

## Malvern Hills Trust

Special Meeting of the Board

Gryphon Room, Malvern College, Thirlstane Road, Malvern.

Tuesday 19 March 2019 7.00 pm

**Present:** Mr D Baldwin, Dr S Braim, Mr D Bryer, Mr M Cordey, Mr M Davies, Dr P Forster, Mr S Freeman (Chair), Mr A Golightly, Mr R Hall-Jones, Mr D Hawkins, Mr J Michael, Mrs C O'Donnell, Mr J O'Donnell, Mr C Penn, Mr C Rouse, Ms S Rouse, Ms H Stace, Mr P Watson.

**In attendance:** CEO, Conservation Manager, Community and Conservation Officer, Finance and Administration Manager, Administrative Assistant, Secretary to the Board, Paul Esrich (AONB), and members of the public.

**No attendance:** Mrs E Holton, Ms S Stewart.

Mr Freeman welcomed everyone to the meeting. He noted that MHT had received a large number of letters and comments about this application, all of which had been made available to Board members.

MHT's meetings were held in public. However they were not public meetings and this meeting would be conducted in accordance with the Trust's Standing Orders. Arrangements had been announced prior to the meeting to enable members of the public who wished to address the Board to do so. No one who had asked had been denied the opportunity.

### **1. Apologies for absence**

Mr R Bartholomew, Mrs P Cummings, Mrs L Hodgson, Prof J Raine, Mrs G Rees, Mr D Street, Mr T Yapp.

### **2. Chair's Announcements**

The Chair explained that there would be a change of Chair to accommodate the requirements of the Trust's Conflict of Interest Policy. Some members of the Board would be asked to temporarily leave the room whilst the nature of any conflict of interest they might have was debated and voted on and they would then return either temporarily or permanently depending on the outcome of the vote and the nature of the conflict.

There would be a short adjournment before the start of the main agenda item and before any vote upon it.

### **3. Declarations of Interest**

Personal conflict of interest

Ms Rouse took the Chair.

**Mr Freeman** said that it had been alleged (which he did not accept) that he had a conflict of interest because he had a direct or indirect financial interest in the outcome of the application. He had made a full statement in public at the last Board meeting, and members had received paper copies of that statement. There were no questions and Mr Freeman left the meeting. Mr Penn confirmed that when the allegation had first become known, Mr Freeman had given full details to him, Prof Raine, the CEO and Secretary to the Board and it had been agreed that the connection was too tenuous to warrant further action.

The matter was put to the vote and it was unanimously agreed that Mr Freeman did not have a conflict of interest in relation to the application.

Mr Freeman took the Chair.

He said that **Mrs Hodgson** had sent apologies. She was the elected member for Chase Ward on Worcestershire County Council. She was entitled to claim councillor allowances (including as a portfolio holder) and she accepted that she had a conflict of interest.

**Mr James O'Donnell** was an elected member for Chase Ward on Malvern Hills District Council (MHDC). He was entitled to receive councillor allowances in respect of this. He was also elected member for Langland Ward on Worcestershire County Council (for which he also received allowances). There was considerable local opposition to the easement and the position which he took in relation to the easement could affect his chances of re-election and therefore his financial position. Land owned by Bits Heritage Limited, a company of which he was a director had been accepted into the SHELAA (Strategic Housing and Economic Land Availability Assessment for the South Worcestershire Development Plan). The removal of competing land from the SHELAA might enhance the possibility of other sites being selected for development.

Mr O'Donnell said that his elected position had been correctly stated. In addition he was on the Town Council and was involved in their Neighbourhood Development Plan. He did not believe he had a direct conflict of interest but he had been advised by officers that he had. He did not accept that he had a personal conflict of interest.

Mr O'Donnell left the meeting.

Mr Freeman pointed out that Mrs O'Donnell could not vote in relation to Mr O'Donnell's potential conflict of interest as she was a connected person. Mr Hall-Jones stated it was absurd to put district councillors in this position - there was no planning application. Had it been expected that district councillors would not be able to participate, the Acts would have so provided.

Mr Freeman said that since the Acts were passed, MHT had become a registered charity and the meeting would be conducted in accordance with the recommendations and conflict's guidance of the Charity Commission.

Ms Rouse said that the issue was whether people could perceive that Mr O'Donnell might have a conflict of interest; that he might be torn between voting for the people in the meeting who elected him as their representative. The Trust's Conflicts Policy had been approved and set out that conflicts had to be dealt with in accordance with charity law. If a vote was taken including the vote of a conflicted person this could result in the Trust's decision being examined. She felt it could be perceived that Mr O'Donnell would struggle to make a decision based on the Trust's best interests. The matter was put to a vote and it was decided by 12 votes to 4 that Mr O'Donnell did have a personal conflict of interest.

Mr O'Donnell returned to the meeting.

Mr Freeman confirmed that Mr O'Donnell would be required to leave the meeting for the discussions in relation to the easement application and for the vote.

**Mrs Chris O'Donnell** – was a connected person, because of her relationship with James O'Donnell. She was also a director of Bits Heritage Limited and had a potential conflict in her own right. Mrs O'Donnell did not agree that she had a conflict of interest.

