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Dear Sir/Madam,

City of Durham Parish Council – Representations to the Durham City Neighbourhood Draft Plan Consultation.

These representations have been prepared on behalf of our Client, Kier Property Ltd, in response to the Durham City Neighbourhood Draft Plan (“DCNDP”) Consultation. In short, whilst noting the importance of the conservation of key historic and environmental assets within Durham City there is also a need to ensure that proportionality and the planning balance is better represented within the DCNDP Policies. As such, Kier Property Ltd objects to the wording of a number of Policies within the DCNDP and suggested amendments are proposed to ensure they meet the basic Neighbourhood Planning conditions as required by law.

The National Planning Policy Context

The National Planning Policy Framework (“NPPF”) states, at paragraph 37, that Neighbourhood Plans are required to meet certain “basic conditions” and “other legal requirements” before they can come into force. These conditions and requirements are specified in paragraph 8 of Schedule 4B to the Town and Country Planning Act 1990 (as amended). The first basic condition as set out in the legislation above requires a Neighbourhood Plan to have regard “to national policies and advice contained in guidance issued by the Secretary of State”.

Furthermore, paragraph 13 of the NPPF states that Neighbourhood Plans should support “the delivery of strategic policies contained within local plans or spatial development strategies”. It is within this context that these representations are made. Further commentary on specific policies is set out below.

DCNDP Commentary

S1 – Sustainable Development Requirements

Part j) of this policy requires development to, amongst other criteria to reduce climate change by:

“Avoiding sites in the Flood Zones 2 and 3, and incorporation of the sustainable urban drainage system (SUDS) to achieve improvements in water quality, aquatic ecosystems, and habitats in order to increase resilience to climate change”.

It is noted that Figure 1 which identifies Key Resource Sustainability Issues makes reference to paragraphs 157 to 164 of the NPPF regarding the requisite sequential test. The different levels of vulnerability to flooding

are also noted with commercial development recognised as “less vulnerable”. However, Kier Property Ltd consider that the Policy wording in its current form does not meet the basic legislative conditions as required and objects to its inclusions within the Neighbourhood Plan unless suitable amendments are made. In the absence of a direct cross reference to Figure 1 and to ensure that this policy is clear it is important that the Policy wording itself accords with national policy and makes clear reference to the sequential test. As such, we suggest the following amendment to the Draft Policy wording:

j) Applying the Sequential Test and if necessary the Exceptions Test (as required by paragraphs 158, 159 and 160 of the NPPF) with the aim of directing development away from the Flood Zones 2 and 3 where possible and necessary taking into account the level of flood risk vulnerability for the relevant land uses.

[New sub paragraph k] incorporation of the sustainable urban drainage system (SUDS) to achieve improvements in water quality, aquatic ecosystems, and habitats in order to increase resilience to climate change.

The suggested amendments above would also ensure that the DCNDP are better aligned with Draft Strategic Policy 36 (Water Management) of the Draft County Durham Plan (DCDP) which also refers to the need for Sequential and Exceptions tests where appropriate.

S2 – The Requirement for Masterplans

The requirement for Masterplans for all “large sites” is noted in Draft Policy S2. However, the definition of what constitutes a large site is ambiguous for the purposes of this Draft Policy, both within the Draft Policy text or the accompanying justification. As such, Kier Property Ltd object to the Draft Policy as presented. Paragraph 16 notes that Plans should:

- a) ***contain policies that are clearly written and unambiguous, so it is evident how a decision maker should react to development proposals [Savills emphasis];***

In order to demonstrate regard for national planning policy, a clear definition of what constitutes a large site should be provided. Alternatively the specific sites subject to masterplan requirements should be named and reasoning provided. The Policy justification as drafted makes reference to sites whereby Durham City Parish Council consider that masterplanning would be necessary, namely Milburngate House, Aykley Heads, Mount Oswald, Mountjoy, Hild/Bede and Elvet Riverside but also notes that “other sites may become available in the future”. In the absence of clear criteria, a decision maker or developer presented with development opportunities elsewhere would not be able to establish at the outset whether this Policy applied to other sites within the City.

We note that paragraph 16 of the NPPF also requires Policies to ensure “proportionate and effective” engagement between plan makers and communities. The potential requirement for all development sites in the City Centre to be subject to masterplanning is not proportionate, particularly as many are of a size that would likely come forward as part of a full, detailed planning application. Masterplans are typically required for large scale major developments that come forward in outline form or as part of a large scale strategic allocation within the DCDP.

H1, H2 & H4 – World Heritage Site, Conservation Areas and Heritage Assets

The need to conserve the setting of designated heritage assets is noted and this is reflected in Draft Policies H1 – Protection of the World Heritage Site, H2 – The Conservation Areas and H4 – Heritage Assets. However, the Draft Policies do not currently show regard to national policy with regard to the consideration of impacts upon heritage assets and the crucial difference between paragraph 195 and 196 of the NPPF. As such, Kier Property Ltd object to these Policies as proposed and suggest alternative wording.

