

## **Land South of Oughtonhead Lane**

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### **ADVICE**

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#### **Introduction**

1. I have been asked to advise North Hertfordshire District Council (“the Council”) on a number of matters arising out of its consideration of two planning applications relating to the development of Land on the South of Oughtonhead Lane, Hitchin, Hertfordshire, SG5 2NA (“the Site”) submitted by Cala Homes (“the Applicant”).
2. The first application (ref: 23/0555/FP) concerns the creation of an access to the development, and was granted permission by the Council on 2 August 2023 (“the First Application”). The second application (ref: 23/00563/FP) concerns the erection of 43 dwellings, access and associated development (“the Second Application”).
3. Specifically, I have been asked to advise on:
  - a. The merits of successfully defending any appeal that may arise in relation to the Second Application, as well as likelihood of an award of costs being made against the Council.
  - b. What steps the Council should take to progress the Second Application whilst avoiding any concerns of apparent bias, predetermination or fettering of discretion.
  - c. Review the advice provided by Sasha White KC and provide any guidance to assist the Council in making its decision on the Second Application.

## **Relevant Background**

4. The Site is allocated in the North Hertfordshire Local Plan 2011-2031 (adopted 8 November 2022), under Policy HT3 for the provision of 46 homes. The criteria for the allocation are as follows:
  - *Access from Westbury Close or Long Innings [sic]<sup>1</sup> whilst maintaining the general integrity and character of Oughtonhead Lane (Restricted Byway Hitchin 003);*
  - *Consider and mitigate against potential adverse cumulative impacts of sites in this area on Oughtonhead Lane SSSI;*
  - *Retain and reinforce planting along western and southern boundaries to ensure integrity of revised Green Belt boundary; and*
  - *Sensitive design to minimise impacts upon landscapes to the west, including longer views from the Chilterns AONB.*
5. Oughtonhead Lane is a restricted byway.
6. On 7 March 2023, the First Application was submitted for “*Creation of access from Lower Innings to Land south of Oughtonhead Lane*”. The red line location plan submitted with the application just relates to the access over Oughtonhead Lane.
7. On 8 March 2023, the Second Application (ref: 23/00563/FP) was submitted for “*Erection of 43 dwellings, access from Lower Innings, associated internal roads, parking, landscaping, amenity space and open space*”. The red line location plan submitted with this application covered the entirety of the Site, including the access over Oughtonhead Lane.
8. The Transport Statement (“TS”) submitted with the applications noted that the Public Rights of Way Officer had requested that the intersection between the new access and the Lane be designed with priority for non-motorised users of the Lane.<sup>2</sup> However, it explains that this option was not taken forwards because: (a) it could lead to an increased risk of collision where drivers become complacent; and (b) the visibility splays required by car drivers would be significant and require hedgerow clearance along the lane that could impact on its character. Accordingly, the intersection was designed with priority for vehicles, but in such a way to ensure that vehicle speeds

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<sup>1</sup> It is clear that this should read “Lower Innings” rather than “Long Innings”.

<sup>2</sup> Transport Statement, para. 4.2.3.

crossing the intersection are very low, which was considered to be the safest design for all users.<sup>3</sup> The access design was reviewed as part of a Stage 1 Road Safety Audit, and the recommendations made were accepted and incorporated into the proposed design.

9. In a consultation response dated 7 April 2023, the Highway Authority indicated that it did not raise any objection to the proposal subject to the imposition of 2 conditions.
10. The consultation response from the Public Rights of Way Officer provided in July 2023 continued to request vehicles should be subservient to users of the lane at the crossing. However, it did not raise an objection to the proposal.
11. The Officer's Report for the First Application ("OR1") explained that if the access was approved it would serve a residential development for 43 dwellings that was proposed under the Second Application, but the matters under consideration for this application were "*limited principally to the impacts of the proposed access only*".<sup>4</sup> The report considered highways safety at paras. 4.3.7 – 4.3.11, concluding that "*the proposed development and its [sic] design would not result in any unacceptable harm to the safe use of nearby public highways*".<sup>5</sup> Any impact on Oughtonhead Lane was considered at paras. 4.3.12 – 4.3.15, which explained that the justification for priority being given to motorists was acceptable notwithstanding the comments from the Public Rights of Way Officer. OR1 therefore recommended that planning permission should be granted subject to conditions.
12. The First Application went before the Council's planning committee meeting on 27 July 2023. During the course of the debate, an officer from the Highways Authority clarified that, notwithstanding the indication by the applicant and in OR1 that priority would be given to motorists at the intersection with Oughtonhead Lane, recent changes to the Highway Code meant that cars would now have to give way to pedestrians on Oughtonhead Lane.<sup>6</sup>

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<sup>3</sup> Transport Statement, paras. 4.2.4 – 4.2.8.