Mrs O'Donnell left the meeting.

Mr Freeman confirmed that Mr O'Donnell could not vote on the matter of Mrs O'Donnell's potential conflict of interest as he was a connected person.

Mr Hall-Jones said that the points he had made earlier applied. The Secretary to the Board clarified that Mrs O'Donnell was Mr O'Donnell's mother and there was no doubt that under the policy she was a connected person.

The matter was put to a vote and it was decided by 12 votes to 4 that Mrs O'Donnell did have a personal conflict of interest.

Mrs O'Donnell returned to the meeting.

#### Conflict of Loyalty

Mr Freeman stated that the South Worcestershire Development Plan (SWDP) was being reviewed and there had been a call for sites for the revised version of the plan. Rose Farm had been accepted. Worcester City Council and Malvern Hills District Council were part of the South Worcestershire Councils. Councillors would ultimately be responsible for approving preferred sites for inclusion in this plan.

The Secretary to the Board announced that Ms Bovey had resigned as a Trustee.

Affected Board members were therefore: Mr Hall-Jones, Mrs Cummings, Mr Davies, Prof Raine, Mr Michael, Mrs O'Donnell, Mr O'Donnell, Ms Rouse, Mrs Hodgson.

A number of councillors accepted that they had a conflict of loyalty. (Mr Davies, Prof Raine, Mr Michael, Ms Rouse, Mrs Hodgson)

Mr Hall-Jones did not accept that he had a conflict and stated that the site had been incorrectly reported as being accepted for development. The site had been put forward as one on a potential list but there is no guarantee that it would be accepted.

Mr Davies accepted that he had a conflict of loyalty as a member of MHDC standing for re-election. He supported the development policy of the Council and hoped to be active in the review of the SWDP. There was likely to be an increased level of housing need and the review would be required to allocate deliverable sites to meet this. Maintenance of a sustainable supply of land was vital to the plan. His loyalty to the policy of the Council could influence his consideration of the application.

Mr O'Donnell did not accept he had a conflict of loyalty. The site had not been looked at by the planners so he did not see there could be a conflict at this time.

Mrs O'Donnell did not accept there was a conflict.

Mr Freeman reported that Prof Raine accepted he had a conflict of loyalty and had given his apologies for absence.

Mr Michael accepted he had a conflict of loyalty as a District Councillor for the same reasons as Mr Davies and he would be involved in the planning process and the SWDP.

Ms Rouse accepted she had a conflict of loyalty as a District Councillor who would vote on which sites will be included in the SWDP.

Mr Freeman reported that Mrs Hodgson had accepted she had a conflict of loyalty.

The Chair proposed that the Board should vote en bloc in relation to councillors who shared the same potential conflicts of loyalty as outlined.

The councillors left the meeting.

The matter was put to a vote and it was decided by 11 votes (with 1 abstention) that the councillors had a conflict of loyalty.

The councillors returned to the meeting. Mr Freeman confirmed that those with a conflict of loyalty could take part in the discussion but would be asked to leave the meeting during the vote.

Mr O'Donnell and Mrs O'Donnell left the meeting.

#### **4. Public Questions**

No public questions had been received.

#### **5. To determine the application from the Rose Farm Partnership for easements from Chance Lane and crossing Jackpits Lane.**

Mr Freeman announced that standing orders would be suspended to allow members of the public to speak.

Mr Huskinson (on behalf of the Residents' Association) said:

The Residents' Association had taken advice from Matrix Chambers. The Trust was a charity whose responsibilities included preservation of the 'natural aspect' of the 'Hills'. The Hills meant all land under MHT's jurisdiction. It was difficult to conclude that a scheme which would substantially harm the natural aspect of the Malvern Hills should be approved. The Board should not be property developers or speculators. This was one of the biggest decisions MHT was likely to make. If the easement was granted and the development facilitated this would have far reaching implications for all in this part of south Worcestershire. The trustees could not safely vote for this resolution or should at least vote to defer consideration until they were satisfied that they were proceeding correctly.

MHT was a public body for most purposes which brought obligations in relation to transparency and consultation, designed so that public confidence was not eroded. There was evidence that the Trust had fallen down in this respect – little informed debate or consultation and the proposals had only been made available at a late stage. Proper account must be taken of all representations. A public body must act in a way that was consistent with previous decisions. Meetings must be conducted in public but on a number of occasions the public had been excluded for no accountable reason. Threats at a recent meeting that Board members risked personal liability if they did not resolve to grant this easement were intimidatory and wrong in law.

In 2012 the Rose Farm Partnership applied for a vehicular right of way. Board members refused the easement request. Conflicts of interest debarring trustees from voting had to be genuine and substantial. The Trust's November 2018 legal advice was suspect as it ignored the Trust's public law status. It was a scandal that Mr Hall-Jones and Mr O'Donnell were excluded. The Heads of Terms were little more than an in principle request and the Trust did not have enough detail to make an informed decision. Did the Trust appreciate what sort of precedent this could set for the Trust in the future? The decision has to be bomb proof both procedurally and in its reasoning

since it was under threat of a challenge both from the local residents and the applicant, and subject to criticism from the Charity Commissioners. The Residents implored the Trust to reject this application or defer consideration of it until the matters outlined above have been dealt with.

