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Your ref: DM/25/0445

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FAO Members of the District Planning Committee

BY EMAIL ONLY: to Committee Members

CC: joanne.fisher@midsussex.gov.uk;
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Dear Members of the District Planning Committee

RE: Outline application for up to 80 dwellings with associated landscaping, open space, infrastructure and vehicular and pedestrian accesses at Colwell Farm, Lewes Road, Haywards Heath, West Sussex

Applicant: Miller Homes Ltd

Ref. DM/25/0445

1. We are instructed by Ingrid Marson and Ian Howard of 90 Lewes Road, Haywards Heath, RH17 7SX. Our clients live adjacent to the application site and thus are directly affected by this application.
2. On 21 August, the above application will be considered by the District Planning Committee. The Planning Officer ("PO") has recommended approval. We are writing to express our concerns about the recommendation and the assessment of policy compliance. Our reasons are set out below. It is submitted that in light of the points raised, the application should be refused permission.
3. Since the Council is unable to demonstrate a five-year supply of deliverable housing sites, the tilted balance applies and the Council has to weigh up the positive benefits of the scheme against any harm that may be caused and conflicts with the development plan policies and the NPPF.
4. Although the PO recognises that there is significant non-compliance with the development plan as a whole and with several specific policies, for the reasons set out below, it is our view that the Planning Officer's assessment of the harms is flawed and that she also understates the conflicts with the development plan.
5. In this context, it is important to remember that many of the assessments (for example of the degree of harm or benefit and the weight to be given to these factors, together with the balancing exercise itself), whilst based upon the advice provided, are subjective. Although the PO has expressed her opinion, it is open to the members of the planning committee to reach their own judgment. They are not obliged to accept the PO's opinion (and in fact they

are required to form their own opinion which may or may not match the opinion of the planning officer).

Heritage

6. The proposed development is sited in the setting of designated and non-designated assets. These include Colwell House, a grade 2 listed, 19th century home (no. 1354956) to the northeast of the site. The Council's conservation officer noted that:

'..the level of harm caused to be around the mid-level, to an asset of a mid-level of interest in the local context. Again, this will not be purely through visual impact, but also in terms of noise, activity and light levels. In the case of the Barn, the level of impact is also affected by the likely historical relationship between the former farm building and the farmlands which were part of the farmstead.'

7. The Officer's Report ("OR") accepts that permitting development at this site would breach policies DP34 and 35 of the Mid-Sussex Development. This harm would fall into the less than substantial category.
8. The PO then goes on to give this harm significant weight in the planning balance. This is incorrect, in fact, under NPPF paragraph 212 this harm should have been given great weight. There is no evidence that the PO has given this harm great weight. The Planning Committee should do so.
9. Similarly, while the OR notes that special regard¹ should be given to the desirability of preserving listed buildings and that settings, this is not explained.²
10. As well as harm to the listed building, there is also harm to the Conservation Area. The Council's Conservation Officer notes that

"I would consider that the impact on the Conservation Area is likely to be one of less than substantial harm, at around the mid-high range of that scale" (paragraphs 12.99 of OR).

11. There is also harm to a non-designated heritage asset (see paragraph 12.108)
12. In summary, there are three aspects of heritage harm – to the setting of the listed building, to the conservation area and to a non-designated asset. These all need to be taken into account in the assessment.
13. Curiously, the planning officer carries out the assessment of benefits of heritage harm at paragraph 12.104, before her consideration of non-designated assets. She assesses the harm to the listed building and the conservation area against the development's combined benefits and concludes:

¹ See 12.90 in relation to s. 66 of the Listed Building and Conservation Area Act 1990 and at 12.91 in relation to Policy DP34.

² Courts have interpreted "special regard" as giving "considerable importance and weight" to the desirability of preservation: *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303; *R (on the application of Austin) v Wiltshire Council* [2017] EWHC 38 (Admin) at [42].

“in the balance between the less than substantial harm and the public benefits of the proposal, it is considered the public benefits do outweigh this harm.”

