
Nikki White
Principal Planning Officer (East)
Somerset Council
County Hall
Taunton
Somerset TA1 4DY

Our ref: PfP.001
Your ref: 2023/0864/FUL



By email only – nikki.white@somerset.gov.uk

22 October 2024

Dear Ms White

**Erection of 74 dwellings, 1 no. children with disabilities home, including means of access, drainage, landscaping and associated works (“the Application”)
Land at Packsaddle Way, Frome, Somerset (“the Site”)**

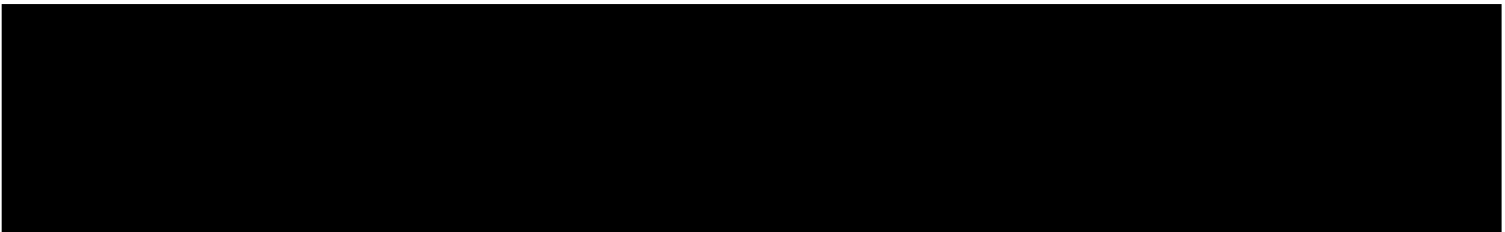
Thank you for your email (14 October 2024) enclosing a copy of Ms Gully’s responses to my letter (26 September 2024).

I have now discussed the response from Ms Gully with my client and we remain of the view that Ms Gully’s response does not explain why the Council / LPA considers that the Application should provide the currently-assessed level of education contribution.

As the LPA will be aware, Government guidance on viability states as follows:

“Where viability assessment is used to inform decision making under no circumstances will the price paid for land be a relevant justification for failing to accord with relevant policies in the plan.” (Paragraph: 006 Reference ID: 10-006-20190509)

“The cost of fully complying with policy requirements should be accounted for in benchmark land value. Under no circumstances will the price paid for land be relevant justification for failing to accord with relevant policies in the plan.” (Paragraph: 018 Reference ID: 10-018-20190509)



The benchmark value for the Site has remained unaltered since the first Viability Assessment in November 2023. As “the cost of fully complying with policy requirements” (emphasis added) must be reflected in the stated benchmark land value, Ms Gully and the LPA are asked to respond to the following specific issues:

1. Ms Gully has provided the 2024 SOP table. For 2024, the table shows a surplus of 11 spaces at Hayesdown First School, a surplus of 69 spaces at Vallis First School and a surplus of 30 spaces at St Louis Catholic Primary School. These figures are broadly similar to the 2023 figures for the same schools, with the exception of Hayesdown which had no surplus in 2023.

In her response, Ms Gully explains this change in circumstances as follows: “In 2023, there were many applications expected to be approved, but the homes have not come forward”.

With respect, this response misses the point. As the Authority’s Monitoring Reports confirm, 957 homes in Frome had consent in 2023 but had not yet commenced development. All of these homes would have been required to provide education contributions to mitigate their impact. If that is not the case, the LPA should explain why such contributions were not required under the applicable section 106 obligations for those schemes. (A scheme for 150 homes in Marston Lane was refused in 2023, meaning that no provision would have been necessary.)

Under Regulation 122, planning obligations cannot be sought unless they are necessary. Planning applications which are “expected to be approved” but have not been consented are irrelevant to the exercise of funding school places, as those schemes do not have consent.

Accordingly, given that no significant changes have occurred in housing consents since 2023, it is simply unclear why the requirement for a higher education contribution in 2023 (as confirmed by Ms Gully at that time and maintained by her until 11 September 2024) is no longer required for the Application. What has changed? Did the LPA over-require contributions from other schemes (which would have been unlawful), resulting in a current surplus of funding? The LPA needs either to explain and justify its rationale with evidence, or agree that its calculations cannot be relied upon.

2. In relation to the approval at Little Keyford, Lane, this was a scheme for 70 homes. The Application is for 74 homes. In her response, Ms Gully states that “the education authority is not always able to provide satisfactory evidence to ensure success in gaining education contributions to meet the Regulation 122 [requirements] [and] in most cases SEN funding is only required for developments over 100 homes, due to the low pupil yield estimated”.

This is not an acceptable justification. SEN is either required or it is not. There is no policy which states that SEN funding should not be required for developments of less than 100 homes. If the education authority was able to provide satisfactory evidence (under Regulation 122) for requiring such funding at Little Keyford Lane, there is no rational basis for it not carrying out the same exercise in relation to the Application.

