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27 October 2025

Dear Mr Ewings

Pre-Action Protocol Letter: Land at Packsaddle Way, Frome, Somerset, BA11 2JU
Appeal Ref: APP/E3335/W/25/3363055

1. This is People for Packsaddle's ("**PfP**") letter of response to your client's intended application for statutory review of the decision of Inspector Michael Chalk BSc (Hons) MSc MRTPIR dated 29th October by which he, on behalf of the Secretary of State, dismissed your client's appeal in relation to the proposed development of Packsaddle Fields ("**the Site**").

2. The proposed claim for statutory review is unarguable and will be resisted in full by PfP.

Relevant factual background

3. Your client alleges that the Inspector erred in his conclusion that Policy DP16(1) of Mendip Local Plan Part 1 ("**LPP1**") applied to the appeal scheme. The nature and context of the dispute is essential to properly assessing whether the Inspector erred in law. PfP takes this opportunity to highlight the following matters which it will draw to the attention of the Court assessing your client's challenge.

4. **Firstly**, by the close of the Inquiry it was not disputed that, as a matter of fact, Packsaddle Fields has been used by the local community as public open space more than 50 years. The DL records the extensive,

Khift Ltd
Beggars Roost
Fore Street
Morchard Bishop
Devon EX17 6NX

unchallenged evidence that was presented to the Inquiry. It was also common ground that the site met the definition of open space for the purposes of both the local plan, and the NPPF.[1]

5. **Secondly**, there was no suggestion by your client during the Inquiry that there was an excess of recreational or open space in the settlement and the proposed loss would not result in a current or likely shortfall during the plan period such that DP16(1)(i) was satisfied. Indeed, your client did not dispute the evidence from PfP that there was a significant shortfall of open space in Frome. That evidence was the most up-to-date assessment of the quantum of open space within Frome. Your client's planning witness agreed in cross-examination that the deficit is significant.

6. **Thirdly**, there was a dispute between the parties as to whether the public's use of the site was lawful as a matter of private law. Your client, who is not the owner of the Site, regards the public's use of the Site beyond the permissive path running through the site to be a "trespass".

7. The Council, however, is the legal owner of the site. The oral evidence of the Council's witness (Mr Jones) was that:

   (i) He was not aware of anything having been done to prevent the public's access over the past 50 years.

   (ii) He was not aware of any discussions within the Council to the effect that the Council would take any measures to prevent the public's access in future.

   (iii) He was not aware of the estates team or anyone else within the Council regarding the public's use of the Site to be a trespass.

   (iv) He would not encourage a fresh application for planning permission in respect of the site. His evidence was that were pre-application advice sought, he would say that the site is an asset of community value and that it has significant value such that an application would not be encouraged.

8. In addition, in February 2023 the Council as planning authority adopted a Greenspace SPD. The SPD identified the Site as a Typology 3 "greenspace". Mr Jones' written evidence was that he considered the Site meets the criteria for Typology 1.

9. Against that, your client obtained a statement from a former employee of the Council, Charles Field. Mr Field purported to give evidence on the historic management of the Site by the County Council. His statement was appended to the opinion evidence of Mr Dunlop as planning witness. As a matter of civil procedure, it was hearsay evidence: see CPR 33.1.

[1] The local plan definition is at para. 6.141 of LPP1.

10. Your letter notes that Mr Field's evidence was "unchallenged". Mr Field was not called as a witness by your client at the Inquiry. He did not give oral evidence. It is not possible to "challenge" the "evidence" of a person who makes a statement in the form of an appendix to an expert witness's proof, and who does not attend the Inquiry. The Court will have its own view on whether this is an appropriate way of leading evidence on a disputed fact at a Public Inquiry. These matters are relevant to the allegations in paragraph 8.32 of your letter as to the Inspector's approach.

11. **Fourthly**, until relatively recently, the Council was not the owner of the Site. Your client's written evidence did not always make that distinction sufficiently clear. As Mr Dunlop accepted in cross-examination, the Inspector had to bear in mind in assessing the evidence that prior to the formation of the unitary authority, the Site owner and the local planning authority were distinct.

