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Development Management

**Our ref:** RA/2023/146640/01-L01  
**Your ref:** 2023/93539

**Date:** 19 January 2024

By email: [dc.admin@kirklees.gov.uk](mailto:dc.admin@kirklees.gov.uk)

Dear Nick

**OUTLINE APPLICATION, INCLUDING THE CONSIDERATIONS OF ACCESS APPEARANCE, LAYOUT, AND SCALE, FOR THE ERECTION OF A SIX-STOREY BUILDING TO HOST 76 RESIDENTIAL APARTMENTS (C3 USE) AND ANCILLARY WORKS COMPRISING DEMOLITION OF VACANT BUILDING, FORMATION OF NEW ACCESS, PARKING AREAS, OPEN SPACE AND LANDSCAPING; ERECTION OF CYCLE AND BIN REFUSE STORAGE STRUCTURES – LAND ADJ, LEDGARD BRIDGE MILL, BACK STATION ROAD, MIRFIELD, WF14 8NZ**

Thank you for consulting us on this application which we received on 18 December 2023. We object to the application as detailed below.

**FLOOD RISK**

Our Flood Map for Planning shows the site lies within Flood Zone 2 and 3, with a medium and high probability of flooding from rivers and/or the sea. The application is for residential apartments, which are considered to be a 'more vulnerable' land use in [Annex 3](#) of the National Planning Policy Framework. It is therefore necessary for the application to pass the Sequential Test and Exception Test and to be supported by a site-specific flood risk assessment (FRA), which can demonstrate that the 'development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall'.

**Flood Risk Assessment**

An FRA by EWE Associates Ltd referenced 2017/2153, RevE and dated 22 November 2023, has been submitted in support of the application.

**Environment Agency position**

In the absence of an acceptable flood risk assessment (FRA) we **object** to this application and recommend that planning permission is refused.

**Reasons**

The submitted FRA does not comply with the requirements for site-specific flood risk assessments, as set out in paragraphs 20 to 21 of the Flood Risk and Coastal Change planning practice guidance and its site-specific flood risk assessment checklist. The FRA does not therefore adequately assess the flood risks posed by the development.

In particular, the FRA fails to:

- Make an adequate assessment of the flood risks to the site.
- Adequately demonstrate how the development and its users will be kept safe from flooding, up to and including the design event (1%AEP event, taking the impacts of climate change into account).
- Demonstrate that the proposed development will not increase offsite flood risk.
- Adequately demonstrate that site users (including emergency services) will have a safe means of access and egress to and from the site.

### **Overcoming our objection**

To overcome our objection, the applicant should submit a revised FRA which addresses the points highlighted above.

If this cannot be achieved, we are likely to maintain our objection. Please re-consult us on any revised FRA submitted and we'll respond within 21 days of receiving it.

### **Advice to LPA**

If you are minded to approve this application for major development contrary to our flood risk objection, we request that you contact us to allow further discussion and/or representations from us in line with the [Town and Country Planning \(Consultation\) \(England\) Direction 2021](#).

This statutory instrument prevents you from issuing planning permission without first referring the application to the Secretary of State for Housing, Communities and Local Government (via the National Planning Casework Unit) to give them the opportunity to call-in the application for their own determination. This process must be followed unless we are able to withdraw our objection to you in writing. A failure to follow this statutory process could render any decision unlawful, and the resultant permission vulnerable to legal challenge.

### **Sequential test - advice to LPA**

#### **What is the sequential test and does it apply to this application?**

In accordance with the National Planning Policy Framework (paragraph 168), development in flood risk areas should not be permitted if there are reasonably available alternative sites, appropriate for the proposed development, in areas with a lower risk of flooding. The sequential test establishes if this is the case.

Development is in a flood risk area if it is in Flood Zone 2 or 3, or it is within Flood Zone 1 and your strategic flood risk assessment shows it to be at future flood risk or at risk from other sources of flooding such as surface water or groundwater.