14. In our view this is not the correct approach. The Council should be assessing the combined harms to the various heritage assets (giving that harm great weight and having special regard³ as appropriate) alongside the other harms and policy conflicts and balancing those harms against the combined benefits. That is what the committee is invited to do.
15. In summary, the Committee should:
- give great weight to the harm to the Listed Building;
 - have special regard to the desirability of preserving listed buildings and their settings;
 - note the combined harm (the listed building, the conservation area and the non designated asset);
 - note the policy conflicts; and
 - assess all of these factors alongside other harm when considering the balance of benefits against harms.

Landscape

16. This is addressed at 12.65 onwards and, as the PO acknowledges, is relevant to policies DP12 and E5 as well as NPPF 187. The OR refers to the comments of the Landscape Consultant:

(12.74) “The character effects of the countryside transition to the south and into the wider countryside will be impacted by the development.’

(12.75) “the assessment has neglected to appreciate that this also visually and perceptually separates the site from the surrounding residential extension to Haywards Heath and provides a strong sense of place within an undeveloped area of the countryside. this development would constitute a major change to the key character of this site resulting in a permanent alteration where the baseline situation will be substantially changed”

(12.76) In winter months, views may be obtained of the residential development which would impact the sense of entering the countryside from the built-up edge of Haywards Heath.’

(12.80) [they] ‘would have judged the effects on the site and immediate context as higher than medium. We judge that this development would constitute a major change to the key character of this site resulting in a permanent alteration where the baseline situation will be substantially changed.’

17. These are forthright comments which are echoed in many of the comments of the Conservation Officer (“it is clear that the development would have a fundamental impact on the character of the site, which would become suburbanised” (Report Pack p154)). However, they are not reflected in the PO’s own assessment, despite her saying at paragraph 12.82 that she agrees with the Landscape Consultant’s assessment.

³ See 12.90 in relation to s. 66 of the Listed Building and Conservation Area Act 1990 and at 12.91 in relation to Policy DP34.

- a. the PO refers to “some adverse impact on the character of the countryside” and suggests that “the impact of the proposed development on the character of the countryside has been mitigated to a reasonable extent”. She does not refer to major, permanent or substantial changes in the key characteristic of the site (as the Landscape Consultant does).
- b. She does not address the conflict with Policy E5: (new development will only be permitted if it ‘would not unduly erode the landscape character of the area or its ecology’). She says at 13.22 that the application complies with some, but not all the criteria within policy E5. It is very hard to see how, in light of the Landscape Consultant’s views, there can be any other conclusion that there is a clear breach of policy E5.
- c. The PO also makes the comment at 12.81 that:

It is clear that with any green field development there will be a significant change at the local level from that of an undeveloped landscape to a housing development. It is accepted that many people would regard this as a significant adverse impact on the landscape.

It is not clear whether the PO would regard this as a significant adverse impact on the landscape but the wording suggests that she would not. If not, that may explain her assessment and may provide a further reason why the members of the committee might choose to depart from her judgment.

- d. Paragraph 12.81 of the OR continues:

“In order to meet the housing needs of the District, there will inevitably be a need to develop green field sites (this is particularly the case in a predominantly rural authority such as Mid Sussex). This cannot, however, be an argument on its own to stop the incremental development of settlements, especially in view of the national objective, as set out in paragraph 61 of the NPPF of significantly boosting the supply of houses.”⁴

The planning system is intended to regulate where development takes place and the policies set out the criteria to be used. The suggestion that the development on green field sites such as this is inevitable and so landscape considerations should be given less weight is inappropriate.⁵

18. In summary, the Committee members are reminded that although the PO has expressed her own opinion on the extent of landscape harm, it is open to the members of the Planning Committee to reach their own judgment on this. They are not obliged to accept the PO’s opinion (and in fact they are required to form their own opinion which may or may not match the opinion of the PO). For the reasons set out above we suggest that it would be open to the Committee members to conclude that:

⁴ This argument is also used in the assessment of weight to be given to landscape impact at 13.9.

⁵ This is particularly the case where the site is acknowledged to be outside the development boundary and the Council’s failure to demonstrate a five year housing supply is (see OR 12.169) is due to a change in the formula and the need for an appropriate buffer. Were it not for this (and the application of the tilted balance) it is very unlikely that an application on this site would have any prospect of succeeding.