<sup>4</sup> OR1, para. 4.3.2-4.3.3.

<sup>5</sup> OR1, para. 4.3.11.

<sup>6</sup> Planning committee minutes for the meeting on 27 July 2023, p. 4.

13. The Council accepted the recommendation in OR1 and, in a decision notice dated 2 August 2023, granted planning permission for the First Application subject to 5 conditions.
14. The consultation response from the Highway Authority relating to the Second Application, dated 6 April 2023, also raised no objection to the scheme, concluding that the development “*is not likely to have any significant impact on parking demand, congestion or highway safety on the local highway network*”. However, it considered that the Transport Statement was “*deficient in its review of promoting active travel*” and “*does not properly review the existing highway infrastructure to identify whether any deficiencies that create barriers to vulnerable road users currently exist*”. Accordingly, it recommended that a condition be imposed requiring an audit to be carried out to identify any existing barriers along primary routes and propose potential improvements that would be secured prior to occupation of the development.
15. The consultation response from the Public Rights of Way Officer to the Second Application was largely the same as the first, although a further follow-up response noted that the County Council was currently dealing with an application (ref: NH/235/MOD) to modify the Definitive Map and Statement and had decided to make an order that would confirm new public footpaths across the Site. It explained that these had been incorporated within the design of the scheme, but provided a plan for the information of the local planning authority in the event that there were any changes to layout of the proposed development.
16. The Second Application went to the Council’s planning committee on 15 February 2024. However, after some considerable debate about the acceptability of the access and the permeability of the scheme, it was deferred to see whether the Applicant could secure the provision of an additional pedestrian access through a neighbouring development to the southeast of the Site. A revised site layout plan was produced and consulted upon showing this additional connection.<sup>7</sup> However, the management company for the neighbouring development responded in a letter dated 18 March 2024 refusing to grant pedestrian access and indicating that it was not interested in entering into any negotiations on the matter.

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<sup>7</sup> Drawing No. 23/003/11, revision PL07.

17. The Applicant instructed Sasha White KC (“SWKC”) to advise on various matters relating to the access in conference and then provide a written advice on an agreed set of questions. On 19 March 2024 SWKC’s written advice, dated 18 March 2024, was provided to the Council. It addressed the following two questions:

- a. Question 1 – If the LPA decide to refuse the planning application on the grounds of access what are the prospects of success on appeal?
- b. Question 2 – What would be the prospects of getting a costs award against the LPA in such circumstances?

18. In relation to the first question, SWKC’s advice was that the prospects of success would be around 80%.<sup>8</sup> In relation to the second question, SWKC’s advice was that the refusal would unquestionably be deemed unreasonable and the prospects of an award of costs against the Council would be incredibly strong.<sup>9</sup>

19. The Second Application was due to be taken back before the Council’s planning committee on 21 March 2024. However, the day before the committee meeting, the Applicant’s communications team emailed the committee members individually to provide them with:

- a. A copy of SWKC’s Advice; and
- b. A briefing note addressed to councillors, which purported to provide an overview of the proposal, its benefits and advice on how the issue of the access should be considered.

These documents were not circulated more widely or made publicly available.

20. When it became clear that this communication had taken place, the planning committee’s consideration of the Second Application on 21 March 2024 was deferred so that the Council could take advice on how best to proceed.

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<sup>8</sup> SWKC Advice, para. 10.

<sup>9</sup> SWKC Advice, paras. 10 and 17.

