

Helen Bowen
Somerset Council
County Hall
Taunton
Somerset
TA1 4DY

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



By email only – helen.bowen@somerset.gov.uk

29 October 2024

Dear Helen

**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”)**

I am instructed by People for Packsaddle (“PFP”) in relation to the Application. PFP has submitted several objections to the Application. The Application is due to be considered by the Planning Committee (East) on 5 November 2024.

Given the short period available, please could you forward this letter (and the attached Opinion) as a matter of urgency to the lawyer who will be advising the LPA in relation to this application. Given the importance of these issues, please could this letter also be copied to the Chair and Members of the Committee.

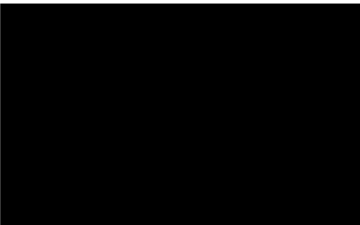
The errors of law which would render a decision on the Application unlawful are set out below.

1. The interpretation of Policy DP16.

The Officer’s Report considers the effect of Policy DP16 at paragraphs 83-91. At paragraph 90, the Officer states that “the policy is perhaps complicated by a broad definition of ‘open space’ or ‘public open space’”. The Officer then relies on the Policy Officer’s comments which are that the Policy does not apply to the Application as the Policy is only relevant to open space which has “public accessibility”.

This letter is confidential and may be subject to legal professional privilege.

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This interpretation is untenable for the reasons which have already been set out to the LPA. I attach an Opinion from Richard Moules KC and Harley Ronan which confirms that the Council's analysis of Policy DP16 is legally flawed.

Policy DP16 could not be clearer: "development resulting in the loss of existing open, sport or recreational space" will not be permitted unless it can satisfy the requirements of Policy DP16(i) and (ii). The Site was listed as an ACV expressly because it provides recreational green space for the public, and has done so for more than 50 years. It is not merely "space" but is both objectively and subjectively open space which is used by the public.

As the Opinion explains, the right of the public to use open space may exist even if it is only based on a bare licence. In any event, even if the public were not allowed to be on the Site (which is not the case), Policy DP16 would still apply, as it does not seek to only protect "public" open space (see paragraph 6.141 of the explanatory text in the Local Plan).

The reference in the Officer's Report (at paragraph 88) to paragraph 6.148 of the Local Plan neither trumps paragraph 6.141 nor complicates the correct meaning of the Policy. Paragraph 6.148 seeks to ensure that public open spaces are safeguarded but that does not mean that other open spaces (whether public or not) which are "important parts of our everyday community infrastructure offering a range of social, environmental and health benefits" (per paragraph 6.141) should be disregarded under the Policy.

As the Officer's advice is wrong in law, it will mislead the Committee unless it is corrected, per *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452:

"The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

As you will see, the Opinion is clear that Policy DP16 does apply to the Application and, accordingly, the advice provided by Jo Milling (and confirmed in the Officer's Report) is incorrect as a matter of law.

2. The assessment of the Application's biodiversity impact

By way of brief background, the Site was cleared of vegetation in July-August 2022, shortly after the applicant had commenced its baseline surveys for its ecological impact assessment (section 2.4, Ecological Impact Assessment). The Ecological Impact Assessment ("EIA") concluded that "the Site baseline comprises 19.62 habitat units and 5.94 hedgerow/ linear units [and] the proposed development will comprise 20.54 habitat units and 6.37 hedgerow/ linear units, resulting in a net gain of 0.92 habitat units (4.69%) and an increase in hedgerow units of 0.43 (7.30%)".

PfP's appointed ecologist has noted several areas of concerns in the timing of these surveys:

1. the end of May is a late start for an ecological survey and risks missing early-flowering flora and early nesting bird species;

2. clearing a site in the third week of July risks missing some late-nesting bird species, or repeat nesting attempts;
3. clearing a site in the third week of July could have illegally destroyed some active birds' nests, dormouse nests and sheltering reptiles and hedgehogs; and
4. due to the two clearance events, no data could be collected concerning usage of the site by wildlife from the rest of the year.

PfP also have concerns on the efficacy of the survey works in relation to the potential impact of the development on greater horseshoe bats. The EIA records that the Site lies within Bat Consultation Zone Band B for the purposes of the North Somerset and Mendip Bats SAC Guidance on Development SPD ("the SPD"). The SPD requires, among other things, a survey by automated detectors over a period of 50 days from April to October and to include at least one working week in each of the months of April, May, August, September and October.