12. **Fifthly**, there was, as your letter notes, a dispute as to the interpretation of DP16(1). That dispute extended to whether the policy applied to the appeal scheme, and the application of that policy – i.e. whether the scheme would comply with DP16(1)(ii). This occupied much inquiry time.

13. Prior to the appeal, the Council's planning officers considered that DP16(1) did not apply to the Site because the Site was not identified in the Policy Map (or Proposals Map) accompanying the local plan. Officers' position was, in short, that the Site had to be "identified" in the Policy Map in order for the policy to apply to the Site.

14. Our client disagreed with this analysis. This firm explained to the Council in writing and at the Committee Meeting why that interpretation was wrong. PfP obtained the advice of Leading Counsel, who also considered that it was wrong to suggest that the application of the policy turns on whether the Site is identified in the Policies Map. This opinion was disclosed to the Council.[2]

15. Members ultimately disagreed with officers' analysis and concluded that the Site was existing open space within the meaning of the policy. Having reached that conclusion, they then considered that there was a conflict with that policy, and taken in the round, the proposal was not sustainable development. Members accordingly refused the application for planning permission.

16. Your client maintained at appeal that the Council was wrong and Policy DP16(1) did not apply to the appeal site. The interpretation of DP16(1) urged upon the Inspector by your client was that DP16(1) could only apply to a Site if:

    (i) the Site was identified in the Policies Map at the date the plan was adopted, or

[2] And was before the Inquiry as Core Document 9.11.

(ii) it was a "new space that has come forward since the adoption of the Plan" (para. 76 of the Appellant's Closing Submissions).

17. Criterion (ii) was based upon the supporting text to the policy (at para. 6.149 of LPP1).

18. In its proposed grounds of challenge, your client now alleges that "new space" itself has a restrictive meaning, and that the Inspector erred in law in his construction of that phrase.

19. This is surprising. The application of the relevant legal principles to support your client's interpretation of DP16(1) is set out in paras. 91 to 103 of its Closing Submissions. You will note that these Closing Submissions did not contend that the phrase "new space" itself had some particular meaning which the Inspector must adopt as a matter of law when applying the policy.

20. At the Inquiry, PfP and the Council disagreed with your client's suggestion that DP16(1) could only apply if the Site was identified in the Policy Map or was a "new space". The following submissions (among others) were made.

(i) PfP submitted that, applying established legal principles of interpretation, DP16(1) cannot be read as being applicable to the Site only if one of the above two conditions are met. The words mean what they say: existing open spaces will be protected by DP16. That protection does not hinge on extraneous conditions being satisfied. Indeed, Mr Dunlop agreed in cross-examination that, looking at the words actually used in the policy text, no reasonable reader could understand them as meaning that the application of the policy is conditional on identification in the policies map. Further, he accepted that if para. 6.149 were absent, DP16(1) would have been engaged and would need to be satisfied (see the Council's Closing Submissions, para. 7).

(ii) The Appellant accepted that the Site was open space as defined by the local plan. That ought to have been the end of the matter: DP16(1) applied to the appeal scheme as it involved the development of existing open space (see para. 36 of PfP's Closing Submissions).

(iii) In respect of the argument that the supporting text gave rise to the two conditions on which the application of DP16(1) turned, both PfP and the Council submitted (inter alia) that para. 6.149 cannot be read as importing additional requirements on which the application of the policy turned.

(iv) In any event, as the Council noted, even if one assumed that the Appellant's interpretation was right, there was no reason in law why the Council (and in turn, the Inspector) could not now conclude as a matter of planning judgement that the Site was a "new space" in light of the Council's knowledge as to the nature and extent of the public's use of the Site: see para. 10 of the Council's closing submissions. As the Council's submissions explained, the Council's knowledge of the Site's use was

developed through the ACV and Inquiry process. In other words, as a matter of planning judgement, the Site could lawfully be regarded as a "new space" in the circumstances of this case.