Paragraph 195 of the NPPF outlines decision making requirements whereby development proposals result in the substantial harm to (or total loss of) significance of a designated heritage asset. In this instance it is necessary for proposals to achieve substantial public benefits that outweigh the harm or loss [Savills emphasis] unless the proposals meet other narrow criteria as set out in the same paragraph. However, crucially, paragraph 196 recognises that not all development that results in some level of harm to heritage assets should be required to deliver substantial benefits. Indeed, paragraph 196 of the NPPF states that:

“Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including where appropriate, securing its optimum viable use” [Savills emphasis].

It is a key requirement for any decision maker to understand firstly the level of harm upon a heritage asset and whether that is either substantial, or less than substantial. This then guides the decision maker as to whether they are required to look for substantial public benefits, or whether the requirement of considering the less than substantial harm within the wider planning balance along with wider public benefits applies. As drafted, Policies H1, H2 and H4 appear to automatically adopt the stance that any perceived harm from development will result in substantial harm and that substantial public benefits will be required in order to be acceptable. Furthermore, H4 is also unclear on how development impacting upon the setting of a heritage asset would be treated by a decision maker. This is not the correct approach in the context of the basic conditions required for Neighbourhood Planning. Each policy is addressed in turn below.

H1 – Protection of the World Heritage Site.

The second part of this Draft Policy relates to development outside the World Heritage site which has the potential to impact upon its setting. It is simply stated that development “must be shown to sustain, conserve and enhance the setting of the World Heritage Site”. However, there is no recognition of the need to assess the level of harm resulting from development, nor are there instructions for development which results in harm to the World Heritage Site. As set out in paragraph 194 of the NPPF, development adversely affecting assets of the highest significance, including World Heritage Sites should be “wholly exceptional”, however, this requirement is only triggered where “substantial harm” to that designated heritage asset is identified.

It is respectfully suggested that this part of the Policy is re-drafted in its entirety to recognise that development within wider Durham City which sustains, conserves and enhances the setting of the World Heritage Site should be approved, whilst also recognising that harm to the designated asset can be permitted, depending upon the level of harm identified and the circumstances and level of public benefit associated with the proposed development in question. Indeed, the National Planning Policy Guidance (NPPG) recognises the need for plans to strike:

“A balance between the needs of conservation, biodiversity, access, the interests of the local community, the public benefits of a development and the sustainable economic use of the World Heritage Site in its setting, including any buffer zone”.

Furthermore, Draft Strategic Policy 46 of the DCDP also notes that Development that would result in harm to the Outstanding Universal Value of the World Heritage Site or its setting will not be permitted other than in wholly exceptional circumstances [Savills emphasis]. Paragraph 5.482 of the DCDP also clarifies that

“Where a development proposal would lead to less than substantial harm to the significance of the asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use and realising the economic potential of the WHS providing benefits are managed in a sustainable manner.”

Mindful of the above, it is evident that Policy amendments are required in order to ensure consistency with national planning policy and strategic policies within the wider development plan.

H2 – The Conservation Areas

In a similar manner to Draft Policy H1, Policy H2 seeks to ensure that new development respects the distinctive heritage values of the Durham City Conservation Areas and establishes requirements for development both within and affecting the setting of Durham City Conservation Area. Criteria b) to g) of the Policy establish the conservation requirements with each criterion adding the allowance that “unless the loss or harm is necessary to achieve substantial public benefits”. Whilst this allowance is welcome, in order to adequately reflect national planning policy, the requirements of paragraph 196 of the NPPF should also be recognised. In short, it is only necessary to demonstrate substantial public benefits where substantial harm to the Conservation Area is identified.

Mindful of the above, it is respectfully suggested that this Policy be amended fully to require an assessment of the impact of a development proposal upon the Conservation Area in the first instance and followed by the recognition that the level of harm to a heritage asset determines whether it is necessary to demonstrate substantial public benefits. In assessing the impact upon a conservation area, the majority of criteria a)-k) would be taken into account by the author of the assessment and the determining authority.

Suggested alternative wording is provided below:

Development proposals within or affecting the setting of Durham City Conservation Area should seek to respect the distinctive heritage values identified within the associated Conservation Area Appraisals. Such proposals should be accompanied by an assessment of the impact of the development upon the setting and significance of designated heritage assets. Matters for consideration in an assessment comprise the following (where relevant):

- *The impact upon the historic and architectural qualities of buildings*
- *The impact upon and relationship with frontages, street patterns, boundary treatments, floorscapes and roofscapes.*
- *Historic plot boundaries*
- *The impact of any demolition of buildings of historic or architectural interest*
- *The impact of any loss or harm to an element of a building which makes a positive contribution to its individual significance and that of the surrounding area.*
- *The impact of the loss of open space which contributes to the character and appearance of the surrounding area.*
- *The impacts upon views of the Durham City Conservation Area from viewpoints within and outside the Conservation Area.*

- *The impact of the scale, height, massing, density, layout, landscaping, spaces between buildings, lighting, detailing including choice of doors, windows and wall finishes, and materials of the proposed development upon local character. and*
- *The cumulative impact of development schemes which dominate either by their size, massing or uniform design.*

Where proposals will result in substantial harm to the Conservation Area and its setting, development will not be permitted unless it is necessary to achieve substantial public benefits that outweigh that loss or harm (or where it meets the wider criteria bespoke to paragraph 195 of the NPPF.)