As the clearance of the Site took place in the third week of July 2022 and again in late August 2022, PfP has noted that when comparing the dates of the automated bat surveys set out in the appendix to the EIA with the dates on which clearance of the Site occurred, only 15 days of surveying occurred prior to clearance rather than the 50 days required by the SPD. Accordingly, the survey work fails to meet the requirements of the SPD and may not have correctly captured the extent of bat activity on the Site.

Separately, a "shadow" Habitats Regulations Assessment ("SHRA") was undertaken on behalf of the applicant for the purposes of the Conservation of Habitats and Species Regulations 2017 ("the 2017 Regulations"). The SHRA did not refer to the clearance of the Site in July and August 2022. The SHRA concluded that:

"Subject to the proposed development being undertaken in accordance with the mitigation detailed above, including the HEP calculation, BNG, the implementation of a sensitive lighting strategy and LEMP, these measures are considered sufficient to ensure that the construction and operation of the proposed development does not, either alone or in-combination with other plans or projects, give rise to any adverse effects on the integrity of the Mells Valley SAC."

On 5 April 2024, the Council indicated that it accepted the conclusions in the SHRA:

"Following review of the Shadow Habitat Regulations Assessment (SHRA), titled Packsaddle Way, Frome, Somerset, Shadow Habitat Regulations Assessment prepared by GE Consulting (dated February 2024), the Council has considered the content and measures designed to mitigate the impacts of the proposed development on the Mells Valley SAC site. The Council agrees with the conclusion that any such impacts will be fully mitigated considering the measures proposed and that, as a result, the Council has ascertained beyond reasonable scientific doubt that the development will not adversely affect the integrity of the Mells Valley SAC site either alone or in combination with other plans or projects. The Council, as the competent authority, adopts the SHRA to fulfil its responsibilities under Regulation 63 the Conservation of Habitats and Species Regulations 2019 (EU Exit) (as amended)."

The letter explained that the Council's endorsement was conditional on Natural England concurring. On 6 June 2024 Natural England concurred with the results of the SHRA.

The Local Plan and the NPPF each contain relevant policies relating to biodiversity and habitats. These include Policy DP5 and DP8 of Part 1 of the Local Plan, and paragraphs 180(a) and 186(a) of the NPPF. In short, these

policies are aimed towards authorities conserving and/or enhancing biodiversity when making planning decisions and ensuring that protected species are conserved.

It is uncontroversial that a lawful application of these policies presupposes that the LPA properly understands the “baseline” biodiversity, given that these policies are aimed towards the LPA making a judgement as to the acceptability of a proposal on that baseline. In order to make that judgement, it is inherent in the policies that the LPA forms an adequate view on what the current baseline is.

The EIA sets out the applicant’s view as to the baseline, namely, that the clearance had no effect on the validity of its conclusions. However, a decision to grant planning permission based on an acceptance of the EIA would be unlawful as the Council does not have sufficient information to lawfully conclude that the Application complies with the policies set out above. A lawful application of local and national policy requires the LPA to form an adequate understanding of the underlying biodiversity conditions, which (for the reasons set out above) are flawed because the baseline conditions have been artificially reduced and/or not properly assessed in accordance with the SPD.

Similarly, the SHRA’s reliance on the survey results in the EIA means that the SHRA is not an appropriate assessment within the meaning of the 2017 Regulations, and that any grant of planning permission on the basis of that assessment would be in breach of Regulation 63 and liable to be quashed.

The Officer’s Report fails to address any of the above points, relying instead on short statements to the effect that the Council’s Ecology Team has agreed that the mitigation is acceptable. At paragraph 237, the Officer’s Report notes that “some neighbours have referred to potential inaccuracies in the baseline position put forward” but that “no conclusive evidence has been submitted to justify this position”. This statement is merely a conclusion and fails to explain why the evidence which has been submitted by PFP has been dismissed by the LPA (contrary to the requirements set out in *South Bucks District Council v Porter (No 2)* 1 WLR 1953).

Importantly, the LPA will also be aware that as the Council owns the Site, the LPA’s planning decision requires additional scrutiny. In *R (on the application of G) v Thanet District Council* [2021] EWHC 2026 (Admin), the Court confirmed as follows:

“24. Where a local planning authority has an interest in a site for which it is considering a planning application, it is under a particular duty to weigh the issues, engage with objections thoroughly, conscientiously and fairly (Stirk v Bridgenorth District Council (1996) 73 P&CR 439 at p. 444) and to set out all relevant material in any report (R v South Glamorgan County Council ex p. Harding (1998) COD 243).”

The comment in the Officer’s Report that “no conclusive evidence has been submitted to justify this position” fails to meet not only this standard but also the lower usual standard (for applications in which the Council does not have a legal interest) set out in *Mansell*.

