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**For the attention of Shiraz Sheikh, Monitoring
Officer**

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Date: 08 March 2023
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Urgent

Dear Sir

**Application for outline planning permission - reference 21/04289/OUT
Planning Committee 9 March 2023**

We are instructed by our client Dorchester Living regarding the above planning application for development of up to 230 dwellings, creation of new vehicle access from Camp Road and all associated works on land adjoining and West of Chilgrove Drive and adjoining and North of Camp Road, Heyford Park (referred to herein as the "Site" and "the Application"). We understand that the Application is due to be presented to planning committee on 9 March 2023 with an officer recommendation to approve. However, for the reasons set out below, we wish to highlight that the basis on which the officer's report to the planning committee ("Officer's Report") is formulated is flawed and misleading. Should the Council resolve to grant planning permission in reliance on the report, and that permission subsequently be granted following completion of the proposed section 106 agreement, the decision would be susceptible to legal challenge.

As you will be aware, section 38(6) of the Planning and Compulsory Purchase Act 2004 sets out that "*If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.*" As the Officer's report acknowledges, the Site is not allocated for development in the Cherwell Local Plan, the Council can now demonstrate a 5 year housing land supply, and the relevant policies in the Local Plan are considered up to date. The grant of consent for the Site would therefore amount to a departure from an up to date Local Plan. As confirmed in the NPPF, local planning authorities may take decisions which depart from an up to date local plan, but only if material considerations indicate that the plan should not be followed. Consequently it is the duty of the Council to identify, consider and weigh in the balance all material considerations before making its decision in respect of the Application.

The Officer's Report fails to identify, assess or otherwise consider a number of material considerations which should properly be weighed in the balance in the determination of this Application and as such, fails to ensure the committee is properly informed in relation to the Application. In particular the Officer's Report does not correctly assess and address the impact of the proposed development on both the local and strategic highway network. Any decision taken in reliance on the Officer's Report will fail to comply with the Council's statutory duty.

Background

The Council will no doubt be aware that on submission of our client's application reference 18/00825/HYBRID (referred to herein as "the Hybrid Scheme"), National Highways (acting as Highways England) objected to the proposal. The objection was only removed on the basis that a planning obligation would be secured in respect of a '*significant financial contribution to Baynards Green and Padbury Roundabout (where the M40 Southbound offslip joins the A43)*'. Development was to be restricted above a specified threshold until the mitigation works have been undertaken (see paragraph 9.73 of the report to committee in respect of the Hybrid Scheme). This was subsequently secured through the section 106 agreement entered into immediately prior to the grant of permission on 8 September 2022.

Similarly Oxfordshire County Council as local highway authority objected to the development until a significant package of highway improvements and further monitoring had been secured for the strategic and local highway network (paragraphs 9.75 to 9.83 of the same report). Financial contributions and physical works to the local highway network, most notably to address traffic impacts at Middleton Stoney, were also secured through the Hybrid Scheme's associated section 106 agreement, dated 8 September 2022 with additional restrictions imposed on development above specific thresholds until packages of improvements have been completed or contributions made towards delivery by the County Council.

The Application's impact on the highway network

The Officer's Report identifies, at section 9, a number of '*key issues*' for consideration in relation to the Application. Whilst these include highway safety, it does not identify as relevant the impacts that the development of 230 dwellings at Heyford Park will have on the strategic highway network; this is instead relegated to an '*other matter relevant for consideration*'. Sections 9.55 – 9.59 conclude that the proposal is considered acceptable in highway safety terms and notes that the local highway authority does not object to the proposal.

The local highway authority's assessment of the highways impacts as reported in the Officer's Report, and Officer's own conclusions as to highway impacts, such as they are, appear to be predicated on the content of the Applicant's submitted Transport Assessment ("TA") dated 15 December 2021.

Our client's consultation response on the Application to the Council dated 6 May 2022 was accompanied by a review of the submitted TA undertaken by an independent highway consultant. This identified a number of flaws with the TA, including that the TA had been based on an assumption that the full suite of mitigation for development at Heyford Park will already have been delivered before the Application scheme comes forward. It is important to note that at the point at which the TA was prepared, consideration of the TA by consultees, and indeed the date of our client's consultation response, the section 106 agreement for the Hybrid Scheme had not been concluded. As such the exact terms of the highway mitigation to be secured, and timing for its delivery, was not settled. The independent consultant's review also noted that various data was missing from the TA, and that the scheme should be required to make a proportionate contribution to mitigation for its impact on the highway network. Our client's consultation response concluded that the concerns identified gave rise to a requirement for urgent re-consultation between the LPA and the Highway Authority.

The flaws with the TA (in particular) were raised again in our client's subsequent letter to the Council of 11 July 2022. This letter additionally drew the Council's attention to the requirement being pursued by National Highways for the imposition of a Grampian style restriction on development pursuant to the Hybrid Scheme by reference to trip generation thresholds until highway mitigation had been delivered. It was pointed out that the relationship between the Application and the Grampian restriction to be imposed in relation to the Hybrid Scheme would need to be considered, including through consultation with National Highways: without such consideration the mitigation secured through the Hybrid Scheme section 106 agreement, would be undermined by unaccounted for trips taking place on the highway network, over and above the trigger levels identified at which the works were required to be complete. The trip generation thresholds had been identified through detailed discussions and negotiations

between our client and the two highway authorities in order to avoid unacceptable impacts on the affected highways.