The only developments exempt from the sequential test in flood risk areas are:

- Householder developments such as residential extensions, conservatories, or loft conversions
- Small non-residential extensions with a footprint of less than 250sqm
- Changes of use (except changes of use to a caravan, camping or chalet site, or to a mobile home or park home site)
- Applications for development on sites allocated in the development plan through the sequential test and:
  - the proposed development is consistent with the use for which the site was allocated; and
  - there have been no significant changes to the known level of flood risk to the site, now or in the future, which would have affected the outcome of the test.

Avoiding flood risk through the sequential test is the most effective way of addressing flood risk because it places the least reliance on measures such as flood defences, flood warnings and property level resilience.

### **Who undertakes the sequential test?**

It is for you, as the local planning authority, to determine an appropriate area of search and to decide whether the sequential test has been passed, with reference to the information you hold on land availability. You may also ask the applicant to identify any other 'reasonably available' sites which are on the open market and to check on the current status of identified sites to determine if they can be considered 'reasonably available'. Further guidance on the area of search can be found in paragraphs 027-030 of the planning practice guidance [here](#).

### **What is our role in the sequential test?**

We can advise on the relative flood risk between the proposed site and any alternative sites identified - although your strategic flood risk assessment should allow you to do this yourself in most cases. We won't advise on whether alternative sites are reasonably available or whether they would be suitable for the proposed development. We also won't advise on whether there are sustainable development objectives that mean steering the development to any alternative sites would be inappropriate. Further guidance on how to apply the sequential test to site specific applications can be found in the planning practice guidance: [Flood risk and coastal change - GOV.UK \(www.gov.uk\)](#).

### **Exception test – advice to LPA**

The exception test should only be applied as set out in flood risk table 2 of the Planning Practice Guidance (PPG) following application of the sequential test. The exception test should not be used to justify the grant of planning permission in flood risk areas when the sequential test has shown that there are reasonably available, lower risk sites, appropriate for the proposed development.

In those circumstances, planning permission should be refused, unless you consider that sustainable development objectives make steering development to these lower risk sites inappropriate as outlined in PPG (ref ID: 7-031-20220825).

### **Our role in the exception test**

The exception test is in two parts, described in the NPPF (paragraph 170). For the test to be passed it must be demonstrated that

1. The development would provide wider sustainability benefits to the community that outweigh flood risk; and
2. The development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

Paragraph 171 of the NPPF makes clear that both parts need to be met for the test to be satisfied. It is for the applicant to demonstrate this.

We provide advice on the second part of the test, but it is for you, as the local planning authority, to consider the first part of the test, accounting for the findings of the flood risk assessment and our flood risk advice, and to determine whether the test, overall, has been satisfied. Development that does not satisfy both parts of the exception test should be refused.

## **Where the flood risk assessment shows the development will be safe throughout its lifetime without increasing flood risk elsewhere**

Even where a flood risk assessment shows the development can be made safe throughout its lifetime without increasing risk elsewhere, there will always be some remaining risk that the development will be affected either directly or indirectly by flooding. You will need to weigh these risks against any wider sustainability benefits to the community.

## **BIODIVERSITY**

There is a lack of information about impacts to otter on the site. The Ecological Impact Assessment provided includes an otter survey, but as the banks of the river could not be fully surveyed for health and safety reasons, the presence of otters cannot be fully discounted. Because of this, there is a chance that a resting site could be missed and therefore further assessment may be necessary if a protected site is present. We have otter records covering the Calder in Mirfield, so there is a chance they could be present adjacent to this site resting or migrating through the river corridor. As the development is close to the river, disturbance to the species is likely and it is not clear if having a fence and using sympathetic lighting alone will be enough to counteract or mitigate this disturbance, especially as the development is 4 stories high, and it is not clear how disturbance from the upper floors (for example) will be managed?

Mitigation through appropriate lighting can only be managed by the developer on lights within their control, so how will light spill from private dwellings and balconies be managed, for example? The developer cannot control lighting of apartments and balconies above fence height. Noise from residents on balconies at night cannot be controlled, how can this disturbance be managed/mitigated? There is not enough evidence given to understand how this can be managed and maintained throughout the lifespan of the development.

