

# Strategy and Resources Committee

17 September 2024

## HORTON CEMETERY

<b>Head of Service:</b>	Mark Shephard, Head of Property and Regeneration
<b>Report Author:</b>	Mark Shephard
<b>Wards affected:</b>	(All Wards);
<b>Urgent Decision?(yes/no)</b>	No
<b>If yes, reason urgent decision required:</b>	
<b>Appendices (attached):</b>	Appendix 1 - July 2024 Council Motion 2 Appendix 2 - A clear, impartial guide to compulsory purchase (RICS) Exempt Appendix 3 - Confidential Budget Breakdown Exempt Appendix 4 - Confidential Counsel's Opinion

### Summary

At its meeting on 30 July 2024, Council resolved to refer Motion 2 (attached at Appendix 1) to this Committee for consideration. Motion 2 proposed for Council to:

- a. *Reclassify the description of Horton Cemetery from “amenity woodland” to “sui generis”.*
- b. *Obtain an expert valuation of Horton Cemetery from the District Valuer, providing them with a full report produced by the Friends of Horton Cemetery.*
- c. *Initiate the compulsory purchase of Horton Cemetery and return it to community ownership.*

This report considers the above Motion 2 proposals and outlines the legislative framework of the Compulsory Purchase Order (CPO) process.

### Recommendation (s)

#### The Committee is asked to:

- (1) **Note the Motion and that no action is to be taken, having noted the advice as set out in paragraphs 3.1 to 3.5, 4.23 to 4.29 and 5.24 of this report.**

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### 1 Reason for Recommendations

- 1.1 The approval of a CPO is by the Secretary of State (Ministry of Housing, Communities and Local Government), not the Council. The Secretary of State determines the CPO following the submission of statutory evidence by the Council (or such other CPO acquiring authority).
- 1.2 The use of a CPO is one of last resort and there must be a compelling case in the public interest to justify interfering with the human rights of those with an interest in the land affected.
- 1.3 Horton Cemetery is not at risk of development. It is protected by the Disused Burial Grounds Act 1884 and excluded from development in the Council's emerging Borough Local Plan.
- 1.4 CPO legislation attaches no significance to the Market Value amount i.e. the success of a potential CPO is not dependent on whether the Market Value of the land to be compulsorily purchased is high or low.
- 1.5 There is insufficient statutory justification available to the Secretary of State to authorise a CPO for Horton Cemetery.
- 1.6 Counsel's Opinion (commissioned by EEBC in 2022, when this matter was last considered) concluded;

*"There is no convincing justification for compulsory purchase under the 1990 Act (or any other power) at present. I accept that providing and maintaining a respectful setting for the dead is an important matter but that will not be a determinable factor in itself".*

### 2 Background

- 2.1 Horton Cemetery is a derelict 5-acre cemetery historically linked to Epsom's five former psychiatric hospitals comprising the Manor, Horton, St Ebba, Long Grove and West Park Asylums, collectively known as the "Epsom Cluster".
- 2.2 The site has not been used for burials since the 1950s and was sold by government (The Department of Health & Social Care) in 1983 to a private property company. Since private ownership, the rectangular site has reverted to its natural state, a woodland, as shown (highlighted by the red dot) in the photograph below.



- 2.3 The definition of a woodland by The Oxford English Dictionary is 'land covered with trees'. Horton Cemetery is clearly woodland and supported by the site's Tree Preservation Order (TPO) 319/A1 dated 8 May 1996; "For land at former cemetery, Hook Road, Epsom - area comprising Poplars, Horse Chestnuts, Sycamores, Sweet Chestnuts, London Plane, Ash, Acacia, Copper Beech, Oak, Lime, Maple and Lawsons Cypress."
- 2.4 As a natural woodland (and given the rural setting of the surrounding area), the land is not considered to be inherently untidy.
- 2.5 Above ground, the only evidence today of the former hospital cemetery are the boundary railings and a number of original trees (the previous chapel and gravestones all removed). Below ground, Epsom & Ewell History Explorer's website confirms approximately 8,500 patient burials.