21. **Sixthly**, it was common ground among all parties that paragraph 104 of the NPPF applied to the scheme as the Site was "open space" for the purposes of national policy.

22. Paragraph 104 guards against the development of open space unless one of three criteria are met. Paragraph 104(b) is in materially the same terms as Policy DP16(1)(ii). Therefore, whatever the position on DP16(1), the agreed position by all parties was that appeal scheme must satisfy the para. 104 of the NPPF.

23. In cross-examination, Mr Dunlop (on behalf of the Appellant) accepted that the debate on the applicability of DP16(1) made no difference to the outcome of the appeal and was therefore academic (see Council's Closing Submissions para. 12 and 13). As PfP submitted, whatever tortuous and excessively legalistic route the Appellant might contrive to seek to avoid the application of DP16(1), national policy imported essentially the same requirement which, if not satisfied, militated heavily against the appeal being allowed: see PfP closings, para. 38). It was entirely right, therefore, to say that the debate was academic.

24. **Finally**, and relatedly, Mr Paley (on behalf of the Appellant) accepted in oral evidence that if the Site was to be regarded as open space, it would be not suitable for development at all: see PFP closing submissions, para. 43.

The decision

25. Against that context, the Inspector concluded that the appeal site was a new space which had come forward such that DP16(1) applied. It was a new space which had come forward in light of the significant change in position: the Council (as landowner and planning authority) recognises the significant value of the site as open space, and does not wish to preserve it for future development.

26. We note that this essentially accords with the Interpretation urged by your client, i.e. a site is protected by DP16(1) if it is in the policy map or is a "new space" which has "come forward". In this case, the Inspector concluded it was the latter.

27. In applying that policy, the Inspector concluded that the appeal scheme conflicted with the policy because the scheme would fail to provide alternative space that would be of equal or greater benefit to the community than the space which would be lost.

28. This was an entirely lawful and rational conclusion open to the Inspector.

29. Similarly, the Inspector concluded that the appeal scheme failed to satisfy any of the requirements in para. 104 of the NPPF, and was in conflict with the Framework. That was an entirely lawful and rational conclusion open to the Inspector (and we note you do not suggest otherwise).

30. In carrying out the planning balance, the Inspector concluded that the harm which arose from the loss of open space significantly and demonstrably outweighed the benefits of the scheme such that the tilted balance was disapplied, and the appeal was dismissed. That was an entirely lawful and rational conclusion open to the Inspector. Again, you rightly do not challenge this conclusion.

31. Your suggestion that the Inspector has erred in his conclusion that DP16(1) applied to the Site is unarguable, for the following reasons.

Legal framework

32. It is agreed that the principles set out in para. 8.21 of your letter apply to the Court's determination of the intended claim. PfP will also draw the Court's attention to the following principles.

33. On planning policy:

(i) **The interpretation of policy is a matter of law for the court.** But the court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract (*Gladman Developments Ltd v Canterbury City Council* [2019] P.T.S.R. 1714, [22]: "The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest".

(ii) **The Court will seek to read the policy sensibly and in its full context** (*Chichester DC v SSHCLG* [2020] 1 P. & C.R. 9, [31]) with realism and common sense, and with a proper understanding of its practical purpose (*R (oao Plant) v Lambeth LBC* [2023] EWCA Civ 809 at [34]). I

(iii) **It is important that the role of the courts in interpreting policy is not overstated**: "some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis": *SSCLG v Hopkins Homes* [2017] 1 W.L.R. 1865, [24]).

(iv) **Disputes over the meaning of policy may well not be determinative of the outcome of a case** (*Hopkins Homes* at [23]).

(v) **The application of planning policy is a matter of judgement for the decision-maker, subject to review on public law grounds** (*R (oao Substation Action) v SSENZ* [2024] P.T.S.R. 561, [40]). Demonstrating irrationality in the application of policy is a "formidable task" in this context (*R(oao*

Walsh) v Horsham DC [2024] EWHC 2640 (Admin) at [83] citing *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]).

