for the last 4 yrs in writing.* The 10 year period for assessment is not subject to no complaints being submitted.
- 7.12 A further comment has been made that they have been *Unable to find any firm confirmation to say that the Club hasn't been running from Verner Common for 10 years but I am sure it hasn't. Certainly hasn't been working from the same area on the Common because I asked them to move in 2007. I also know it didn't take me 4 years before I complained. Many complaints in the last 10 years.* The lack of evidence to dispute the 10 year use and the evidence produced in support of the applicant has to be acknowledged. There is no clear evidence to suggest that only certain areas of the field have been used.
- 7.13 The proposed certificate relates to two matters, the Taking off and Landing of Model Helicopters and parking for members. These matters are considered separately below:

Taking off and Landing of Model Helicopters

- 7.14 The onus of proof in an application for a Certificate of Lawful Use is on the applicant. In determining an application the relevant test is the balance of probability. As discussed above the relevant period for the consideration of the use is 26th July 2003 to the 26th July 2013 (the date of this application).
- 7.15 The evidence submitted by the applicants summarised above is considered to show on the balance of probability the following:

Hayling Helis have operated from 2001.

The taking off and landing of model helicopters has taken place within the red line area every year between July 2003 and July 2013.

The membership of the club has varied over the 10 year period between 20 and 30 members

Members tend to fly between 30-40 days per year.

The site is used all year.

Flying is weather/visibility dependant and tends to take place more regularly in the summer and at weekends.

The taking off and landing of model helicopters takes place on any day of the week.

Take off and landing does not take place on Bank Holiday Mondays.

Take off and landings take place in daylight hours only.

The club operates to rules which vary over the years.

- 7.16 It is considered that a Certificate of Lawful Use can be issued in relation to the taking off and landing of model helicopters within the red line area subject to certain limitations as set out in the recommendation.

Parking for Members

- 7.17 The evidence submitted by the applicants in relation to parking is much more limited. The applicant has provided a plan indicating the usual parking places marked in each field and the driving routes to the parking places. If the fields are wet parking takes place close to the gate in field 1 (the western field).
- 7.18 Whilst evidence in relation to parking is very limited, it is considered probable that members flying their models would be likely to take the machines close to the positions of their use. A third party has confirmed the parking of cars (between 1 and 4) at any one time between April and September 2013. There is no evidence to suggest that car parking has not taken place in association with the taking off and landing of helicopters by members.
- 7.19 On the balance of probability it is considered that a Certificate of Lawful Use can be issued in relation to the parking for members in the areas indicated on the parking plan.

(ii) The impact of Environmental legislation on the consideration of this application for a Certificate of Lawful Use.

- 7.20 The application site is within Chichester Harbour Site of Special Scientific Interest (SSSI). This SSSI is part of the Chichester and Langstone Harbours Special Protection Area (SPA)/Ramsar.
- 7.21 Concerns have been raised in particular with regard to disturbance from the use on the internationally recognised designated sites and the protected birdlife. Detailed consideration has been given in relation to whether these concerns can be taken into account in the determination of an application for a Lawful Use Certificate. In particular the question of whether a Habitats Regulations Assessment is required for this activity has been addressed. Legal Advice has been considered and Natural England, the RSPB, Hampshire and Isle of Wight Wildlife Trust and Chichester Harbour Conservancy have all submitted comments in relation to the application.
- 7.22 A lawful development certificate application does not grant consent for any use but merely recognises the acquisition of lawful use rights in relation to planning. It is not therefore appropriate in determining the certificate to consider the merits or otherwise of the use, rather the evidence that it is or is not lawful in planning terms.
- 7.23 The Local Planning Authority nevertheless considered the possible impact of the Habitats Regulations on the determination of the Certificate.
- 7.24 The Conservation of Habitats and Species Regulations 2010 states:

Assessment of implications for European sites and European offshore marine sites:

61.- (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 for that site in view of the site's conservation objectives.

- 7.25 Of particular relevance in this regard was the Legal Opinion (River Mease - Opinion of David Elvin QC). This considered

(amongst other matters) the impact of the Habitats Directive and regulations on the consideration of Lawful Development Certificates.

7.26 The opinion states that:

The purpose of lawful development certificates under ss. 191 and 192 of the Town and Country Planning Act 1990 do not grant consent but merely determine the legality of existing or proposed uses.

In the case of existing lawful uses, or proposed in accordance with existing rights....., it is unlikely that the application for a certificate could be regarded as falling within the requirements relating to a plan or project since it does not give consent or permission. It merely declares in a definitive manner rights which exist, or would exist in any event, and does not allow their modification at all.

7.27 He concludes: *I do not consider that certificates of lawfulness fall within the requirements of the Habitats Regulations and Directive since it does not grant consent for any plan or project but merely recognises the acquisition of lawful use rights.*

7.28 Natural England, RSPB, Hampshire and Isle of Wight Wildlife Trust and Chichester Harbour Conservancy have considered this opinion (and the Wildlife Trust have taken their own advice) and accept this position.

7.29 Notwithstanding this Natural England have stated that if a Lawful Development Certificate is granted this would not constitute consent under SSSI legislation. *Therefore, should the Local Planning Authority be minded to issue a Lawful Development Certificate, we would request that an informative be attached informing the applicant that the Lawful Development Certificate does not confer consent under the Wildlife and Countryside Act 1981 (as amended). This consent will need to be applied for from Natural England.* This informative will be added to the Certificate and it is noted that the need for a further consent may take precedence over the decision in relation to this Lawful Development Certificate.

8 Conclusion

8.1 In conclusion, it is considered that a Lawful Development Certificate can be issued in relation to the taking off and landing of model helicopters and parking for members.

9 RECOMMENDATION:

That the Executive Head of Planning and Built Environment be authorised to **GRANT A CERTIFICATE OF LAWFUL USE** for application APP/13/00749 for the following reason:

It appears to the Local Planning Authority on the balance of probability that the uses described in the First and Second Schedules and plans attached to this Certificate, as modified by the Local Planning Authority have taken place for a continuous period of at least ten years up to the date of the current application.

The Authority has considered evidence and additional information submitted by the applicant and representations received in response to the Certificate of Lawfulness application..

FIRST SCHEDULE:

This Certificate relates to the following uses:

(i) The taking off and landing of model helicopters

In association with (i) above, the use in the area edged red on the attached plan A is considered to have been demonstrated over the relevant 10 year period.

The use demonstrated is limited to daylight hours.

The use demonstrated excludes Bank Holiday Mondays.

The use demonstrated excludes fixed wing model aircraft.

(ii) The parking for members

In association with (ii) above, the use in the area edged black and annotated 'Parking' on the attached plan B is considered to have been demonstrated over the relevant 10 year period.

The use demonstrated is limited solely to the parking of cars by members of Hayling Heli's in association with their use of the land as set out in (i) above.

SECOND SCHEDULE:

For the purposes of the first schedule (i) above, this relates to the land edged red on the attached plan A this relates to land at Verner Common, Copse Lane Hayling Island.

Definitions:

The following definitions are applicable to the decision:

Daylight The natural light of the day