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- 2.6 At its 9 September 2021 meeting, the Council's Licensing and Planning Policy Committee agreed to the Local Listing of Horton Cemetery, including the boundary railings and a war memorial built in 2004 outside the railings and facing onto Horton Lane. The Local Listing will aid in protecting the site from development which would be considered harmful to its historic significance.

### Friends of Horton Cemetery

- 2.7 The Council has previously been requested by a local charitable organisation, The Friends of Horton Cemetery ('the FHC'), to exercise its statutory powers to compulsorily purchase Horton Cemetery for the benefit of the community.

- 2.8 The FHC is active in raising the site's historic profile and further information can be found on their website:

<https://hortoncemetery.org>

- 2.9 A report was previously prepared for this Committee's Special Meeting on 29 September 2022 but was withdrawn prior to the meeting at the request of the FHC. The report remains available at:

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=132&MId=1420>

- 2.10 The FHC were instrumental in securing the Local Listing. They have also tried repeatedly, without success, to acquire ownership of the site. At the time of the above report's withdrawal, the Council offered to act as intermediary between the FHC and the private landowner. The offer was declined by the FHC.

### **3 Motion 2a - Reclassify the description of Horton Cemetery from "amenity woodland" to "sui generis".**

- 3.1 Home Office Memorandum (CEM49, December 2000) confirmed;

*"For planning purposes, cemeteries and crematoria are not grouped with any other land uses: both are "sui generis". Any attempt to create a new cemetery or crematorium on land previously used for something else would be regarded as a material change of use of land. The developer would have to submit a planning application for consideration by the local planning authority."*

- 3.2 As a former cemetery, Horton Cemetery's planning classification remains "sui generis". By virtue of Mother Nature and the passage of time (approximately 40 years private ownership), it is a former cemetery that now includes a natural TPO protected 'amenity' woodland as part of its "sui generis" classification.

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- 3.3 In contrast to a commercial woodland, an amenity woodland site is left in its natural state for the owner to enjoy the woodland's wellbeing benefits. As far as the Council is aware, the private owner of Horton Cemetery has no interest in using the site for well-being purposes. However, the owner's current disinterest does not preclude wellbeing benefits being taken in the future.
- 3.4 If activities of a commercial nature for Horton Cemetery were proposed by the landowner (such as tree harvesting, paintballing, organised off road biking etc) they would require planning permission in the normal way.
- 3.5 Furthermore, the former cemetery is protected from commercial development by the Disused Burial Grounds Act 1884. Section 3 of the Act provides; "*It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship.*"

### **Recommendation**

- 3.6 It is recommended that Motion 2a is noted with no action to be taken. For planning purposes, its description is already classified as "sui generis" due to its former use.
- 4 Motion 2b – Obtain an expert valuation of Horton Cemetery from the District Valuer, providing them with a full report produced by the Friends of Horton Cemetery.**
- 4.1 District Valuer Services (DVS) is the specialist property arm of the Valuation Office Agency.
- 4.2 Formal property valuations are undertaken by appropriately qualified members of the Royal Institution of Chartered Surveyors (RICS). They are Chartered Surveyors with an additional Registered Valuer designation signifying valuation competence in a particular land or property valuation category.
- 4.3 UK jurisdiction valuations comply to the *RICS Valuation; Global Standards (Red Book Global Standards)* and are commonly known as 'Red Book Valuations'. The most commonly used Red Book basis of valuation is 'Market Value' (formerly known as 'Open Market Value').
- 4.4 Market Value is an estimate of the likely price an asset will sell at or more technically;
- "The estimated amount for which an asset will sell between a willing buyer and a willing seller in an arm's length transaction after property marketing where the parties had each acted knowledgeably, prudently and without compulsion."*

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- 4.5 Where an asset has several uses or functions, a seller will likely achieve the best sale price by ensuring the marketing includes the most valuable use (as identified by the Red Book valuation).
- 4.6 The Red Book allows the instructing client to use valuation bases other than Market Value. For example, if a valuation was based on Existing Use value only (commonly used for some accounting purposes), then this could result in a valuation being at a value below its Market Value.
- 4.7 It therefore follows that two separate valuations could formally be undertaken for Horton Cemetery – a valuation that only considered its historic cemetery use and one that only considers the wellbeing value of an amenity woodland.
- 4.8 The Red Book's Market Value definition removes the risk of multiple formal valuations being contested, as Market Value is based on the land or property's highest potential value.