34. On the distinction between the interpretation and application of policy:

    (i) **Because the application of policy may only be challenged on the ground of public law error, there is a "critical difference" between a challenge to interpretation and application as the "juridical basis" on which the Court may intervene are different**: "a claimant must not dress up what is in reality a criticism of the *application* of policy as if it were a *misinterpretation* of policy": *Barker Mill Estates Trustees v Test Valley BC* [2017] P.T.S.R. 408, [83]

    (ii) **A claimant will fail "… to raise a genuine case of *misinterpretation* of policy unless he identifies (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct interpretation of the policy wording in question**. A failure by the claimant to address these points… is likely to indicate that the complaint is really concerned with *application*, rather than *misinterpretation*, of policy: *Barker Mill Estates Trustees v Test Valley BC* [2017] P.T.S.R. 408, [84].

35. On the duty of parties to an Inquiry:

    (i) The general rule is that it is incumbent on the parties to a planning appeal to place before the decision maker the material on which they rely: West v First Secretary of State [2005] EWHC 729 (Admin), [42].

    (ii) "A party to a planning appeal must be expected to tell the decision maker all he wishes to tell them… In general, the determination of a planning appeal does not require the decision maker to go beyond proper consideration of the material put forward by the parties": *Keep Chiswell Green v Secretary of State for Levelling Up, Housing and Communities* [2025] J.P.L. 912, [65], citing *West*.

    (iii) A planning Inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument which the claimant did not see fit to rely upon at any stage in its appeal: *Mead Realisations Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin), [179]

Response to the proposed claim

36. The proposed challenge is, in reality, a challenge to the Inspector's planning judgement that the Site is a "new space" for the purposes of Policy DP16. It is unarguable.

37. **First**, at paragraph. 8.29, you allege that the Inspector's interpretation of "new space" was wrong because "*a "new space" should be interpreted objectively (etc) as a piece of open land which was not known about at the time of the adoption of the Plan (and so could not be protected on the Proposals Map) but has since come to the notice/knowledge of the Local Planning Authority*."

38. As a preliminary point, we note that this was not an argument your client made to the Inspector at the Inquiry. It was not submitted by the Appellant that "new space" had this restrictive meaning. In fact, para. 97 of the Appellant's Closing Submissions appear to contemplate numerous ways in which a site might be a "new space" which has "come forward" for the purposes of Policy DP16. It is surprising that your client now alleges that the Inspector was wrong to not adopt a restrictive interpretation of "new space" which it did not suggest to him.

39. In any event, your letter identifies no legal argument to support the view that a "new space" can only be a site which was not known to the authority at plan adoption but has since come to light. There is nothing in the wording of Policy DP16(1) or the supporting text to that policy which suggests that this concept has the restrictive, binary meaning which you contend for. The fact that you do not identify anything in the policy to support your argument is telling. Your interpretation is a bare assertion, and it is unarguable.

40. Whether a site is a "new space" which has "come forward" is a classic example of a broad-brush planning policy concept which must be applied by a decision maker on the facts of any particular case. In this case, the Inspector concluded that the Site is a "new space" such that DP16 applied to the appeal scheme. Your challenge is, in reality, a challenge to that conclusion rather than an argument about interpretation.

41. Similarly, the matters dealt with in para. 8.29 of your letter concern the application of the Inspector's planning judgement. The alleged error of law is a clear example of a claimant "dressing up" "… what is in reality a criticism of the *application* of policy as if it were a *misinterpretation* of policy". Paragraph 8.29 is unarguable.

42. **Second**, para. 8.30 of your letter suggests that:

> "it was common ground that the condition and/or use of the Appeal Site had been the same from 2012 (the date of adoption of the Plan) to date. Further, the definition of "open space" (either in the LPP1 or NPPF) had not changed from 2012 to date. It follows that the Appeal Site was not a "new space" that had come forward at all. This is not an issue which the Inspector considers at all, even though it was one of the central reasons why the Claimant submitted the Appeal Site was not a new space (see Closing Submissions at paragraph 97)."