## **Relevant legal framework and principles**

### *Approach to determination of applications*

21. Section 70(2) of the Town and Country Planning Act 1990 (“the 1990 Act”) provides that in dealing with an application for planning permission the LPA shall have regard to the provisions of the development plan, so far as material to the application, and any other material considerations.
22. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) provides 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.
23. The effect of s. 38(6) of the 2004 Act is to create a presumption that planning decisions will be taken in accordance with the development plan, but that presumption is rebuttal by other material considerations. This was summarised by Sullivan LJ in *R (Cala Homes (South) Ltd) v SSLCG* [2011] JPL 1458 at [6] by reference to the judgment of the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447:

Two passages from the House of Lord’s decision explain how the presumption is to be applied in practice. According to Lord Hope (at p. 1450B-D):

"it requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the relevant decision-taker. The development plan does not, even with the benefit of section [38(6)] have absolute authority. The planning authority is not obliged, to adopt Lord Guest’s words in *Simpson v Edinburgh Corporation*, 1960 S.C. 313, 318, ‘slavishly to adhere to it’. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority"

According to Lord Clyde (at p. 1458E-F):

"By virtue of [s.38(6)] if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given"

24. In *R (Ashchurch Rural Parish Council) v Tewkesbury Borough Council* [2023] PTSR 1377, Andrews LJ observed at [33]:

“Subject to any matter which they are legally obliged to take into account, materiality (i.e. relevance) is something for the decision-maker alone to determine. If something is capable of being regarded as relevant to the decision on a planning application, but the planning authority does not take it into account, their decision can only be challenged on an irrationality basis, i.e. on the basis that that factor was ‘so obviously material’ that no reasonable decision-maker could have failed to consider it. That principle is established by a long line of authority including *Samuel Smith* [2020] PTSR 221 ...”

25. Previous decisions are capable of being a material consideration in the determination of planning applications, as was confirmed by the Court of Appeal in *North Wiltshire DC v SSE* (1993) 65 P & CR 137, per Mann LJ at p. 145:

“It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision

in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate.

26. The courts have subsequently confirmed that this principle also applies to local planning authorities determining a planning application (*R (Midcounties Co-operative Limited) v Forest of Dean District Council* [2013] EWHC 1908 (Admin), per Stewart J. at [16]).
27. A lawful fallback position can be a material consideration in decision-making when the decision maker considers that there is a “real prospect” of that alternative development being carried out should planning permission be refused for the proposed development. In this context, a “real prospect” does not necessarily mean probable or likely: a possibility will suffice, although it should be more than merely theoretical (*Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, per Lindblom LJ at [27]).
28. A decision-maker should give the views of statutory consultees considerable weight, and a departure from those views requires cogent and compelling reasons (*Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), per Beatson J. at [72]).

#### *Apparent bias / predetermination*

29. The test that will be applied when determining an issue of apparent bias is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased (*Porter v Magill* [2002] 2 AC 357, per Lord Hope at p. 494).
30. When considering apparent predetermination, the test is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real risk that minds were closed. In considering this question, it is important to bear in mind that councillors are not in a judicial or quasi-judicial position, and the importance of appearances is more limited than in those circumstances. There is a distinction between pre-disposition and pre-determination and, unless there is clear evidence to show that there was a closed mind, prior observations about favouring a



particular decision will not be sufficient to show apparent pre-determination (*R (Lewis) v Redcar and Cleveland BC* [2009] 1 WLR 83, per Pill LJ at [66] – [69] and Rix LJ at [95] – [98]).

31. The distinction between pre-disposition and pre-determination is now also reflected in s. 25 of the Localism Act 2011, which provides that, in the context decisions by a member of a relevant authority, a decision maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because (a) the decision maker had previously done anything that directly or indirectly indicated what view the decision maker took, or would or might take, in relation to a matter, and (b) the matter was relevant to the decision.
32. It would be contrary to the principles of procedural fairness and natural justice for a decision-maker to take information into account which has not been made available for other interested parties to comment on (*Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 W.L.R. 1255 at p. 1260).
33. It is important that a decision maker is not influenced by any representations of which the objectors were unaware, and it is equally important that the appearance of such unfairness is not created (*Wilkinson Properties v Kensington and Chelsea RLBC* [2011] JPL 1083).