### Indicative site value – former cemetery

- 4.9 As previously mentioned at paragraph 3.5, Horton Cemetery is protected from commercial development by the Disused Burial Grounds Act 1884. It has nominal commercial development value as the costs associated in preparing the site (mass exhumation of c.8,500 burials and associated remediation) would almost certainly render it financially unviable.
- 4.10 It is therefore reasonable to assume that a formal valuation from the DVS (based on a report produced by the Friends of Horton Cemetery as per Motion 2b) would be nominal in value – perhaps in the order of £1,000 - £10,000. This is because the valuation would be restricting value to its former cemetery use only. It would not represent Market Value which additionally, would include any value attributable to the inclusion of its natural (TPO protected) amenity woodland.

### Indicative site value – Market Value

- 4.11 Horton Cemetery potentially derives additional value as a naturally occurring amenity woodland. An amenity woodland is; *“typically small areas of woodland, such as shelter belts, not managed as either commercial woodland or short rotation coppice.”*
- 4.12 In its Amenity Woodland Spotlight dated October 2021, Savills mention:  
*“According to Forest Research, around 50% of people who have visited local woodlands as a result of Covid-19 restrictions reported an increase in their level of happiness when in the woods.”*
- 4.13 They go further to state that:

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*“Since the lockdowns, we have seen an increase in demand for amenity woodland – clients are coming to us wanting to buy pockets of woodland as places to escape the city and reconnect with nature.”*

- 4.14 Amenity woodlands are used for a wide range of private outdoor activities. For some, it is purely their own ‘space’ and a place to be at one with nature.
- 4.15 Savills report that the average price for a woodland (under 5 ha) across the UK from 2017 – 2021 is £45,000. The report is assessable in the link below:
- 4.16 [https://www.savills.co.uk/research\\_articles/229130/320470-0](https://www.savills.co.uk/research_articles/229130/320470-0)
- 4.17 Amenity woodlands for sale are available on many public websites including:
- <https://www.woodlands.co.uk/>
- <https://www.woods4sale.co.uk/>
- 4.18 South East amenity woodlands recorded as sold on the above websites were marketed with the following guide prices:
- |                                |            |         |
|--------------------------------|------------|---------|
| Garrison Copse, near Guildford | 3.16 acres | £54,500 |
| Juniper Wood, Hampshire        | 2.22 acres | £43,500 |
| Starlight Wood, Hampshire      | 2.48 acres | £48,000 |
| Saddle Wood, Tunbridge Wells   | 4 acres    | £75,000 |
| Settle Wood, Rye, East Sussex  | 5 acres    | £85,000 |
| Sprocket Wood, Horsham         | 0.5 acres  | £15,000 |
- 4.19 Please note that Horton Cemetery comprises 5 acres and for comparison purposes, the above sale figures will need suitable adjustment. For example, Sprocket Wood, Horsham equates to a 5-acre equivalent of £150,000.
- 4.20 There are various factors that will influence the price achieved for an amenity woodland including its locational scarcity (particularly in Surrey) and Ancient Woodland content.
- 4.21 In the case of a former cemetery, this will undoubtedly dissuade some potential purchasers but equally, (and however disrespectful it may sound), will attract other potential purchasers.

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- 4.22 Based on Horton Cemetery being a scarce 5-acre Surrey site and with due regard to the publicly available information contained in paragraphs 4.15 to 4.18, it is reasonable to assume that its market value could be up to, or even in excess of £100,000 as amenity woodland.