43. PfP is at a loss to understand the error of law being alleged in this paragraph. The Inspector concluded that the Site was a new space which had come forward and was, therefore, subject to Policy DP16.

Paragraph 8.30 identifies no arguable error of law in that respect. It is a further criticism of the planning judgement ultimately reached.

44. **Thirdly**, as to paragraph 8.31. The arguments here rely on the mistaken assumption that a site can only be a "new space" in the restrictive circumstances contended for in para. 8.29 of your letter. The arguments in para. 8.31 also rely on a selective and incomplete account of the context before the Inspector, which we have set out more fully above.

45. The simple point which arises from para. 8.29 is whether, in assessing whether a site is a "new space" which has "come forward" such that it is now open space to which DP16(1) applies, the conduct and intention of the landowner taken in the round is legally *irrelevant* (or *immaterial*) such that the Inspector has had regard to irrelevant considerations.

46. Your client cannot succeed in that issue. The above matters are obviously relevant to the planning judgement of whether a site is a new space which has come forward. The fact that a landowner actually permits access to the public post-adoption of the plan, and intends to continue doing so, is directly relevant to whether as a matter of fact the Site can be regarded as a "new space" or not. Your client might disagree with the weight the Inspector placed on these matters to conclude that the Site was a "new space" which had "come forward". But absent irrationality, the Inspector's conclusion is unimpeachable.

47. **Fourthly**, at paragraph 8.23.3 your letter alleges that "The Defendant has failed to take into account material considerations (the resolutions of Somerset Council as Landowner on how the site should be sold for housing development)". This is unarguable.

    (i) The allegation depends upon the simplistic assumption that a failure to not expressly address the point means it has not been taken into account. It does not follow that because the Inspector has not dealt with every peripheral point, he has not taken them into account: see paragraph 8.21 of your letter, which sets out the legal framework. It is also absurd to say that the Inspector failed to have regard to these matters: they were expressly dealt with in evidence in chief by Mr Dunlop.

    (ii) In any event, this allegation depends upon the Inspector being obliged as a matter of law to have regard to the matters you identify (i.e. because the policy expressly or impliedly required them to be taken into account, or because it would be irrational to not take them into account: see *R. (oao Samuel Smith Old Brewery) v North Yorkshire CC* [2020] P.T.S.R. 221). Your letter does not identify any legal basis to support the view that the Inspector was obliged to have regard to these matters in forming his planning judgement. The mere allegation of a failure to take into account certain matters goes nowhere in the absence of a legal obligation to take them into account.

48. **Fifthly**, there is no "error of fact" in the Inspector's decision. As set out above, the evidence before the Inspector included unchallenged evidence of use of the Site by the public for more than 50 years. Notably, Mr Jones' oral evidence was that he was not aware of any suggestion in the Council that it regarded the public's use of the site to be a trespass, or that the Council as landowner would stop access in future. Moreover, Mr Jones indicated that the Council (which is also the landowner) would not support any future application for planning permission of this site. It also identified the Site in its Greenspace SPD. In Closings, the Council expressly submitted that its change of knowledge should be relied upon by the Inspector to conclude that the Site was a "new space": see para. 10 and 11 of the Council's Closing Submissions).

49. Against that, the height of the Appellant's case was the hearsay evidence of a former employee of the County Council, appended to a proof of evidence, who did not attend the Inquiry and who was not cross examined.

50. There is no prospect of convincing a High Court Judge that, against that evidence and context, the Inspector could not lawfully and rationally have found that the Council's intention with respect to this site had changed. The Inspector made a rational and lawful finding of fact which, in turn, lawfully informed the Inspector's judgement that the Site should now be regarded as a new space which has come forward for the purposes of DP16(1).