Dr Crisp said:

MHT must comply with its Acts to preserve the 'natural aspect' and consider the easement per se and the resulting development. The Playdell Smithyman report used viewing points of Rose Farm Partnership's choosing and there was no evidence that the screening would be effective all year round. The report presented simulations distorted by the viewing angle. Paul Esrich said sensible relevant conclusions could not be drawn from the report. He said views were compromised locally, and also to and from the Hills. The developer's impact was adverse and moderate to major. The evidence said there would be a material adverse effect on the natural aspect and the Chair and CEO had said only after an assessment of any adverse impact should regard be given to financial considerations.

In the SWDP review, the Trust objected to draft policy 27 because economic consideration would outweigh environmental considerations. There was no exchange rate between the natural aspect and cash. The idea of balance must rest on the use to which the money would be put. The Trust had said that for 10 years they had no opportunity to buy suitable land. He called on the Trust to follow the principles of the hills acts and protect the natural aspect as they did in 2012.

Mrs Harris said:

She had chosen to live where she did because the wide open spaces had been protected by Malvern Hills Trust. The residents had been taken aback by the Trust's behaviour, belittling their concerns and the Trust's lack of transparency and the holding of meetings behind closed doors. Last Tuesday's pre-meeting ahead of tonight was a case in point. This followed the adoption of a new easement policy in November 2018 thereby implicitly recognising that the previous policy might not have authorised this easement. It has been said by the CEO that this was just another easement. It was for 100s of properties; it was unique and set a precedent due to its scale. Money had been considered before the impact on the Hills and commons. The Trust was not allowed to treat the Hills and commons differently. Little wonder local precept payers thought MHT had lost its way. Mr Wilesmith's application to the call for sites said the site was available and that an easement had been negotiated. The Trust would be remembered if it agreed to this easement for the damage done and a betrayal of residents' trust. The Trust must acknowledge the value of the Trust land either side of the road that made Malvern's eastern approach unique.

Angus McCulloch

Full statement annexed at schedule 1

Clive Smith said:

He found it risible to put in the agenda that it would not have an impact on the Hills. The agenda paper with the Counsel's opinion said there was a likelihood whichever decision the Trust made it could end up being confronted with a judicial review. People asked him what he would do if he was still on the Board and he would postpone a decision until there was more advice from the Charity Commissioners so any decision made was bomb proof. He was one of the members who voted against it in 2012<sup>1</sup>. If the Trust did not make a decision tonight he suggested it look at the little strips of land which it owned and that the Trust would have people trying to get an easement across it. If the Trust approved this tonight the precedent was there for an urban sprawl spreading half way across the plain towards Worcester. Vote this down – it would be manifestly unjust if the Trust voted for this.

Mr Watts said

If you looked at Paper A it talked about Trustees' powers under the Malvern Hills Acts and the Charity Commissions guidance on what was appropriate for a trustee. It was totally silent on the law about easements, and the regulatory framework of charities. Had the Department of Transport's advice on the adoption of roads been considered, the involvement with the developer been thought thoroughly then it would be clear this was a sale. The possession and control of that land would pass to the developer and Worcestershire County Council. The Trust would not have use of the air above the easement or access to the land below and it would not be free to erect signposts. The Trust was not free to do what it wanted subject only to the Malvern Hills Acts. The substance of the transaction was a sale. It was not an easement. The Guarlford land was both heritage and an inalienable asset. An inalienable asset had to be retained indefinitely for the charity's own use. It did not mean the land could be sold. The Conservators should have a policy in their annual report looking at the acquisition, preservation, management and disposal of heritage assets. There was nothing of the sort in the annual report. The comment in paper A which stated that the 2011 policy of refusing access to the development of Rose Farm was inconsistent with charity regulations was nonsense. It was wrong to threaten that any blanket policy was a failure by Trustees to properly exercise their judgement. The policy statement in 2011 was not a failure by the Trustees. The Trustees were trying to abide by the Charity Commission regulations on heritage assets. All this meant was that the Conservators did not have power to enter into such a contract. What the Trust had to do was go straight to the Charity Commissioners for their

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<sup>1</sup> The minutes record that Mr Smith did not vote at the meeting in 2012 as he had declared a conflict of interest

approval. It would be rejected. The application would not comply with the regulatory advice on how to spend part of the permanent endowment.

The meeting was adjourned and then resumed

Mr Freeman said he had been made aware of a set of written questions that were submitted for the Special Board meeting in November. He would exercise his discretion to take the questions.

See Schedule 2

Mr Freeman introduced a presentation from the officers.

The Secretary to the Board drew members' attention to the papers for the meeting and said all should have read and considered the points made in correspondence from members of the public. She said drawing 2212-11 was superseded and was no longer relevant. She identified the land in question. The partners in the Rose Farm Partnership were Martin, Doreen, Emma and Mark Wilesmith. She said that if any Board member knew them and had a conflict of interest they should declare it.