### Valuation purpose

- 4.23 In 1983, the private landowner acquired Horton Cemetery in good faith from the Regional Health Authority and does not wish to sell.
- 4.24 Horton Cemetery is not at risk of development. It is protected by the Disused Burial Grounds Act 1884. Furthermore, it is excluded from development in the Council's emerging Borough Local Plan.
- 4.25 In the context of the private landowner not wishing to sell Horton Cemetery, the basis of formal valuation adopted – be it as a former cemetery only (nominal value) or Market Value (taking account of amenity value) - is irrelevant as the land is not for sale.
- 4.26 Section 5 below will consider CPO legislation and the Secretary of State (Ministry of Housing, Communities and Local Government) approval process for a local authority to use its CPO powers. For CPO valuation purposes, legislation adopts RICS Red Book Market Value.
- 4.27 CPO legislation attaches no significance to the Market Value amount i.e. the success of a potential CPO is not dependent on whether the Market Value of the land to be compulsorily purchased is high or low.
- 4.28 The CPO legislative process is very prescriptive and must be strictly followed. It carries a high threshold to pass (deliberately so as the removal of a private landowner's rights to own their own property should only be taken away as a last resort).
- 4.29 For the purposes of a CPO, it is irrelevant whether the Market Value of Horton Cemetery is £1 or £1,000,000 – the same legislative process will apply to ensure the private landowner's rights are protected and only extinguished by the Secretary of State in appropriately justified cases.

### Recommendation

- 4.30 It is recommended that Motion 2b is noted with no action to be taken.
- 4.31 A valuation does not determine the success of a CPO being approved by the Secretary of State. A formal RICS Red Book Market Valuation would only need to be undertaken by an RICS Registered Valuer (with expertise in CPO land acquisitions) on behalf of the Council, as a consequence of this Committee agreeing to initiate the CPO process set out in Section 5 below.



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### **5 Motion 2c – Initiate the compulsory purchase of Horton Cemetery and return it to community ownership.**

#### Compulsory Purchase Order – site acquisition compensation

- 5.1 The basis of compensation payable for the compulsory acquisition of land is based on the principle that the owner should be paid neither less nor more than their loss.
- 5.2 There are several components to CPO compensation but the relevant one for Horton Cemetery is Market Value under the Land Compensation Act 1961, section 5, rule 2:
- “5(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.”*
- 5.3 The determination of Horton Cemetery’s Market Value would form an important element of the CPO process and be assessed on the Council’s behalf by specialist RICS Registered Valuers. The process further allows for the market value to ultimately be determined by the Upper Tribunal (Lands Chamber) in the absence of agreement between the respective specialist valuers.
- 5.4 A consumer guide published by the RICS – *A clear, impartial guide to compulsory purchase* – is attached at Appendix 2. Attention is drawn to page 11 which explains compensation is paid to reflect the market value of the land / property that is being compulsorily acquired.

#### Compulsory Purchase Order – process and legislation

- 5.5 The use of a CPO is one of last resort and there must be a compelling case in the public interest for the Council to use the powers.
- 5.6 In promoting a CPO, the Council should be sure that the purposes for the CPO justify interfering with the human rights of those with an interest in the land affected. The Council must also take into account its public sector equality duty contained in the Equality Act 2010.
- 5.7 There are a range of enabling statutory powers depending on the purpose for which the land is being acquired. Government guidance reiterates best practice to use the most specific power available for the purpose in mind, and to only use a general power when a specific power is not available.
- 5.8 A general power to acquire is contained in section 121 Local Government Act 1972 and the Act further allows under section 214, a single specific power to acquire land for a statutory function, including the operation of cemeteries.