51. The allegation that there has been an error of fact is unarguable.

52. **Finally**, your letter alleges that "The Defendant has reached a decision which is internally inconsistent and irrational" and "The Defendant has failed to give any (or any adequate) reasons to explain (a) why the Claimant's interpretation has been rejected and/or (b) why the Inspector has interpreted the Policy in this manner."

53. The allegation of irrationality is a makeweight point and takes matters no further.

54. As to reasons, the allegation at paragraph 8.32.6 of your letter is unarguable. The DL must be read in the context of the dispute before the Inspector, and in the context that it was written for the parties. At the Inquiry, your client alleged that DP16(1) could only apply to an open space which is (i) in the policy map or (ii) is a "new space which has come forward". PfP and the Council disputed that. They argued that this conditionality is not present in the policy. Instead, what matters is whether the site is open space at the point of the decision. They both contended that it was such that the policy was engaged.

55. Ultimately, the scope of any material dispute is narrow. All parties agreed that the Site met local plan definition of "open space" and was not identified in the Policy Map. The only material point raised by your client's interpretation was whether or not the Site was a "new space which had come forward".

56. The Inspector disagreed with the suggestion that the Site was not a "new space" which had come forward. The Inspector considered that the Site is a "new space" which has come forward because of the change in circumstances as to the Council's intentions and conduct with respect to the Site. Your client may disagree with that judgement, but it reflects an interpretation of the policy in precisely the terms your client urged upon the Inspector.

57. There is no mystery as to what the Inspector has decided or why in relation to DP16(1)(ii). The reality is that your client disagrees with the outcome. That is not an error of law and does not amount to inadequate reasons.

58. To the extent that your client now contends that "*new space*" itself has a binary meaning. As noted above, your client did not argue before the Inspector that as a matter of law a site can only be a "*new space which has come forward*" if it is "*a piece of open land which was not known about at the time of the adoption of the Plan (and so could not be protected on the Proposals Map) but has since come to the notice/knowledge of the Local Planning Authority*" (para. 8.29 of your letter).

59. The obvious answer to this complaint is that an Inspector does not fail to give adequate reasons because they do not address an argument which was not made to him: see *Mead Realisations*. In any event, the contention is unarguable as such a requirement cannot be gleaned from the words actually used in in the local plan.

60. Any reasons challenge is unarguable.

Simplex

61. There is no arguable error of law in the decision. However, in any event, this is an obvious case in which the Court would refuse relief applying *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1989) 57 P. & C.R. 306.

62. As Mr Dunlop accepted, the dispute over DP16(1) was ultimately academic in a context where the Appellant accepted that the site was open space within the meaning of paragraph 104 of the NPPF. That concession was rightly made. Even if DP16(1) did not apply, essentially the same matters had to be considered by the Inspector under para. 104.

63. Those matters were considered, and the Inspector found that the scheme would fail to meet any of the requirements in para. 104. The non-compliance with para. 104 and the harm arising from the loss of the site as open space were harms directly relevant to the application of the tilted balance. In turn, the Inspector concluded at DL49 that: "The value attached to the recreational enjoyment of the existing open

space by residents is such that this harm arising from the development would in this instance significantly and demonstrably outweigh the very significant benefits that it would deliver."

64. Therefore, even if DP16(1) is removed, the very same harm arising from the conflict with the policy (a) still had to be taken into account under para. 104 NPPF and (b) was such that it significantly and demonstrably outweighed the benefits.

65. The decision would, therefore, have necessarily been the same even if, as your letter contends, DP16(1) should not have been applied.

Conclusion

66. The proposed claim is unarguable. If your client nonetheless issues proceedings, PfP is entitled to be joined as a party. It will robustly defend the Inspector's decision for the reasons set out above.

67. For the purposes of this matter, this firm is authorised to accept service on behalf of PfP. All correspondence should be marked for the attention of Tim Taylor, who will have conduct of this matter.

Yours sincerely

Khift

KHIFT LTD

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