The CEO outlined the detail shown on plan 2212-09. The detail shown inside the boundary of Rose Farm was illustrative only and should be ignored for the purpose of the application. He pointed out the position of the 2 proposed easements and described what was shown on the drawing in detail. There was a request to lay services under the easement, and there was one existing public footpath across the site. He highlighted the letters which had been sent in by members of the public. There had been suggestions in some of them that this application was in some way unusual and a suggestion had been made that this was the biggest decision MHT had been or would be called upon to make. That was not the case. Neither was it unheard of for MHT to agree to grant an easement before planning permission was granted or to designate land as highway. This had been done on a number of occasions in the past in this area. Three examples were:

- applications granted pre-planning for Hall Green/ Hall Green Close in 1948 and 1949,
- a pre-planning application option was granted in 1987 to reposition an easement previously used for light industrial purposes to create the residential access for Baldenhall,
- Malvern Urban District Council was granted access for a residential development off Guarlford Road (which was dedicated as highway and is now Eston Avenue) in 1964. Approximately 17,000 sq feet of common was taken up for the slip road, access and pavements.

The Secretary to the Board went through some of the legal duties of the Board when considering the application and the legal background. The overriding

duty was to act solely and exclusively in the best interests of the Trust and its charitable purposes and trustees were not the representatives of those who appointed them to the Board. Allowing personal views to sway the exercise of a trustee's judgment would be a breach of duty. Assessment of the application had to be on the basis of the criteria set out in the Acts.

She went through the factors set out in para 1.2 of the Charity Commission guidance CC27 on making decisions, the factors set out in Malvern Hills Act 1930 s7A (as amended by Malvern Hills Act 1995) and the legal advice received in relation to the terms used. She confirmed that legal advice had been sought on each aspect in s7A. The Board was required to look at the effect of granting the easement on the land under the Trusts jurisdiction and not, as had been suggested, the implications for "all of this part of south Worcestershire."

The case law on the effect on the natural aspect indicated that the effect had to be significant or material, and that a literal interpretation of the duties set out in the Acts was not appropriate. The Trust had to take into account not only the effect of the access itself but also the impact of the development which would flow from the granting of that easement. There was an obligation to consider whether conditions should be imposed to ensure any adverse effect was minimised.

Advice had been taken on a point raised in a number of the letters – that it was very difficult to take into account the impact on the natural aspect without any information about what the development would entail. The professional advice from Bruton Knowles and from Counsel was that the Trust should become involved when the planning application was submitted or completed. It was not difficult to assess the impact of the accessways themselves, as the drawings were very detailed. The proposal which had been put to Counsel, and which he had approved was to consider the application in 2 parts – to consider the impact of the accessways themselves now, but to consider the impact of the development once there was sufficient detail available. An example was the suggestion made by Paul Esrich that the Trust needed to be able to assess the effect of the on-site landscaping, but Playdell Smithyman had said this could not be done at this stage as there was no plan for the site. The benefit of the approach was that the Board was not closing the door on granting the easement but would be making it clear that the easement would not be granted until the Trust knew what the effect on the natural aspect would be and what mitigation was required.

It might be the Trust would set conditions on the basis of which the applicant would not be prepared to proceed. The process would ensure that the development was sympathetic to the adjoining MHT land.

The Board should take note that there had been previous applications. The previous applications in 2012 and 2011 were in principle only. There was no location for the roadway. There was no information on which a judgement could have been made and she referred to the detailed considerations set out in the paper of 4 March 2019 in relation to those previous decisions.

The CEO went through the detail set out on the drawings 2212-10A and 2212-12. The access was off Chance Lane and not the Guarlford Road, therefore some of the public comments regarding the visual impact on the Guarlford Road needed to be considered in the light of that. He explained the request to give a temporary licence during the construction period over the land shown yellow on plan 2212-12 to provide a working area, which would be fenced off for safety reasons whilst work on the access was ongoing. He then went through the detail from plan 2212-09A relating to the access crossing Jackpit Lane.

The Secretary to the Board asked the Board to decide whether the criteria in s7A(1) 1930 Act were fulfilled.

The District Councillors left the meeting. (Mr Hall-Jones protested that he was legally entitled to be at the meeting and take part in the vote).

Mr Freeman proposed and it was **RESOLVED** (11 votes in favour and one abstention) that the application was to afford access from the highway to land lying within or adjacent to part of the Malvern Hills.

Secondly Mr Freeman proposed and it was **RESOLVED** (11 votes in favour and 1 abstention) that the land appeared to lack satisfactory access for the purpose set out in the application (residential use).

The District Councillors returned to the meeting.

The Secretary to the Board explained the proposal to adopt a two stage process in determining the application. The Board should look first at the effect of the two easements themselves. Detailed drawings had been provided. If satisfied under the s7 criteria about those accessways, the Board would then defer consideration of the effect of development of the site until there was sufficient information to assess the effect on the natural aspect and whether conditions should be imposed. She showed a flow chart setting out the process which would be followed were this approach to be adopted. She confirmed, in response to the questions raised by Mrs Gibson, that MHT's solicitors would, at the second stage, draft the details of the overage clause and the other clauses which were at this stage only bullet points. If the applicant still wished to proceed, the document would come back to the Board for approval.