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- 5.9 Previously, in April 2018, the Committee considered a paper seeking authority to use a CPO under section 214, to extend Epsom Cemetery to provide further burial capacity in the Borough. A CPO would have been pursued as a last resort but fortunately, was not required as agreement was reached with the private landowner.
- 5.10 The Council does not consider section 214 would apply to Horton Cemetery as the purpose of the acquisition is not for the statutory function to provide burial capacity. In contrast, the purpose proposed by Motion 2c is to return it to community ownership.
- 5.11 To acquire Horton Cemetery using a CPO would therefore require reliance on a general power and Section 226 of the Town and Country Planning Act 1990 is typically used to acquire land compulsorily for development and other planning purposes. This broad power can be used where no single specific compulsory purchase power is appropriate.
- 5.12 To exercise its compulsory purchase powers under section 226, the Council would need to consider whether there is a public interest in acquiring Horton Cemetery. Under section 226(1A), the acquisition would need to satisfy the following:
- “(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects—*
- *the promotion or improvement of the economic well-being of their area;*
  - *the promotion or improvement of the social well-being of their area;*
  - *the promotion or improvement of the environmental well-being of their area.”*
- 5.13 An acquiring authority must dedicate extensive resource both in terms of time and cost to successfully exercise a CPO. Secretary of State approval (Ministry of Housing, Communities and Local Government) is required before any CPO can be exercised. It is very process driven and specialist external legal and CPO property advice would be required by the Council.
- 5.14 External legal and property consultants would advise on procedure, justification and valuation, draft orders and represent the Council in any proceedings.
- 5.15 The Council does not have in-house property or legal resource to prepare or undertake a CPO. To coordinate the various external appointments, the Council would require a temporary internal project management resource.

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- 5.16 For the Council to be in a position to seek Secretary of State consent would take at least 18 months and would almost certainly include a public inquiry. The government's target for deciding compulsory purchase orders is 20 weeks from the close of a public inquiry with the remaining cases to be decided within 24 weeks. It is therefore likely that the whole process could take 2 – 3 years to complete.
- 5.17 Furthermore, there is no guarantee that the CPO will be confirmed by the Ministry of Housing, Communities and Local Government. If it is not confirmed, the reasonable costs of remaining objectors will need to be met by the Council.
- 5.18 The RICS consumer guide at Appendix 2 explains the CPO application process on page 4 and the necessity to obtain MHCLG approval. It is the Secretary of State who will decide if the CPO should be authorised and not the local authority.
- 5.19 A total project budget requirement of £377,000 is considered necessary to pursue a CPO acquisition of Horton Cemetery. There would also be a need to identify further annual savings or additional income to fund the estimated annual maintenance requirement of £23,000 per annum.
- 5.20 A full confidential breakdown of the estimated acquisition costs is attached at Exempt Appendix 3. It is considered commercially sensitive due to the interests of the private landowner of Horton Cemetery and the inclusion of untendered external consultancy fees.

### Counsel's Opinion

- 5.21 As explained in paragraphs 5.13 to 5.17 above, it is not the Council that determines whether a CPO is ultimately progressed, but the Secretary of State that issues the authorisation.
- 5.22 To assess whether approval would be forthcoming from the Secretary of State, the Council sought Counsel's opinion in 2022 from a specialist chambers in planning and CPO law.
- 5.23 Counsel's opinion is attached at Exempt Appendix 4.

### Recommendation

- 5.24 It is recommended that Motion 2c is noted (to exercise a CPO and return to community ownership) with no action to be taken because:
- There have been no known changes so as to warrant a departure from the advice provided by Counsel back in 2022;
  - There is insufficient statutory justification available to the Secretary of State to authorise a CPO;

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- There is no identified revenue funding from either the FHC or the Council;
- There is no identified capital funding from the FHC and the Council's limited reserves are already likely to come under substantial pressure in future years.

### 6 Risk Assessment

Legal or other duties

#### 6.1 Equality Impact Assessment

6.1.1 Not applicable.

#### 6.2 Crime & Disorder

6.2.1 Not applicable.

#### 6.3 Safeguarding

6.3.1 Not applicable.

#### 6.4 Dependencies

6.4.1 None.

#### 6.5 Other

6.5.1 None.

### 7 Financial Implications

7.1 If the Council decided to pursue a CPO, the Council would need to identify how it could fund the estimated one-off costs of £377,000.

7.2 In addition, the Council has no budget identified to fund the estimated recurring post-CPO maintenance costs of £23,000 per annum. To fund this liability on an ongoing basis, either additional recurring income or savings from services would need to be identified.

