

Kirklees Council
PO Box B93
Civic Centre 3
Huddersfield HD1 2JR

Attn Victor Grayson, Planning Case Officer

By email only (dc.admin@kirklees.gov.uk)

29 April 2021

Dear Kirklees Council

**Land East of Leeds Road, Chidswell and Land South of Heybeck Lane, Chidswell
Planning applications with references 2020/60/92331/E and 2020/60/92350/E**

Introduction

1. We act for _____ and have been instructed to review the application documents for the above applications for outline planning permission on our clients' behalf. We have identified a number of legal issues with the applications that must be rectified prior to determination of the applications. In this letter we will refer to the development proposed by application reference 2020/60/92331/E for a mixed use development of up to 1,354 dwellings and 35 hectares of employment space, among other things, as the "Mixed Use Scheme", and to the development proposed by application reference 2020/60/92350/E for up to 181 dwellings as the "Residential Scheme".
2. This letter sets out our clients' initial concerns following a preliminary review of the planning application documents and their position is reserved as regards any further representations that they may seek to make following a more detailed review. In particular, they have instructed transport and ecology specialists to review the transport and ecology evidence submitted in support of the applications and may seek to make representations as to the adequacy of the assessment of such impacts in due course. Such representations will be made as soon as possible, but if the council is minded to refer the matter to committee prior to receiving our clients' further comments, please let us know so that we can ensure that they are submitted in time for the officer to refer to them in his report to committee.

General approach to environmental impact assessment

3. As you know, the Mixed Use Scheme and the Residential Scheme comprise part of the same allocation in the local plan, MXS7. They are proposed by the same applicant, C.C. Projects, a subsidiary company of the Church Commissioners for England, whom we assume are the freehold owners of both application sites. The applications were received by the council on consecutive days (21 and 22 July 2021) and were prepared by the same team

of consultants, led by Deloitte LLP. A single Transport Assessment by Pell Frischmann has been submitted in support of both applications.

4. It is clear on the basis of the above that the Mixed Use Scheme and the Residential Scheme are part of a single masterplan development for the whole of the MXS7 site. There is no legal requirement for a single planning application to be submitted covering the whole of the applicant's MXS7 masterplan. However, if more than one planning application is made, a careful approach is required in relation to the assessment of the environmental effects of the development as a whole.
5. In particular, in a case such as this where the two applications are very clearly part of the same masterplan development, it is appropriate for a single environmental statement ("ES") to be submitted covering the development as a whole. Should the applications be approved without a compliant ES, there will be a breach of the prohibition in Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the "EIA Regulations") not to grant planning permission in respect of EIA development unless an EIA has been carried out in respect of the development. You are no doubt aware of the principle established by the European Court of Justice in *Case C-142/07 Ecologistas en Acción-CODA v Ayuntamiento de Madrid* [2009] ECR I-6097:

"... the purpose of the amended [EIA] directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive ..."

This principle remains of legal effect in relation to the UK's domestic EIA Regulations. Subsequent UK judgements, in particular that of the Court of Appeal in *Larkfleet Ltd v South Kesteven DC* [2015] EWCA Civ 887, have reaffirmed this principle in the domestic context, emphasising the need for local planning authorities to come to an "evaluative judgement" as to whether two sets of works are in fact a single project for EIA purposes.

6. In the instant case, there are no factors whatsoever which point to the two applications for planning permission comprising two distinct developments, save for the fact that the applicant has decided to bring them forward as two applications. The applicant could just as well have made a separate application for each parcel or phase of the MXS7 development, with the parcels small enough to escape the need for EIA completely. As things stand, an ES has been submitted for the Mixed Use Scheme, which considers type 2 interproject cumulative impacts with the Residential Scheme, but no ES has been submitted for the Residential Scheme. The effect of this is to downplay the potential impacts that might have been shown to arise had a fully comprehensive ES been submitted for the MXS7 development as a whole.

Approach to climate impacts in ES

7. As mentioned above, our clients are obtaining technical advice regarding the adequacy of the topic-specific chapters in the ES, which will be shared with the council as soon as possible. In the meantime, there is one matter which has immediately come to light following our review of the ES. We note that the council's scoping opinion stated the following in relation to climate impacts:

“The way that waste arising from construction and operation is dealt with could result in significant implications for the greenhouse gas emissions generated. The ES should accurately quantify the direct and indirect effects on climate change and consider adaptation and vulnerability of those affected. In terms of potential mitigation, offsetting could be considered.

The impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change should be considered in the ES in terms of the likely significant environmental effects. The Council are able to agree the precise scope of this exercise following further consultation from the applicant.”

8. No assessment of the greenhouse gas emissions of the development, as a result of either its construction or its operational phase, is included in the ES. Instead, the applicant has stated *“it was agreed that Climate Change would be dealt with primarily in a Sustainability Statement, however as climate change is highly relevant to flood risk this has been covered within the Flood Risk Assessment to a degree and within the cumulative impacts chapter”*.
9. We have not seen a copy of the correspondence between the council and the applicant in which the council agreed to revise the requirements of its scoping opinion in relation to climate impacts. However, there is no reason why the climate impacts of the development should be scoped out in the manner now proposed by the applicant. In particular, the development will entail a significant amount of greenhouse gas emissions in the production of the materials used in its construction. A sustainability statement may put forward ways in which the climate impacts of the development may be mitigated, but that only addresses one aspect of the EIA process. The ES must set out what the greenhouse gas emissions of the development would be before suggesting what forms of mitigation might be used to lessen them. Without such an assessment, the ES is incomplete and should be supplemented in accordance with Regulation 25.