If the Option Agreement was signed there would still be other requirements which the applicant had to satisfy. One of the correspondents had raised the

question of commoner's rights. The applicant would have to obtain consent under the Commons Act. They would also have to obtain planning permission and if this was not granted, neither would the easement be granted. If planning permission was granted, the matter would come back to the Trust to look at the effect of the development on the natural aspect of the land under the Trust's jurisdiction. It could refuse to grant the easement at this stage if the impact was major, or conditions could be imposed to ensure that any adverse effects were minimised. The professional advice was to defer consideration of the effect of the built environment on the Trust's land as described.

The Secretary to the Board asked whether the Board accepted the professional advice as it would affect how much information needed to be introduced during the remainder of the presentation.

Mr Watson said that the charity had to make decisions that were in the best interests of fulfilling the charity's objects. He was not sure what preserving the natural aspect meant but it was preserving the countryside and that would be replaced by tarmac, pavements, road signs and traffic. The Secretary to the Board confirmed that the charity's objects would be considered at a later stage in the meeting. Mr Watson asked why the Board could not just vote yes or no. Mr Freeman advised that it was necessary for the Board to consider all the factors which were being outlined. Dr Braim said he found it difficult to share his views on the process without having formed his views on the ultimate question. He asked for the remaining steps to be outlined.

Mr Freeman said the process was as advised by Counsel and solicitors. Ms Stace said that giving an indication on the 2 stage process did not compromise Board members when they came to make the final decision. It was an "in principle" point.

The Secretary to the Board said it was not necessary to give an indication at this stage but it might avoid having to go through additional detail.

The Conservation Manager explained that he had assessed the site and informed the Board in the paper of the relevant conservation and access matters. He went through the relevant factors for the two easement sites.

Jackpit Lane was common land with no other designations. It was a small piece of the Severn and Avon Vales National Character Area and the landscape character type was principle timbered farmland. None of the key elements of that landscape character type would be directly affected by a change to the surface type of the area in question. A National Vegetation Classification Survey (NVC) in 2013 found this area comprised 4 plant communities which were all typical of semi-improved, mown and well-trodden areas. They were not priority habitat. Worcestershire Biological Records Centre data showed records of various protected species in the area, but

these were present across the wider countryside. There were no key features or resources used by protected species on the land in question. Were the matter to proceed to planning, the ecology would be taken into account and would be mitigated for as part of the planning process. There were no designated or known archaeological features. No grazing rights were being exercised, nor would this route have been likely to have provided a significant local agricultural resource. There was a public footpath along Jackpit Lane and the land was open under the Malvern Hills Acts. The pathway was well used by local people. The change of ground surface should have no impact on the level of access provided. The area was of low priority in relation to the whole MHT holding. The Conservation Manager did not propose any mitigation in relation to this site.

The land off Chance Lane had no national or statutory designations. It was part of common land unit 18 and part of the Guarlford Green to Rhydd Green Local Wildlife Site for certain grassland habitat. The area of the easement formed 0.6% of that site. It was of the same landscape character type as Jackpit Lane. It contributed more as it was larger and held unimproved grassland. The NVC Survey found 2 habitats, MG1 (1/3 of the area), and MG5. MG1 was not a priority habitat but MG5 was a more diverse plant community recognised as a priority habitat. The same considerations applied in relation to protected species as for Jackpit Lane. There were no features or resources which would hold protected species. There were 2 old fruit trees in the area, which he described as notable and deserving of protection. Many species would be using the verge as part of a wider network of habitats. There were no designated or known archaeological features. The Common had been used for grazing until about the 1980s. The land was open access under the Malvern Hills Acts. It had local use by people on foot and occasionally on horses. The proposed change would not alter the level of access. The Conservation Manager highlighted 3 points in terms of mitigation:

- To preserve the open and unenclosed nature, he would not agree with proposals to put a hedge or line of trees alongside the new easement, but a well-placed gorse bush or further fruit trees would help break up any features whilst maintaining the open aspect of the verge.
- The fruit trees should be retained and protected
- Given the importance of the MG5, at least an equivalent area of MG5 should be created locally to make sure there was no net loss of habitat.

Paul Esrich, who was a chartered Member of the Landscape Institute, confirmed he had been asked to comment on the landscape mitigation report prepared by Playdell Smithyman. His initial comments on the report had been incorporated into their final report. He confirmed that the landscape character type was classified as principle timbered farmland and that one of the key

features was tree cover. The Worcestershire County Council guidelines included creation of new woodlands. The proposal to plant a woodland belt along the southern part of the site was in accordance with the general landscape character. The Conservation Manager had outlined the effect of the access off Chance Lane and Mr Esrich agreed with his assessment that because of the unenclosed nature of the common, mitigation by way of a hedge or an avenue of trees was not appropriate. The areas should be kept open with perhaps a single tree planted. No Landscape Impact Assessment had been prepared and the effect of the development could not be assessed until the detail was known. It was right to assess those effects in detail when the information was available. His report set out an indication only and was no substitute for a full assessment.