## **Advice**

### *Scope of the application*

34. In the first instance, it is important to clarify the scope of the Second Application. For the avoidance of any doubt, it is important to emphasise that this application also includes, and seeks planning permission for, the access to the site from Lower Innings. The description of development refers to “*access from Lower Innings*”. Moreover, the red line “Site Location Plan” (Drawing No. 23/003/010) clearly includes the access from Lower Innings over Oughtonhead Lane. This is the plan which identifies the land to which the application relates (per Article 7(1)(c)(i) of the Town and Country Planning (Development Management Procedure) (England) Order 2015). This also accords with the guidance in the PPG under the sub-heading “*What information should be included on a location plan*”, which states:

“...The application site should be edged clearly with a red line on the location plan. It should include all land necessary to carry out the proposed development (eg land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around buildings)...”

35. Therefore, even though the Council has already granted planning permission for the vehicular access to the Site through its determination of the First Application, the principle of access is also included within the Second Application. In other words, the proposal has not simply been split between two separate applications. Instead, the Second Application overlaps with (and duplicates) the First Application insofar as it relates to the vehicular access to the Site. This is important for two reasons.

36. First, it would be wrong to proceed upon the basis that the Second Application is not also seeking planning permission for vehicular access to the Site and that this issue does not need to be considered. Clearly, the fact that the Council has recently granted planning permission for that access will be a highly material consideration (discussed further below), but, in my opinion, it would be wrong to approach the Second Application on the basis that this issue is not open for consideration or that “*material planning weight cannot be given to refusing the scheme on the principle of the access arrangements*”, as the briefing note provided by the Applicant suggested.<sup>10</sup> In this respect, I also disagree with SWKC’s<sup>11</sup> advice that the principle of the access is not for consideration now and that access is not a material consideration when considering the Second Application.

37. Second, it is important to ensure that all necessary conditions imposed on the first planning consent are also imposed on any planning permission that is granted pursuant to the Second Application. Although both planning applications are consistent with each other and could be implemented together, the second planning permission relating to the whole site could be implemented and permit access to the development without implementation of the first planning permission – i.e. if pre-commencement conditions were not discharged. In this respect, if the condition relating to the approval of detailed technical drawings is not included on any planning permission granted pursuant to the Second Application, the condition requiring installation of the approved access should

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<sup>10</sup> Applicant’s Briefing Note, p. 2.

<sup>11</sup> SWKC, paras. 8.2 and 8.3.

at least expressly refer to first consent (ref: 23/00555/FP), for the avoidance of any doubt. Furthermore, in my view, it would be sensible to re-impose condition 5 (relating to use of the access by construction traffic) on any consent granted pursuant to the Second Application.

38. Furthermore, the Second Application also includes other points of access beyond the primary vehicular access to Lower Innings. In addition to this, it also includes three further pedestrian access points onto Oughtonhead Lane. Clearly, the acceptability of these further points of access, or indeed the need for any additional points of access, would not have been considered under the First Application, as it was simply looking at the access proposed from Lower Innings in isolation. It was not considering what access requirements the housing development might have more generally, whether it would have an unacceptable impact on the highway network, or whether it would be well-connected to the surrounding area.

*The merits of successfully defending any appeal that may arise in relation to the Second Application, as well as likelihood of an award of costs being made against the Council.*

39. In considering this question, I will focus on the issues of access and permeability, which are the two issues that have been drawn to my attention. I am not aware of any other issues relating to the proposed development which have been identified by officers or members as justifying a potential reason for refusal.
40. On the basis of all the information that is currently before me, I consider that it would be very difficult for the Council to successfully defend a reason for refusal relating to the principal access to the Site. There are several reasons for this:
- a. First, the Local Plan allocation for the Site (Policy HT3) expressly indicates that access for the development will be provided from either Westbury Close or Lower<sup>12</sup> Innings. Furthermore, the quantum of development that is proposed does not exceed that provided in Policy HT3, and would presumably not have any greater impact on the access from this location than was anticipated when the Site was allocated.

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<sup>12</sup> When the typographical error referring to “Long Innings” is corrected.

Therefore, the proposed access accords with the principal policy in the development plan, which directly relates to the development of this Site.