Ms Gully has not explained or provided the evidential basis on which the education authority has concluded that there is no need for SEN funding for the Application. However, the latest Somerset Council budget monitoring report states as follows in relation to the ‘High Needs Block’ (SEN) (as at end of July 2024):

“Data for 2024/25 suggests that there is an in year overspend of £5.4m on the DSG [Dedicated Schools Grant] above the budgeted deficit of £18.9m for 24/25...There continues to be significant pressure on costs within

the High Needs Block, which relates to low inflationary increases to school funding, a range of factors putting pressures on school budgets and historic underfunding of Special Educational Needs (SEND).”¹

As the Council’s own evidence states that there is an existing deficit and continuing “significant pressure on costs” for SEN provision, there is plainly a demonstrable need for such contributions. If this is not the case (despite the Council’s own evidence from July 2024), the Council must explain why.

3. In relation to Little Keyford Lane, an education contribution was also required for Lower and Middle Schools. As per my comments at (1) above, what has changed such that there is no requirement for a similar contribution for the Application? Whilst Christ Church School is shown in the SOP Table 2024 as having excess capacity of 162 in 2023, this occurred following a poor Ofsted Report and the reclassification of the school as an Academy, leading to a reduction in its pupil roll from 194 pupils in 2022 to 77 pupils on the roll at the start of 2023. The children who left the school would have still required education.

In order to understand the evidence more fully, please could the LPA provide the SOP Tables for both 2023 and 2022 and all other supporting evidence for its conclusions.

4. In relation to the Early Years Contribution, the proposed development at Selwood Garden Village includes an agreed figure of £27,674 per pupil. The equivalent contribution for the Application is £21,188. What is the justification for the differential between these two figures?
5. In her response, Ms Gully states that “s106 obligations can only be paid at the time the homes are occupied, or the relevant time as indicated in any one legal agreement, which is linked to the viability of the site as it progresses. We as education authority are able to reimburse education borrowing, at the time the education contributions are due”.

The implication here is that borrowing is a fallback option for the education authority if the s106 agreement does not provide contributions in a timely manner. However, that does not explain why the contributions are not requested in the first place, if there is a need for them. Education contributions under s106 agreements are routinely required prior to the development of a particular phase of the development and I am unaware of any example where such contributions have not been sought because the education authority has the power to borrow against any shortfall. If that is the education authority’s justification for not requiring the full contribution under the s106 agreement for the Application, it is misconceived.

6. Based on the information which has been provided to date, the position is as follows:

- the required contribution for education was consistently stated as being £882,441 in the Viability Appraisals dated 6 November 2023, 30 April 2024 and 10 September 2024;
- in an email (16 August 2023), Ms Gully stated that the education requirement could be reduced to £691,146 (emphasis added):

“to reduce the burden on your viability I am able to take off the sum for Early years development as there is a little more capacity at present in the early years settings, and the generation of 7 children may still be able to be accommodated by the time this development is built. In addition I can change the Middle school request to a cost to build of an extension, which is the most likely project to expand the middle schools which will provide another saving.”

- the reduced figure of £691,146 was not included in the Viability Appraisal dated 10 September 2024, which instead retained the figure of £882,441;

¹<https://somerset.moderngov.co.uk/documents/s37249/M4%20Appendix%2002%20-%20Childrens%20Services.pdf>

- the Viability Appraisal dated 10 September 2024 included 12% affordable housing, a reduction of 3% on the affordable housing provision in the Viability Review dated 30 April 2024;
- an email was sent by you to Francis Gully on 11 September 2024 at 11.18am, although its content (if any) is missing;
- in the recent FOI response, the Council has stated that there has been no written correspondence in relation to the Application between Frances Gully, the Council's Estates Planning Advisor and the Council's Strategic Manager (Head of Education Places);
- on 11 September 2024, Ms Gully emailed you back at 12.45pm and stated that the education contribution could be reduced to £156,791.20, ending her email with "I hope that helps"; and
- as a consequence of the reduction in the education contribution, a revised Viability Report was issued on 13 September 2024 which showed a substantial increase in affordable housing to 22%.

In order to understand how the education authority's position could change in such a short space of time from the one it had held for the previous 12 months, please could you provide a full copy of your email to Frances Gully timed at 11.18am. Please could the Council also confirm that no discussions have occurred within the Council, whether written, or verbal, which have sought to reduce the amount of the education contribution in order to increase the amount of affordable housing which could be provided by the Application and/or to improve the viability of the Application. Specifically, please could you also confirm that you did not speak to Frances Gully on 11 September 2024 and ask her whether the amount of the education contribution could be reduced in order to improve the Application's viability and/or enable more additional housing to be provided.

The Council is respectfully reminded of the duty of candour which requires "the public law Defendant, and especially the Government Department or Minister, to co-operate with the Court, and to provide for the Court a full and accurate picture of the decision-making substance and process, as a partnership in maintaining the rule of law" (*Friends of the Earth Ltd v SSLUHC* [2023] [EWHC 3255], which will become relevant should this matter proceed to judicial review. The Council is also reminded of the Court's specific disclosure powers under CPR 31.12.

As before, given the importance of the issues set out above, PfP has asked that the Ward Councillors, Duncan Sharkey and Alison Blom Cooper are copied into this letter.

Yours sincerely



Tim Taylor
KHIFT LTD

cc Alison Blom-Cooper - alison.blomcooper@somerset.gov.uk

cc Duncan Sharkey - duncan.sharkey@somerset.gov.uk

cc. Cllr Adam Boyden - adam.boyden@somerset.gov.uk

cc. Cllr Dawn Denton - dawn.denton@somerset.gov.uk