- a. There would be a significant impact resulting in major, permanent and substantial changes in the key characteristic of the site;
- b. There is a breach of Policy DP12;
- c. The development would unduly erode the landscape character of the area in breach of E5; and
- d. The suggestion that housing development on (this) green field site is in some way inevitable should be disregarded and should not be taken into account in assessing land.

Trees and Hedgerows

- 19. The applicant's Arboricultural Impact Assessment accepts that the proposed development intends to cut down 176 trees. The Council's Tree Officer is very clear that she has concerns about the significant loss of trees on such a small site which includes mature oak trees which "cannot be compensated by replanting, as the ecological value of mature oak trees would take years to develop from newly planted specimens" (see OR paragraph 12.175).
- 20. The Tree Officer notes in conclusion that "Would it not be possible to retain more of the category B trees from within the development or access from another location to prevent the felling of these mature trees? I can't support the felling of mature trees and for the reasons stated above, I object to this proposal."
- 21. The PO suggests that "replacement planting could come forward to mitigate such a loss". However, there is no condition requiring this and in fact the BNG assessment refers only to the replacement of 126 trees suggesting that at least 50 will be permanently lost.
- 22. The PO also suggests that "the proposal is thereby considered to comply with Policy DP37" (paragraph 12.179). This is in direct contradiction with the Tree Officer's opinion and it is very difficult to understand how there can be any conclusion other than that there is a clear conflict with Policy DP37.
- 23. In summary:
 - a. There will be an unacceptable impact on trees (with the permanent loss of 50 trees);
 - b. There is a clear conflict with Policy DP37;
 - c. The damage in respect of the oak trees cannot be compensated for by planting
 - d. The PO has not given appropriate weight to these aspects.

Ecology

- 24. The PO has recognised that there will be negative impacts to the rich ecology of the development site which has been left fallow since the 1980s. Although the ecology officer has accepted the proposals subject to mitigation conditions the following points should be noted:
Bats

25. The proposed plans would result in the destruction of mature trees, and a loss of foraging corridors and potential roosting sites for numerous bat species. Species recorded on-site include the rare Barbastelle bat which was recorded on site on multiple occasions during the applicants' survey. Four trees located on site were identified in the applicants' survey as potentially support roosting bats, all of which will be removed under current proposals.

Reptiles

26. Slow worm, common lizard and grass snake were identified on-site during the applicants' surveys. Our clients have suggested that the surveys carried out significantly underestimate the number of slow worms, common lizards and grass snakes present on-site.
27. This may be partially explained by the inadequacy of the reptile survey. The National Reptile Survey Guidance, produced by Amphibian and Reptile Conservation, is clear that the timing of surveys should be split across two sampling periods: (i) March to June, and (ii) mid-August to mid-October. The EIA shows that the applicants' survey was only carried out from April - May 2024. Natural England's Standing Advice is clear that authorities can refuse planning permission if surveys for protected species do not provide enough evidence to assess the likely negative effects.
28. The applicant proposes retaining translocated reptiles in a narrow strip of grass and woodland on the edge of the site. However, ecological guidelines⁶ state that translocated reptiles need to be moved to a suitable habitat with a buffer zone.

Badgers

29. There are two entrances to an active badger sett located on-site. The EIA states at paragraph 5.2.2.6 that "works within 30m of the sett will result in likely negative impacts at the county level", for instance, by causing disturbance impacts to the clan, distress to the animals and possible abandonment of the sett. However, the mitigation proposed in the EIA and accepted in the OR is to impose a 20 metre, rather than a 30 metre, buffer around the sett.

Dormice

30. Hazel dormice were found on the application site during the applicants' survey. The proposed development will require the removal of hedgerow, mature trees and bramble scrub, and thus will result in the destruction of vital habitat for hazel dormice. Please note that even though the PO recognised that a European Protected Species Mitigation Licence (EPSML) will be required for any works impacting the hedgerows, mature trees and bramble scrub where dormice are living, this has not been recommended as a condition, despite an EPSML needing to be obtained and submitted to the LPA before commencement.