- b. Second, the Highways Authority considers that the proposed access is acceptable and has not objected to it. As statutory consultee on this issue, the views of the Highways Authority should be given considerable weight, and any departure from them would require cogent and compelling reasons (*Shadwell Estates Ltd* at [72]). Clearly, if the Highways Authority had concerns relating to the proposed access after considering the position in more detail following receipt of the planning application, that would represent a material consideration that may justify a departure from Policy HT3 and determination in accordance with the development plan. However, that is not the case here.
- c. Third, the Council has already granted planning permission (ref: 23/00555/FP) for the access from Lower Innings. That very recent decision was taken by the Council in the knowledge that the access would serve the development of the Site for 43 dwellings,<sup>13</sup> and there does not appear to have been any material change in circumstances which would justify a different approach to the Second Application (subject to my comments below seeking clarification on the issue of priority). The importance of consistency in decision-taking is a material consideration which should be taken into account, and it would be necessary to provide clear reasons to explain why a different approach should be taken to the Second Application (*North Wiltshire DC*, per Mann LJ at p. 145). Furthermore, I agree with SWKC that there would be no planning constraint to prevent the Applicant from creating the access pursuant to the first consent once the relevant conditions have been discharged. This may therefore represent a lawful fall-back position, if there is sufficient evidence to demonstrate that there was a real prospect, or possibility, that the Applicant would implement this consent even if planning permission was refused under the Second Application (*Mansell*, per Lindblom LJ at [27]). I have not seen evidence on this point, but it seems reasonable to think that the Applicant would in order to support any further applications or enhance their prospects on appeal.
- d. Fourth, there would appear to be very limited basis for objecting to the primary access. One potential objection might have related to the decision to give priority to vehicular traffic using the access, rather than other non-motorised users of

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<sup>13</sup> OR1, paras. 4.3.2 – 4.3.3.

Oughtonhead Lane, contrary to the request from the Public Rights of Way Officer.<sup>14</sup> However, in light of the advice provided by the officer from the Highways Authority at the first committee hearing, it now appears that priority will in fact be given to the users of Oughtonhead Lane. Those instructing me should check that this is indeed the case, as it is contrary to the position which had been set out in the application documents and OR1,<sup>15</sup> and this advice clearly informed the decision that was taken by the committee regarding the First Application. If the advice was incorrect, then that may well represent a material change in circumstances from the Council's previous consideration of the matter, although it would now need to be considered in the context of that extant consent. It is also important to check that the application documents and consultation responses are consistent with the approach of giving priority to users of Oughtonhead Lane, as the Applicant had previously advised that this could give rise to highway safety issues and lead to a much more significant loss of hedgerow for visibility splays. Nevertheless, subject to these points of clarification, there does not appear to be any serious basis for objecting to the primary access.

41. At the planning committee meeting on 15 February 2024, a number of members raised concerns about the permeability of the Site and its integration into the wider community through non-vehicular points of access. This issue was obviously not considered as part of the First Application, and does not seem to be addressed in SWKC's advice. However, in my view, the prospects of successfully defending a reason for refusal based upon these concerns would also be low for the following reasons:
- a. Policy HT3 does not specify any requirement for an additional pedestrian access to Bowlers End at the southeast of the Site, or indeed any additional pedestrian connections.
  - b. The Transport Statement considers connectivity at section 3.3, on pages 14 – 19. This indicates that there are a range of facilities within reasonable walking distance of the Site.<sup>16</sup> Many of the desire lines, including the town centre, are located to the east of the Site and can be accessed via Oughtonhead Lane.<sup>17</sup>

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<sup>14</sup> See Consultation Response from the PROW Officer.

<sup>15</sup> OR1, paras. 4.3.12 – 4.3.15.

<sup>16</sup> Transport Statement, paras. 3.3.6 – 3.3.11.

<sup>17</sup> Transport Statement, Figure 3.3 on p. 16.

- c. The development is not limited to a singular means of access, and provides a number of access points onto Oughtonhead Lane, including one in the northeast corner, which would appear to provide convenient access to the town centre and other facilities located to the east and southeast.
- d. Although the Highways Authority considered that the TS was deficient in its review of promoting active travel and fails to review and improve existing non-vehicular routes, it did not raise an objection on this basis because it considered that it could be overcome through the imposition of a condition.<sup>18</sup>
- e. The Council's planning officers did not raise any concerns relating to this issue in OR2, although the point does not appear to have been considered in any real detail.
- f. It now appears that there is no prospect of an additional pedestrian link to the Southeast of the proposed development, as the Management Company for Bowlers End has confirmed that they have refused to grant access and are not interested in entering into any negotiations. Accordingly, it is not simply a question of whether appropriate opportunities to promote sustainable travel have been taken up.<sup>19</sup> Instead, the question is now whether the development of the Site is unacceptable because there is no scope for an additional pedestrian access across private land to the southeast. Were that the case, there would, essentially, be no scope to develop this allocation at all. In my view, it would be difficult to defend this position at appeal, especially since Policy HT3 does not provide any indication that the allocation is predicated on such a requirement.