Mr Esrich was asked how long it would take for the planting to grow to the height of the buildings. He replied that a two storey house was about 8m to the ridge. Different trees grew at different rates, and growth rate also varied depending on ground conditions. Within 20 years a mixed broadleaved planting should have reached at least the height of a two storey house. Mr Watson said Mr Esrich's report assessed the impact from the Hills between average and major. Mr Esrich said his report was no substitute for a full assessment. In the localised area of the track there would be a loss of common land to tarmac. Clearly that was an adverse effect. In terms of the broader effect, it would vary depending on the vantage point, and the mitigation for the site. It would be best to have the full details in place before that assessment was done.

The Secretary to the Board said that it was an obligation to consider what mitigation might be appropriate. The Conservation Manager had suggested mitigation in relation to the Chance Lane access. There were also 2 pieces of generic mitigation in the Heads of Terms, the screening belt and limiting the build height. She advised that those clauses should be prefaced by the words "without prejudice to any further mitigation which is required".

The other point which needed to be considered was the balance between the impact on the natural aspect and the benefit that would flow to the public from the Trust receiving a significant capital sum which might enable the Trust better to fulfil its objects. Any capital receipt had to be paid into the Parliamentary Fund and had to be used for purposes for which capital could be used – the purchase of land or capital improvements. The Trust could also spend the income from the Parliamentary Fund as set out in the November paper. In response to a comment, she said that the money could not be spent on anything to do with the pension fund. The Secretary to the Board questioned whether, if a large area of land came up for purchase, the Trust had the funds to pay for it? Borrowing was a problem for the Trust as it was not possible to give a power of sale in relation to any land offered as security.

The Trust could borrow against the security of the precept. The letter from Knight Frank set out general figures for current land prices, not taking into account that the Trust would be a special purchaser. Two million pounds would enable the Trust to buy 200 acres or possibly more of public access land. Mr Watson said it was uncertain if and when land would become available, so the money would be sat there doing nothing.

The Secretary to the Board said it would be a matter for the Board whether they wished to draw interest from the Parliamentary Fund or reinvest it. She confirmed in response to another question that the designation and use of the capital funds would not be changed in the proposed Governance reforms.

The Conservation Manager said that the Trust had been acquiring pieces of the Malvern Hills landscape for over 100 years to help deliver the Trust's objects. Through purchases, the landscape character, wildlife and cultural heritage were safeguarded for the benefit of the public. Land acquisition brought security of tenure, continuity of sensitive management and land uses which favoured conservation and public access. Thirty per cent – 210ha of the ridgeline of the Hills was not owned by the Trust and therefore not fully protected. This percentage increased dramatically when considering the foothills, lowland commons and wider setting of the Hills. There were hugely significant pieces of land integral to the landscape which were awaiting the Trust's protection. A large better connected landscape was more robust in the face of change such as climate change and offered more for the public.

The Secretary to the Board referred to a suggestion in the correspondence about formulating a plan for the use of the money. The difficulty was that the Trust could not give any indication of the land it wishes to purchase as this put up the price immediately, and it was impossible to make a plan on a 15 year timescale as what use the money could be put to depended on what land was on the market and the priorities of the Board at the time. The Board could earmark the use of the funds if it wished.

The Secretary to the Board went through the Trust's obligations under the Malvern Hills Act. A number of the powers set out in the acts – provision of car parks and easements for example, involved having some impact on the natural aspect. The loss of the land associated with the easement would give the Trust the chance to acquire another significant piece of open space.

She highlighted the other factors in CC27, one of which was reputational damage. That was a matter for the trustees to weigh up. As most of the Trust's income sources were secure, any effect on the Trust's reputation was unlikely to result in loss of income. There was a risk that the Trust would lose legacies. Public opinion should not necessarily override the duties of charity trustees.

The CEO outlined which factors were relevant to the decision and which were not. Over 100 members of the public had written in. An example of a factor which might be irrelevant was the possible impact on wider development across south Worcestershire. The responsibility of the Trust was in relation to the land under the Trust's jurisdiction. Comments about the loss of valuable arable land were also not relevant. Relevant factors were direct and indirect impacts on MHT land.

The Secretary to the Board reiterated that the Heads of Terms were bullet points and not a detailed draft. If the application was approved in principle, the solicitors would fully draft the Heads of Terms and they would come back to the Board for approval. She went through the key clauses. She explained the reasons for the 15 year timescale, the provision for a minimum payment, the lack of any restrictions on assignment and the overage clause. She also explained the clause which the Trust's solicitors had drafted to enable the Trust to give further consideration to the matter once planning permission was obtained.

She pointed out that the overall conclusion of Bruton Knowles, the land agents instructed on behalf of the Trust, was that the terms of the agreement were commercially acceptable, as was the way in which the payment was calculated.

Mr Freeman asked whether Board members would like a brief adjournment but this was declined.

Mr Hawkins said that he was concerned about the reputation of the Board and what would happen if the application was approved. He was concerned about the impact on the public consultation for the Charity Commission Scheme and upon recruiting new Board members.