⁶ "It is important to ensure that if in-situ measures are considered, sufficient habitat is set aside to allow the persistence of a viable population. An important consideration is the inclusion of buffer zones around suitable habitats defined within the planning application. These should help to protect the animals from disturbance by humans, their pets, recreational usage and other damaging actions." 9.2.2 Mitigation Standards, Page 107, *Herpetofauna Workers' Manual*, Gent & Gibson (2003) <https://data.jncc.gov.uk/data/9d7da8c4-9d76-4b65-8263-6b925b3433a4/Herpetofauna-Workers-Manual-2003.pdf>

Biodiversity Net Gain (BNG)

31. The PO suggests at paragraph 13.13 that the 10% BNG gain is a benefit that should be weighed in the balance.

“Whilst mandatory, the fact that the proposal will deliver a net gain in biodiversity (in this case meeting the mandatory 10%), should be given positive weight in the planning balance.”

32. We do not suggest that this factor should be given no weight. However, it is significant that:

- a. There will inevitably be a BNG loss on this site so that some of the BNG will have to be delivered off site.
- b. The development involves the loss of 176 trees and (although the PO suggests that there can be a condition requiring replacement planting) the proposal is to plant only 126 individual trees (according to the applicant’s BNG report). This includes oak trees which cannot be compensated for by replanting. This is biodiversity harm.
- c. There will be significant permanent loss of hedgerow including at the site frontage as noted in the Landscape assessment (paragraph 12.98). This is biodiversity harm.
- d. There will be harm (albeit mitigated) to habitats and species at this site (as set out above).

33. The Committee members are to give limited weight to the BNG benefit in light of these site specific harms.

Planning Balance

34. There is a further point which should be taken into account by the committee. The extent of the housing shortfall will ordinarily be a relevant and material requirement. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development.⁷ In this case it is clear from para 12.19 that the shortfall is a result of a methodological change and appears to be caused by the lack of an appropriate buffer. The precise extent of the shortfall is not known but it would appear that it is relatively small. This is another factor which the planning committee should give weight to.

35. Further to the issues illustrated above, as noted above, when the PO comes to consider harms caused by the development, she repeatedly weighs up individual harms against all the benefits combined which gives an inaccurate sense that each harm is being completely outweighed by a whole range of benefits rather than all the harms and benefits being weighed up together in the planning balance (see paragraphs 12.84, 12.104 and 13.19 for example).

⁷ *Hallam Land Management v SSCLG Court of Appeal* [2018] EWCA Civ 1808.

36. The assessment should consider the benefits and harms in the round.

Conclusion

37. In conclusion we note that:

- a. The PO recognises that the application does not comply with the development plan as a whole or with several specific policies. Nevertheless, the PO has failed to note the clear breaches of policies DP37 and E5.
- b. The weight given by the PO to various harms does not reflect the extent of the harm identified by other Council officers (for example the Tree Officer, the Conservation Officer, and the Landscape Officer). The Committee should note the views expressed by those other officers when assessing the weight to be given to those harms.
- c. The PO has also failed to apply the proper tests to heritage harm in that she has not given great weight to the harm to the listed building. She has not explained the meaning of having "special regard" to the impact on listed buildings.
- d. The PO has not included the harm to the non-designated assets in weighing up the planning balance.
- e. The PO has provided inappropriate advice about the inevitability of development on green field sites in the context of the landscape assessment.
- f. There are clear ecological impacts which have not been adequately assessed or mitigated. The need for an EPSML for working on areas that dormice are living has not been suggested as a condition by the PO.⁸
- g. The extent of the housing shortfall should be taken into account.
- h. On occasions the PO has weighed individual harm against combined benefits rather than assessing all harms and benefits together in the balance.

38. It is accepted that there would be benefits to the application, primarily that up to 80 houses would be constructed, some affordable housing would be built, some modest economic benefits, and some benefit of meeting the mandatory biodiversity net gain (although limited as the applicant is forced to rely on off-site credits).

39. Nevertheless, the committee can lawfully reach its own assessment and does not have to accept the PO's assessment of the harm and benefits of the application and can instead choose to refuse the application. We submit that the harms of the application, including the conflict with the development plan and specific policies, the widespread loss of trees, hedgerows and bramble scrub (and resulting harm to ecology), the harm to the landscape, and harm to heritage assets, provide valid reasons for refusal.

Yours faithfully



RICHARD BUXTON SOLICITORS

⁸ Please note that as we have only recently been instructed, we have not had time to review all of the proposed conditions to check that all of the recommendations have been incorporated.