42. It follows from the reasons set out above that, in my view, the Council would be at risk of an adverse award of costs being made against it in the event that it refused the Second Application on the grounds of access or permeability. The prospects of such an award being made would depend on the particular circumstances of the refusal and any evidence presented to support it at appeal. However, on the basis of the information currently before me, I consider that the prospects of any potential application for costs by the Applicant in the event of a refusal relating to the primary access would appear strong for the reasons that are already set out at paras. 15 – 16 of SWKC's advice.

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<sup>18</sup> See the proposed condition (No. 10) requiring a detailed audit of the existing local cycle and pedestrian network, so that a scheme of potential improvements can be imposed and implemented.

<sup>19</sup> Per paras. 108(b) and 114(a) of the NPPF.

43. If the Council were to refuse permission on grounds relating to permeability, I consider that the Applicant would be less likely to succeed in an application for costs on the basis of unreasonable conduct for the following reasons:
- a. The Council has not previously considered this issue as part of the First Application, and therefore it does not give rise to any potential inconsistency in approach or failure to have regard to an extant consent that could be implemented. This is an important difference.
  - b. The Highways Authority has identified particular concerns with the TS, which are relevant to this issue. Although the Highways Authority considered that these could be overcome through the imposition of a condition, it would not be unreasonable for the Council to take a different view if they are not satisfied that these issues can necessarily be addressed through the subsequent audit, especially in the absence of a Grampian condition requiring it to be carried out before any development takes place.

*What steps the Council should take to progress the second application whilst avoiding any concerns of apparent bias, predetermination or fettering of discretion.*

44. It is clearly regrettable that the Applicant sent private correspondence to the individual members of the Council's planning committee containing SWKC's advice and a briefing note the day before it was due to determine the Second Application. That should not have happened and the Council was right to defer its consideration of the application. Had the Council proceeded to determine the Second Application on 21 March 2024, I consider that its decision would have been susceptible to challenge by way of an application for judicial review on the grounds of procedural unfairness or apparent bias.
45. Nevertheless, I do not consider that this should prevent the matter being returned to the same planning committee for re-consideration, providing that the following steps are taken:
- a. All information sent to members of the Committee, including the Briefing Note and SWKC's advice, should be published on the Council's planning portal, so that it is publicly available for anyone to consider and make representations on,

should they wish to do so. I understand that there is some uncertainty over whether legal privilege and confidentiality relating to the advice has been fully waived, or whether it was only provided on a limited basis. Therefore, before the advice is disclosed more widely, this point should be clarified with the Applicant.

- b. My advice should also be made publicly available, so that it is clear that the Council has taken its own independent advice on the matters raised, and any difference of opinion is apparent and clearly set out.
- c. The Officer's Report for the Second Application should clearly set out the scope of that application and advise members accordingly. In particular, it should not seek to constrain the discretion of members to consider issues relating to the access. However, it should make it clear that the Council's previous decision on the First Application and the consultation response from the Highways Authority represent important material considerations, and cogent and compelling reasons would need to be provided to justify a change in approach when determining the Second Application.

46. If there is any issue with disclosing the documents provided to the Committee more widely, including SWKC's advice, then another option may be take the decision back to a different planning committee, or one that is composed of different members. However, it is not clear whether this would be easy to achieve, and care needs to be taken to avoid preventing members from taking part in the consideration of an application unless there is a good justification for doing so.

47. Providing that these steps are taken, I do not consider that a fair-minded and informed observer, having considered all the relevant facts, would conclude that there was a real possibility that the planning committee was biased or had approach its decision with a closed mind (*Porter* at p. 494 and *Lewis* at [66] – [69]). Nor do I consider that there would be any procedural unfairness or breach of natural justice which would have caused any prejudice to those objecting to the proposed development.