Also, could additional mitigation be delivered along the river corridor to better mitigate effects such as additional planting to provide more cover for otter along the river?

Due to the above concerns, we object on the following grounds.

### **Environment Agency position**

We **object** to this planning application due to the likely effect this will have on otter and its habitat. Insufficient information has been provided to assess the risks posed by this development and insufficient details of mitigation or compensation measures have been submitted to address any risks. We therefore recommend that planning permission is refused.

### **Reasons**

The otter is a protected species under the Conservation of Habitats and Species Regulations 2017 and listed under section 41 of the Natural Environment and Rural Communities (NERC) Act 2006.

The proposed development may have a detrimental effect on the species/population and its habitat along the river Calder. The application does not include adequate information about the measures proposed to protect the otter in this location given the fact otter were not fully discounted from the river adjacent to site and the proximity of the proposed development to the river.

This objection is supported by paragraphs 180 and 186 of the National Planning Policy Framework (NPPF) which recognise that the planning system should conserve and enhance the environment by minimising impacts on and providing net gains for biodiversity. If significant harm resulting from a development cannot be avoided, adequately mitigated, or as a last resort compensated for, planning permission should be refused. Opportunities to incorporate biodiversity in and around developments should be encouraged.

The Habitats Directive (92/43/EEC) recognises that physical barriers to migration of otter can impact the species and lead to disturbance.

England's Biodiversity strategy identifies priority species also listed as being of 'principal' importance under section 41 of the NERC Act 2006. Local planning authorities have responsibilities under NERC to have regard to those species in their decision-making because of their duty to conserve Biodiversity (s40).

In this instance, the proposed development *may* have a detrimental impact on a priority species that we have a role in protecting. The application does not include sufficient information about the measures proposed to ensure that if present on the river corridor they are fully protected in this location and that mitigation is enough to avoid disturbance and maintain enough cover.

### **Overcoming our objection**

It may be possible to overcome this objection by submitting a scheme for the long-term management and protection of the otter population and its habitat. This should include details of how lighting and noise disturbance can be fully managed. It should also explain what additional measures are needed to counteract the fact that lighting from private dwellings cannot be managed and how noise disturbance from balconies can be addressed. Will additional *mitigation/compensation* be required to manage impacts of balconies overlooking the river corridor, such as additional planting along the corridor to provide an additional vegetated buffer?

In addition, not enough information has been provided within the Ecological Impact Assessment with regards BNG compliance. Although BNG is not currently compulsory as this is an outline application, it must be acknowledged that when full permission/reserved matters are sought, BNG is likely be mandatory.

Despite an acknowledgement that a biodiversity net loss of terrestrial units will be seen as part of the proposed development, and a 0% net gain in waterbody units, there is no acknowledgement of whether the shortfall to no net loss and the 10% net gain in both elements will be achieved. This will not satisfy trading rules once compulsory and although not yet mandatory, the Kirklees Local Plan does mention BNG and supports and encourages net gains in terrestrial and waterbody units. This is a missed opportunity to deliver a development that will satisfy trading rules of the statutory metric once mandatory through delivery of both the required terrestrial habitat units and waterbody units to achieve 10% net gains in both elements. Therefore the applicant should be encouraged to deliver BNG net gain in both terrestrial and waterbody units and provide further information to demonstrate how this requirement can be met.

**Planning Advice Service**

Please advise the applicant that if they would like to get further specific advice on how to overcome our objections, they can take advantage of our planning advice service. We can offer services including meetings, telecons and reviews of revised information prior to formal submission. We encourage the applicant to contact us directly to discuss this further.

We currently charge £100 plus VAT per officer per hour. We will provide you with an estimated cost for any further discussions or review of documents. The standard terms for our charged for service are available [here](#).

If you need any further information or clarification, please contact me.

Yours sincerely

**Bev Lambert**  
**Sustainable Places - Planning Advisor**

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