3. The Specialist Housing Unit

The Application includes a CRF house / Day and Night Centre. However, the LPA has not provided any evidence that there is a need for this specialist unit and has merely relied on the applicant stating that “there is a local need” (paragraph 166 of the Officer’s Report). This is plainly inadequate in demonstrating planning need.

Furthermore, its delivery is subject to the Council’s estates team confirming (pursuant to a planning condition) a need for the unit within 60 days of a planning permission being granted, meaning that even at this late stage

in the application process, the Council does not know if the unit is needed. Despite this, the provision of the unit is given weight in the planning balance (paragraph 386).

In a recent FOI response, the Council stated as follows: “Due to the level of need Somerset Council are experiencing currently, we are looking at faster solutions too, so the Packsaddle [specialist] house may or may not be needed”. The Council’s position is clear, namely, that it cannot confirm a current need for the specialist unit. Accordingly, as planning conditions can only be lawfully sought when they are “necessary” (paragraph 56 of the NPPF), the provision of this single unit cannot be given any weight in the planning balance, nor can it be a lawful planning condition.

4. The Viability Appraisals

Paragraph 358 of the Officer’s Report notes that the quantum of educational contribution required for the s106 agreement “has been queried through the public consultation process”. The position of the LPA remains that the amount of £156,791.20 is the correct amount.

I attach a letter (22 October 2024) which I sent to the Planning Officer in response to the further comments made by the Education Officer. The issues set out in this letter have not been addressed by the LPA. In common with the issues set out above relating to the baseline ecological value of the Site, the LPA is under a “particular duty” to set out all relevant material in the Officer’s Report and to engage with objections “thoroughly, conscientiously and fairly”. This has not happened and the questions raised in my letter remain unresolved and cast significant doubt on the adequacy and lawfulness of the required education contribution.

As my letter explains, the required amount for education has been under-estimated. The correct amount would lead to a significant reduction in the amount of affordable housing which the Application would be able to deliver. This is a fundamental concern and, presumably, will be of key relevance to Members given that the Site is neither allocated nor within the settlement’s boundary. A starting point for the acceptability in planning terms of any such proposal should be that, at the very least, it provides a policy-compliant level of affordable housing. Not only does the Application currently provide almost one-third less affordable housing than the Local Plan requires but, if the correct education contribution is applied to the Viability Appraisal, the amount of affordable housing would reduce to less than half of the policy requirement. On a site which is outside any development boundary and therefore contrary to the Local Plan (when read as a whole), this is plainly insufficient to outweigh the policy harm caused by the Application.

In addition to the issues set out in my letter, the Officer’s Report identifies other contributions which need to be reconsidered as part of an updated viability appraisal:

- (i) The Officer’s Report refers to bat mitigation being provided off-site (paragraph 224). The Report states that the mitigation will be provided on a “parcel of land north of the site”, which PfP understands is in third party ownership. However, the capital cost of the bat mitigation has not been included in the Viability Appraisal. Accordingly, the Viability Appraisal is inaccurate and must be amended to include this cost.
- (ii) For the reasons set out above, replacement open space must be provided under Policy DP16. The cost of doing so must be included in an amended Viability Appraisal.

5. Conclusion

PfP has significant legal concerns relating to the Application, each of which would render any decision to grant permission unlawful:

- (i) the Officer's Report fails to properly advise Members on the correct interpretation of Policy DP16;
- (ii) the Officer's Report fails to give any reason why it considers the evidence which has been provided by PfP in relation to the artificially-reduced ecological baseline has not been accepted by the LPA;
- (iii) the Officer's Report fails to respond to the issues raised by PfP in relation to the quantum of the education contribution proposed by the Education Officer;
- (iv) the correct Viability Appraisal would reduce the amount of affordable housing which could be provided, which would weigh significantly against the acceptability of the Application given its non-allocated location outside any settlement boundary;
- (v) the Viability Report is flawed due to the lack of need for a specialist unit, the cost of off-site bat mitigation and the cost of new open space provision under Policy DP16;
- (vi) the Officer's Report unlawfully misleads Members;
- (vii) the Officer's Report unlawfully fails to comply with the "particular duty" on LPAs when determining applications in which a Council has a legal interest; and
- (viii) unless and until the effect of the legal errors set out above have been corrected, the LPA is unable to undertake the tilted balance analysis as there are relevant policies in the Local Plan which are not out of date and which have failed to be lawfully applied (*Gladman Developments Ltd v SSHCLG* [2020] EWHC 518 (Admin)).

PfP is justifiably frustrated that these issues remain unresolved, despite having raised them on numerous occasions. Unless these issues are addressed prior to any decision being made by the LPA, I am instructed that PfP will seek to judicially review a decision to grant planning permission for the Application.

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