Where development proposals result in less than substantial harm to the Conservation Area, this harm should be weighed against the public benefits of the proposals including, where appropriate, securing its optimum viable use as required by paragraph 196 of the NPPF.

H4 – Heritage Assets

Draft Policy H4 represents a catch all Policy for the development affecting designated heritage assets more generally, including development which affects their setting. It sets out the criteria where development will be approved, namely the requirement to retain, repair and return assets to appropriate compatible use or to conserve heritage assets which are at risk of loss or destruction. Moreover, the final paragraph notes that heritage assets will be protected from inappropriate development unless substantial public benefits can once again be demonstrated.

In its current form the first two paragraphs within the Policy are unclear regarding the impact upon setting and focus predominantly upon the restoration of heritage assets themselves. If it is the intention of the DCNDP to include a Policy which applies to the impact of development upon the setting of heritage assets, then as per Policies H1 and H3 the policy should include a requirement to assess the likely impact upon the significance of each heritage asset and apply the tests as required in paragraphs 194, 195 and 196 of the NPPF. The final paragraph requiring substantial public benefits should be amended in a similar manner to that which is suggested above for Draft Policy H2.

With regard to archaeology, this Draft Policy does not permit development that “compromises the site and its setting”. However, as established within the NPPG, the same proportionate tests regarding the level of harm apply to below ground heritage assets following an appropriate level of investigation and this should also be reflected in Policy.

Finally, with regard to Policies H2 and H4, it is noted that Draft Strategic Policy 45 (Historic Environment) within the DCDP (which the DCNDP is required to reflect) also recognises the need for proportionality in decision making stating:

“Protection will be given to all designated assets and their settings (and non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to scheduled monuments. Such assets should be conserved in a manner appropriate and proportionate to their significance. Substantial harm or total loss to the significance of a designated heritage asset will be permitted only in exceptional circumstances. In the case of designated heritage assets of the highest significance substantial harm to or total loss of the significance will only be permitted in wholly exceptional circumstances. Less than substantial harm will be weighed against the public benefits of the proposal” [Savills emphasis].

This adds further emphasis to the need for amendments to these policies to ensure all levels of the Development Plan (inclusive of Neighbourhood Plans) accord with national policy and avoid conflicts or ambiguity in decision making.

G3 –Creation of the Emerald Network

It is noted that Draft Policy and G3 seeks to create “Emerald Networks” within the city and conserve and enhance biodiversity as required, however, it is noted that the final paragraph of the Policy states:

“Development proposals that would result in a deterioration in the wildlife value of a site in the Emerald Network, or that would damage the connectivity of sites in the Emerald Network, will be refused, unless there are substantial public benefits that outweigh the loss or harm. If this loss or harm cannot be avoided, then appropriate mitigation measures must be included in the proposal”.

The Draft Policy as presented seeks protection of both biodiversity and green infrastructure at a level beyond that which is prescribed within the NPPF. Furthermore, the creation of an “Emerald Network” combines the definition of biodiversity and connective green infrastructure, whereas the two often serve different functions. Indeed, wildlife sites and biodiversity are often protected through reducing the impacts of human activity, hence the requirement for the tests at paragraph 175 of the NPPF. Where connectivity of green infrastructure is harmed, consideration is required as to the amount of harm and whether the overall function of the green infrastructure is lost or damaged to a degree which suggests that a planning application should be refused.

Indeed, paragraph 175 states that development should only be refused if “significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or as a last resort compensated for” [Savills emphasis]. It is clear that the trigger for refusal is significant harm to biodiversity and this should be reflected in the wording of Draft Policy G3. Furthermore, the requirement for substantial public benefits stated in G3 is not a requirement of national policy and should be removed, rather the emphasis (where harm cannot be avoided) should be upon mitigation and compensation which in turn forms part of the wider planning balance for the decision maker. With regard to connective Green Infrastructure, the Policy should also emphasise that there is a need to understand the degree of harm to the function of the Emerald Network and whether this can be mitigated, rather than leading on the premise that development proposals will be refused.

Conclusions

Whilst our client recognises the need to conserve and enhance Durham City in accordance with National Policy, Kier Property Ltd objects to the wording of a number of policies relating to masterplanning, flood risk, heritage and biodiversity on the grounds that they are either ambiguous or do not reflect the proportionate tests as set out within the DCDP, the NPPF and the NPPG. It is necessary for a Neighbourhood Plan to be prepared having regard to national planning policy and guidance as required by Schedule 4B to the Town and Country Planning Act 1990 (as amended). The suggested amendments outlined in these representations will assist the City of Durham Parish Council in ensuring the Neighbourhood Plan accords with the “basic conditions” established in legislation.

We would be obliged if the comments in this document and the requested amendment are taken into account during the final stages of preparing the Neighbourhood Plan and its subsequent examination. In the meantime, we would be most grateful if you could acknowledge receipt of this submission and, if you have any queries with regard to this correspondence, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read "MB", followed by a long horizontal flourish.

Martin Bonner
Associate