#### *Review of SWKC's Advice*

48. As will be clear from the above, I largely agree with SWKC's advice. The key differences in opinion are:



- a. I do not agree that the principle of the access is not open for consideration as part of the determination of the Second Application, or that it does not represent a material consideration (as explained above at paras. 34 - 38).<sup>20</sup>
- b. Although I agree that if the Second Application were refused on the grounds of the primary access the prospects of an award of costs being made against the Council on appeal would be strong, I would not go as far as saying that I cannot think of a stronger case.<sup>21</sup>
- c. SWKC does not appear to have considered the merits of a refusal based upon poor permeability and connectivity to the wider area via non-vehicular modes of transport. Although I consider that the Council would ultimately be likely to lose an appeal on this basis too, in my opinion the prospects of an award of costs being made against the Council would be much lower.

*Guidance to assist the Council on next steps and progressing with the Second Application*

- 49. In the first instance, the Council should seek to clarify whether it is correct that priority will now be given to users of Oughtonhead Lane at the intersection with the vehicular access to the Site, as indicated by the Highways Authority when the planning committee considered the First Application, and whether this has any material implications for the assessments carried out in the application documents and the consultation responses that have been provided to date. Once clarification has been obtained, the position should be clearly set out in the next report to committee, for the avoidance of any doubt.
- 50. The Council should follow the steps which I have set out at paragraph 45 - 46 above and the Applicant should be given the opportunity to respond to any points raised in my advice.
- 51. The officer's report should also address the issue of permeability and connectivity in more detail now that this has been identified as a point of potential concern. In doing so, consideration should be given to whether the proposed condition requiring an audit of the local cycle and pedestrian network to identify potential improvements prior to occupation of the development is sufficient to address any concerns relating to the principle of non-vehicular accessibility and connectivity to the wider network.

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<sup>20</sup> Cf. SWKC's advice, paras. 8.2 and 8.3.

<sup>21</sup> Cf. SWKC's advice, para. 17.

52. Clearly, the Council cannot prevent separate associated applications being submitted to it. However, where that happens, those applications should ideally be determined at the same time by the same committee to avoid the complications that have arisen in the present case.

### **Conclusion**

For the reasons set out above, it is my view that:

- a. The Second Application also seeks planning permission for access into the Site, including vehicular access, and therefore these issues and any relevant considerations relating to them cannot be ignored or put to one side when determining the Application. Nevertheless, the planning committee should also have regard to the decision relating to the First Application and the existing consent, which are highly material considerations. Insofar as the two applications are alike and address the same issues (i.e. the primary vehicular access), clear reasons would need to be provided to justify a different approach to the Second Application based upon a material change in circumstances.
- b. On the basis of the information that is currently before me, I agree with SWKC that it would be very difficult for the Council to defend a reason for refusal on the grounds of access, particularly in relation to the primary access into the Site. A reason for refusal based upon a lack of permeability and accessibility via non-motorised forms of travel would be less difficult, although in my view it would still be likely to be unsuccessful at appeal.
- c. It follows that, on the basis of current information, the Council would be at risk of an award of costs being made against it in the event that it were to refuse the Second Application on the grounds of access or a lack of permeability, although the risk would be much greater if the refusal related to the primary access which the Council has already permitted following its determination of the First Application.
- d. The documents sent to members should all be made publicly available, providing that legal privilege has been fully waived, so that any other parties objecting to the development have the opportunity to consider and comment on them. My advice should also be published, and any differences of opinion should be clearly set out in the subsequent officer's report / update when the Second Application is taken back to committee, so that members are clear about how they should approach the issue of the

access. If this is not possible, consideration should be given to whether the application could come before a committee that is not constituted of any members who were previously sent documents by the Applicant. Providing that these steps are followed, I do not think that there would be a material risk that the determination of the Second Application would be tainted by procedural unfairness or apparent bias.

- e. I largely agree with the advice provided by SWKC, with the exception of the key differences set out at paragraph 48 above. The main difference is that I do not agree that access to the development is not a material consideration in the determination of the Second Application.
- f. The Council should follow the steps set out above at paragraphs 45 - 46 and 49 – 51 in order to progress the Second Application.

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**17 May 2024**