7.3 **Section 151 Officer's comments:** In general terms, Councils shouldn't enter into unfunded future commitments. No budget has been identified to fund any future annual maintenance costs associated with the cemetery, and with the Council already facing a projected revenue budget deficit of £720,000 per annum by 2028/29 (as reported to Strategy & Resources Committee 23 July 2024), the Council's reserves are already likely to come under substantial pressure in future years. As such, unless funding can be identified, the Council's budget does not appear to support a CPO acquisition and the future annual associated maintenance liability of the cemetery.

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### 8 Legal Implications

- 8.1 An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. In making this assessment an acquiring authority should have regard, in particular, to the provisions of Article 1 of the First Protocol and Article 6 of the European Convention on Human Rights (“the Convention”), and Article 1 states that:

*“...Every natural or legal person is entitled to peaceful enjoyment of his possessions... no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law...”*

- 8.2 Although the owner of the land will be deprived of their property if the CPO is confirmed, this will be in accordance with the law and appropriate financial recompense will be made. However the acquisition of land “in the public interest” is specifically allowed by the Convention and if there is a compelling case in the public interest for the compulsory acquisition of land which outweighs the Convention rights and the use of compulsory purchase powers in this matter must be proportionate.
- 8.3 The Council is empowered under s 226(1)(a) of the Town and Country Planning Act 1990 (TCPA) as amended, to acquire any land in its area if it is satisfied that the proposed acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. The Council may utilise its compulsory purchase powers under section 226 of the TCPA:
- A if it thinks the acquisition will facilitate the carrying out of development, or redevelopment or improvement on, or in relation to the land or
  - B which is require for a purpose which is necessary to achieve in the interests of the proper planning of an area in which the land is situated
- 8.4 In order to make an acquisition under section 226(1)(a) of the TPCA, the Council must also consider that the development, redevelopment or improvement will contribute to the promotion or improvement of the economic social or environmental well-being of its area.
- 8.5 The Acquisition of Land Act 1981 governs the procedures which apply to compulsory acquisition. The Compulsory Purchase Act 1965 governs post confirmation procedures and the Land Compensation Act 1961 governs the amount and assessment of compensation.
- 8.6 The Council must pay due regard to its Public Sector Equality Duty (PSED) as set out in section 149 of the Equalities Act 2010

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8.7 **Legal Officer's comments:** Adopting Counsel's advice note at Exempt Appendix 4 and as set out above and in the body of the report.

### 9 Policies, Plans & Partnerships

9.1 **Council's Key Priorities:** The following Key Priorities are engaged: Effective Council

9.2 **Service Plans:** The matter is not included within the current Service Delivery Plan.

9.3 **Climate & Environmental Impact of recommendations:** An acquisition of the land using its CPO powers would give EEBC the right as landowner to ensure the site remains open and the historic asset retained. However, this is currently addressed through the Council's planning powers assisted by the recent Local Listing.

9.4 **Sustainability Policy & Community Safety Implications:** Not applicable.

9.5 **Partnerships:** None.

### 10 Background papers

10.1 The documents referred to in compiling this report are as follows:

#### Previous reports:

- Horton Cemetery, Strategy & Resources Committee Special Meeting 29 September 2022 (Paper withdrawn prior to meeting and not discussed at the request of The Friends of Horton Cemetery)

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=132&MId=1420>

- Horton Cemetery, Strategy & Resources Committee Special meeting 5 May 2022 (Paper withdrawn prior to meeting and not discussed)

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=132&MId=1370>

- Local Listing of Horton Cemetery, Licensing and Planning Committee 9 September 2021

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=131&MId=1170>

- Epsom Cemetery Extension, Strategy & Resources Committee 17 April 2018

<https://democracy.epsom-ewell.gov.uk/ieListDocuments.aspx?CId=132&MId=420>

#### Other papers:

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- Guidance on Compulsory purchase process and The Criche! Down Rules, Department for Levelling Up, Housing & Communities July 2019