Mr Davies said he understood the principle that underpinned the recommendation and was comforted that any Option Agreement would be conditional on the Board being satisfied with the effect on the natural aspect of the Hills. He was concerned about the cost of entering into a long term process of the Trust satisfying itself as to the conditions, the effect on the natural aspect and the mitigation, which would be a significant burden on the resources of the Trust.

Mr Hall-Jones said the paper from the residents set out the position very clearly. A few things had not been sufficiently emphasised and one was the setting of Guarlford Road. Much of Barnards Green had been damaged by development and only at the Guarlford end did the historic environment still exist with hedges and fields on both sides of the road. It gave a memorable view to the Hills. If the Trust allowed the land to the north to be developed the historic setting of the Malvern Hills would be lost. He said it would damage the reputation and standing of the Trust to grab the money and run with it.

The Acts could be revoked and the Trust replaced. He thought the Trust should stick very firmly to its principles as the protectors of the Malvern Hills. The value of the land far exceeded any price the Trust could get for it.

Mr Penn said he had made his mind up about this issue a year ago and had not changed it. He had not been swayed by the strong public views. There had been a fatal traffic accident at the junction and he was concerned that if there was a big increase in the amount of traffic, Highways might insist on increased signage and lighting. It was a beautiful stretch of land and the damage would be more than moderate in this scenario.

Mr Watson said that members of the Board were taken up on the Hills to look down on the town and surrounding area. All the green spaces were evident – Peachfield Road, Guarlford straight, stretching across into the Malvern College playing fields, etc. If the development went ahead an enormous development would be seen and it seems to him that the field would be the perfect green space. He agreed that the Guarlford Road was a wonderful access to Malvern as noted by the Malvern Town Council

Dr Braim said it seemed the proposal was to try to find a middle ground by approving part now but reserving judgement upon whether the development would finally be acceptable. He found the position difficult. The ability to look at the impact on the natural aspect was critical and this was difficult without knowing what the design was. Whilst the middle ground might help, there would clearly be a significant housing estate which would be hard to mitigate to everyone's satisfaction. He was concerned the Trust would feel pressured to give in to the developers at the end of the day.

Mrs Stace said the trustees were in an invidious situation where many of the issues brought to their attention by the public were more material to consideration of a planning application. The trustees had to be careful to take into account the factors which were relevant and ignore the irrelevant ones. Much as she appreciated the historic setting of the road, it was not relevant in terms of the Trust's objects and traffic accidents were a matter for the planners. The trustees' duty was to have regard to the natural aspect of the Hills.

There was a brief discussion about formulation of an alternative resolution to the draft set out in the Paper. Ms Rouse said the reasons for the decision must be the correct ones in line with the Trust's objects.

The District Councillors left the meeting.

On the proposal of Dr Braim, seconded by Mr Cordey it was **RESOLVED** (11 votes in favour with 1 abstention) to refuse the application.

## Schedule 1

Statement of Angus McCulloch:

I am Angus McCulloch of Chance Lane, and I am asking for the Easement application to be refused.

There is no need for this easement.

The Malvern Hills Act of 1995, only permits a new easement if there is no satisfactory access. The field known as Rose Farm is designated and used for agricultural purposes, with an existing satisfactory access from the Guarlford Road. There is no Planning Application, and the field is not earmarked, for future development, in either the current South Worcestershire Development Plan, or more importantly the Malvern Town Neighbourhood Plan.

The applicants are actually asking for an option on an easement, and in my view, the Malvern Hills Acts, do not empower the Trust, to contract Options for Easements, for futuristic speculative developments.

The application fails to satisfy the standard conditions of the Trust's Easement Policy in a number of respects:

The proposed Easement, is much wider than normally allowed, and wide pavements have been added. With vastly increased traffic coming onto Chance Lane, Highways would likely want to broaden the junction with the Guarlford Road, so the consequential loss of Trust land could be much greater than suggested.

The applicants are proposing kerbs, signs and street lighting, which will definitely affect the environment. They also want to park and store materials on the commons along Chance Lane - again not allowed in the policy.

Usually an agreement will expire after 3 years, but the applicants are trying to persuade the Board, into signing an agreement for 15 years, with no fee, nor any other money, unless planning permission is obtained, thus tying the hands of the Board and its successors for an unknown period.

Most importantly, an easement is only granted, for a specified number of properties – but, the applicants don't say how many, because they just don't know, as they would not be developing the field themselves. The Addendum to Paper A says that because of this "*the Board needs to defer judgement on the effect of the development itself, on the natural aspect of MHT's land.*" But is this not, one of the main criteria for deciding this application? It should be refused by the Board and the applicants told to reapply at a more appropriate time.

The Trust will lose no money by refusing the present easement as another opportunity will no doubt present itself, for example if the land becomes earmarked for development in the Town Plan.

No one individual or group owns the Malvern Hills and Commons. They are held in trust for future generations. We are all Guardians of this Gateway to Malvern. So please protect it; do not abstain, and vote to refuse this application.  
Thank you.