The non-residential uses

10. There is some confusion in the application documents as to the quantum of employment floorspace proposed in the Mixed Use Scheme. The application form states that 122,500 sqm of B1(a) office use are proposed, with no other employment uses. The planning statement however states that there will be *“up to 35ha of B1(a and c), B2 and B8 uses”*. We assume that the reference to 35 hectares is a mistake – this equates to 350,000 sqm, well over twice the employment floorspace proposed by the MXS7 allocation. This error in the description of development should be corrected as soon as possible and a clarification statement should be published on the application website to explain exactly what quantum of employment floorspace is proposed.
11. We turn now to the sequential assessment submitted in support of the application, which comprises section 6 of the planning statement. The sequential assessment is stated as relating to the proposed local centre only (para 6.5). That is in spite of the fact that there are other main town centre uses which are not included in the local centre. In particular, any office use which comes forward as part of the employment floorspace would be a main town centre use outside of a town centre, which would be subject to the need for sequential assessment in accordance with paragraph 86 of the NPPF and Policy LP13 of the council’s local plan.
12. Turning to the sequential assessment that the applicant has carried out, the applicant states

that the 500 sqm of retail floorspace proposed as part of the local centre is the only main town centre floorspace in the proposed local centre, but nevertheless concludes that it is appropriate to carry out the sequential assessment on the basis of the total local centre floorspace of 1,500 sqm. The basis for this approach is, according to the applicant, the Rushden Lakes appeal decision, which (again, according to the applicant) established that “various uses should not be disaggregated”. That is incorrect.

13. First of all, the approach to disaggregation in Rushden Lakes was that, in that case, it was not appropriate to disaggregate the *main town centre uses* proposed as part of the development. There was no suggestion that other uses which are not main town centre uses should also be required to be accommodated in any candidate sequentially preferable sites.
14. Second, Rushden Lakes did not establish (nor could it have) that disaggregation is never appropriate. The requirement is for the applicant to demonstrate reasonable flexibility as to format and scale. In some instances, that might include looking to whether individual elements in the development might be accommodated independently from other parts of the development. For example, in the Kingswood appeal decision¹ (for a retail centre on the outskirts of Hull) the inspector concluded that disaggregation would be appropriate: “*In this case there is no particular evidence that it would be commercially or functionally necessary to accommodate a variety of individual and as yet unidentified comparison goods retailers either in only one building or on only one site in the City Centre.*” In the current case, no operator has been identified for the retail space proposed and there is no commercial justification for the need for the floorspace to be co-located in a single building or site. Without some compelling justification to the contrary, the “reasonable flexibility” required for the sequential assessment should consider the possibility of accommodating the development across multiple sites or buildings.
15. These are fundamental issues in the sequential assessment: on the one hand, it ignores the proposed office floorspace but then on the other assumes that the non-main town centre uses in the local centre should be included. It also fails even to consider the possibility of disaggregating the uses across multiple sites or buildings.
16. More than this, however, when the assessment goes on actually to consider the potentially sequentially preferable sites, two of which are currently being marketed and which are therefore available, and all of which could accommodate the whole of the local centre proposed, the applicant dismisses each because it is not located in an area which would be convenient for future residents and users of the proposed development. This completely misunderstands the purpose of the sequential test. The potential sequentially preferable sites in question are in the *town centre*; that is why they are sequentially preferable. The entire purpose of the sequential test is to direct main town centre uses to the *town centre*. If any sequentially preferable site could be dismissed purely on the basis that it was not “convenient” enough on the developer’s measure of convenience, then there could never be a sequentially preferable site. That is because town centre sites are in general likely to be less convenient than out of centre sites.
17. These issues must be resolved before planning permission can be granted for the Mixed Use Scheme.

Affordable housing

18. We note that at present the applicant is not able to demonstrate compliance with the council's policy that 20% affordable housing should be provided on schemes of more than 10 residential units. Paragraph 5.155 states that:

"The proposals will provide a level of affordable housing on Site. The amount and tenure split will be subject to discussion and agreement with the LPA during the determination of this application and will be secured through a s106 agreement."

19. We are not aware of any viability evidence having been published setting out the level of affordable housing that would be appropriate in the case of either the Mixed Use Scheme or the Residential Scheme. Such evidence should be published in accordance with section 100D of the Local Government Act 1972. Failure to do so may give rise to the quashing of any planning permission (see for example *Holborn Studios v LB Hackney* [2020] EWHC 1509 (Admin)).

Conclusion

20. We do not know whether the council is minded to grant planning permission for the development. If it is, these issues must be resolved before it can do so. Should you require any clarification from this firm regarding the issues above please do let us know. In the meantime, our clients will obtain further advice regarding the technical assessments in the ES.