Once the erroneous assumptions on which the TA was based, and the reality of terms on which highway mitigation was in fact to be secured, had been drawn to the Council's attention, it was the duty of the case officer to satisfy themselves that the conclusions in the document were in fact sound and to seek clarification from the two highway authorities as required. It is apparent from the Officer's Report that no further interrogation of the TA has been carried out following receipt of either of our client's letters, or following completion of the section 106 agreement for the Hybrid Scheme and associated crystallisation of the terms on which the full suite of identified highway mitigation would be delivered. Importantly, since the completion of the Hybrid Scheme section 106 agreement it has been clear that the highway mitigation secured in connection with the Hybrid Scheme, and on which the Application TA relies, will not be in place for at least the next five years. This is clearly a material consideration for the purpose of determination of the Application.

It is clear that the local highway authority has not been asked to review its conclusions on the TA notwithstanding that its response to consultation, dated 11 May 2022, notes that the Transport Assessment is sound on the basis that *'the highway mitigation package that accompanies the Cherwell Local Plan PV5 allocation will be in place when this development comes forward. These development proposals therefore benefit from that highway mitigation package.'* No subsequent consultation responses are reported.

Further, the Officer's Report makes no reference to National Highways having been consulted on the Application despite our client's request in its 11 July 2022 letter for their view to be obtained on the proposal. This was of particular concern to our client in the context of the restriction on development being sought to address highway impact from the Hybrid Scheme. However, on 4 March 2023 the Council published a consultation response from National Highways, but dated 2 September 2022. This response concludes 'no objection' to the Application, again on the basis of the assumption in the TA that the full suite of highway mitigation secured in connection with the Hybrid Scheme would have been delivered before the Application scheme came forward. National Highways' response makes no reference to the basis on which it had withdrawn its objection to the Hybrid Scheme nor the restrictions on development by reference to trip generation rates it had sought and were to be secured through the section 106 agreement to be completed a matter of days later. The late disclosure of this consultee response has prevented our client from raising its concerns as to the conclusions with the Council or National Highways.

Given the Council's involvement with the settlement of the section 106 agreement for the Hybrid Scheme, the clear sensitivities to highway impacts in the vicinity of Heyford Park that had been reported to committee in respect of that scheme and, moreover, that the assumption relating to delivery of the highway mitigation package on which the TA was based has been shown to be incorrect, had been drawn to their attention, it was incumbent on the Application case officer to draw our client's concerns to the attention of both the strategic and local highway authority. It was essential that the views of these statutory consultees were sought to confirm whether their conclusions in respect of the Application remained valid in view of the arrangements and delivery programme for the highway mitigation package, and this addressed this in the Officer's Report. Instead only a summary of our client's consultation response has been set out in the report noting, inter alia, that *'the submitted TA contains a number of material omissions'* without further discussion.

It is apparent that the case officer has not interrogated the TA further, nor undertaken any further consultation with either highway authority to test the soundness of the Application document and confirm their consultation responses. Indeed it appears that the case officer has had no regard to our client's consultation response dated 6 May 2022 in breach of its obligation in article 18 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.

The crystallisation of the terms on which the suite of highway improvements associated with the Hybrid Scheme have been secured constitutes a material change in circumstances relevant

to consideration of the Application and its supporting documentation. It remains the case that the mitigation secured through the Hybrid Scheme section 106 agreement has not been delivered and will not come forward for some time: it is clear that the even the lowest of the trip levels specified in the section 106 agreement has not been reached yet through development at Heyford Park, and later triggers will not be reached until approximately half of the Hybrid Permission has been built out with in some cases additional time for delivery by the County Council following payment of contributions.

We also note that, notwithstanding the indication in the Officer's Report that a financial contribution will be sought towards highways works this is limited to a reference to payment of an unspecified contribution to unspecified highway works. On the basis that a highways contribution is intended to be taken into account in the decision whether or not to approve the application the absence of any detail in this regard breaches the requirements of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended).

Conclusion in respect of highways impacts

The Officer's Report fails entirely to engage with our client's assertion that there are flaws in the TA submitted in support of the Application. The extent to which the Application can and should rely on a suite of mitigation which is not yet delivered and outside the control of the current Applicant, and the impact of the Application development's unaccounted for trips on already congested highways in advance of improvements triggered by trip generation from a separate development are key material considerations for the planning committee. The Officer's Report fails to grapple with these material considerations, despite the need for the assessment of material considerations to support the grant of planning permission which is contrary to an up to date development plan.

It is clear that the conclusions in the TA, based on the incorrect assumption regarding highway mitigation delivery (unless the Application is not to come forward for another five years), have directly led to the conclusions of 'no objection' from the two statutory highway consultees. Given the sensitivity of highway impacts in the vicinity of Heyford Park to the local community, as demonstrated through the assessment of the Hybrid Scheme, it is expected that the committee would place great weight on the conclusions of the two authorities that they have no objection to the current Application. Consequently, once concerns had been raised about the TA, it was incumbent on the officer to undertake further consultation with these statutory consultees to establish (a) whether they agreed that the basis for the TA was flawed, and (b) if it was, whether their conclusion of no objection to the Application changed once they had had an opportunity to consider the terms on which highway mitigation measures are secured through the Hybrid Scheme section 106 agreement. Further, clarity on the basis on which the Applicant will be required to contribute to highway works through a planning obligation is also required if this is to be taken into account as a material consideration in the determination of the Application in accordance with Regulation 122 of the Community Infrastructure Levy Regulations 2010 can be confirmed too.

This information should be reported to the committee in order for a fully informed decision taking account of all material considerations to be made in compliance with the statutory duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 and the requirements of the NPPF. Absent of this further information we consider that the Officer's Report presents an incomplete and misleading assessment of the Application, in highway terms, with an unjustified recommendation to approve. Should the committee resolve to grant planning permission in reliance on the content of the Officer's Report, and the Council proceed to grant permission, we are instructed to prepare a legal challenge against the decision for the Council's failure to comply with statutory duty.

Yours faithfully

Eversheds Sutherland

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CC by email only:
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