## Schedule 2

### Questions from Judy Gibson

1. Does MHT note and accept that it cannot safely approve this application until it knows who the members of the RFP are since RFP is not a legal entity unless it is a Limited Liability Partnership (LLP) which is not stated on the heads of terms. The legal entities are the individual members of the RFP. *The CEO said that the information had been provided to Board members so they could identify whether there was any conflict of interest. The partners were Martin, Doreen, Emma and Mark Wilesmith.*

2. Does MHT note and accept that pursuant to correct public law principles the 2012 refusal by MHT to grant an easement in favour of the same land, for the same purpose in the same circumstances (i.e. no planning permission has been obtained and no application submitted or made public) sets a precedent such that this application must be refused. *The Trust did not accept it set a precedent and the question would be addressed in the presentation.*

3. Do MHT note and accept that under correct public law principles approval of this application would set a significant precedent going forwards that, amongst other things, MHT grants easements:

3.1 where MHT acknowledges at least moderate adverse impact on the Malvern Hills and other MHT land; and

3.2 to the full extent of any planning permission which can be obtained by the applicant for the easement, even if that is unknown to MHT;

3.3 under an agreement where the benefit of the easement (and so development of the land) can be assigned to any third party unknown to MHT, possibly multiple times, without MHT requiring any control over this?

3.1, 3.2 *The way in which the application was proposed to be addressed was set out in the paper. Under that proposal, the impact from the Hills would not be dealt with until the planning application was put forward. The issue would be addressed in detail in the presentation.*

3.3 *Mr Freeman said that there was an overage clause but MHT were not seeking to control assignment.*

4. Do MHT note and accept, given the obvious strength of their bargaining position in the negotiation with RFP, that:

4.1 stringent conditions should be attached to any easement to meet MHT's overriding obligation under the Malvern Hills Acts to preserve the natural aspect of the Malvern Hills, by for example, limiting the number of dwellings which can be served by the easement (which was confirmed at the public meeting in August by Mr Bridges to be the usual practice of MHT and thereby a precedent as in 2. above) to under 50, stipulating their design, height (no

higher than 2 storeys) and layout in a way which gives precedence to preserving the natural aspect of the Malvern Hills and other MHT land.

4.2 If an option agreement (and any side agreements) cannot be negotiated such that MHT is not in breach of correct public law principles within a deadline of 8 weeks (given that this application appears to have been going on for very many months) that the application is deemed rejected.

4.1 *Mr Freeman said all of those factors would be addressed before the easement was actually granted.*

4.2 *The Heads of Term provide for a 15 year period for grant of the easement. The applicants did not know if the site would be included in the SWDP.*

5. How much has this application cost MHT to date in terms of the fees of external professionals and internal time at cost, given the limit on such liability imposed on the Applicant by the heads of terms of £15,000 (presumably inclusive of VAT as the figure is not stated to be exclusive) for all aspects of the application until completion of the option agreement and the obligations placed on MHT within it in relation to planning related matters and registering title to other areas of land? Do the trustees consider the £15,000 limit sufficient?

*The figure was based on a quote for professional fees. Information was not available at the meeting on costs incurred to date.*

6. Does MHT accept that it should refuse this application because it is premature to commit to entering into an agreement with an open ended timescale where MT has no specific plans for the option premium and:

6.1 there is no option agreement at all before the board

6.2 only very draft heads of terms available to the trustees have not been reviewed by any solicitors for MHT.

6.3 MHT's own surveyors (Bruton Knowles) criticise the heads of terms in respect of the lack of an option fee, the exceptional and unusual length of the proposed option period, the lack of control in and weakness of the assignment clause, the all-important overage clause is unclear and does not preclude assignments at an undervalue which could short change MHT

6.4 Further, the drafting of clause 5(iv) qualifies the 'best endeavours' requirement in a way which is adverse to MHT and would be difficult for MHT to enforce

6.5 In clause 7 there is a lack of clarity as to whether any of the burdens and the expense of the s18, s38 and s106 requirements of the planning authority might fall on MHT especially if they relate to MHT land, including land in the wider local area (such as around Hastings Pool or junctions with the Guarford Road and that road itself) because of significantly increased traffic as a result of the many hundreds of houses being built.

6.6 Clauses 20 and 21 – dispute resolution and good faith are not drafted at all

*Mr Freeman said the Trust was in a position to deal with the application. The Heads of Terms had been seen by the Trust's solicitors, but no advice had been sought as there was no point in incurring additional costs until the Board had indicated in principle whether the application would be approved or turned down.*

*The Bruton Knowles report raised some points for the Board to consider, but had said overall the agreement was commercially acceptable.*

6.4 *The Secretary to the Board said these were the applicant's heads of terms and she would not envisage the wording would remain in a final draft.*

6.5 *The Secretary to the Board said it was the applicant's draft and she envisaged any final version would provide the agreement would be on the basis that no liability was imposed on the Trust. The Heads of Terms would be reviewed by the Board if the application was granted and following revision/approval by MHT's solicitors.*

6.6 *The clauses were not drafted: they were just bullet points for agreement at this stage. If the Board chose to proceed the draft would go to the solicitors for detailed drafting, and would then be put back before the Board (with the proviso that if the terms were then unacceptable to the applicant, the matter would end there)*