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Terry Collins
Chief Executive
Durham County Council
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Durham City DH1 5UF
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BY EMAIL AND POST

4 January 2019

Dear Mr Collins,

**New Durham County Council Headquarters, Freemans Place, Durham
Planning Application Reference DM/18/02369/FPA**

1. We are instructed by the City of Durham Parish Council. For the reasons we explain below, should Durham County Council (the Council) decide to approve the Application on the basis of the information currently before it, that decision would breach the Council's obligations under both the EIA Directive 85/337/EEC (the EIA Directive) and under the Town and Country Planning (Environmental Impact Assessment Regulations) 2017 (the EIA Regulations), and would therefore be unlawful.
2. Please would you therefore confirm by return that you will exercise your power under Regulation 25 of the EIA Regulations to require the Applicant to revise and update its environmental statement (ES) to address the shortcomings identified below and ensure that the determination of the Application is suspended pending consultation on the revised ES.

Background

The Application Scheme

3. The Application was submitted by Kier Property Developments Ltd to the Council on 3 August 2018 and proposes building a new, smaller County Hall located across two sites at Freemans Place in central Durham.
4. The current County Hall is located at Aykley Heads and has recently accommodated 1,800 staff. Of these staff, 1,000 are expected to relocate to the new site, and the remaining 800 have been relocated to other council facilities¹. The existing County Hall has a total of 1,028 unrestricted car

¹ Environmental Statement, Chapter 4, Socio-Economics, para 4.2.14

parking spaces. Of these, 848 are available for staff, 50 are available for members and 117 for visitors.

5. The new County Hall will be delivered on what is currently the 136 space Sands short stay public car park and the neighbouring coach park and will incorporate 60 dedicated car parking spaces (50 reserved for members, the remaining for pool cars). A further 277 car parking spaces will be delivered in a new multi-storey car parking building (the MSCP) on land which is currently used by Durham Sixth Form Centre as a 120 space long stay car park.
6. Of the spaces within the new MSCP, it appears that 136 will be publicly available short-stay spaces, 125 will be long Stay spaces reserved for Council staff. There will also be a further 16 pool car spaces². Overall, the scheme will result in a net increase of 81 car parking spaces.
7. Notably, no replacement coach parking is to be provided, although the TA notes at paragraph 3.3.4 that coaches will continue to drop off near the Site. Similarly, no replacement long stay car parking is provided for Durham Sixth Form College, although we note that Durham Sixth Form College has recently secured planning permission (reference DM/17/02606/FPA) for a new multimedia facility and reconfigured car parking provision comprising a further 34 car parking spaces within their current site.
8. The project is expected to take two years to construct, and the new County Hall is expected to become operational in winter 2021 (Environmental Statement, August 2018, at paragraph 1.8.6).
9. The two application sites together (the Site) extend to 1.41 hectares and lie within the built-up area of Durham and inside the Durham City Conservation Area. The Site is close to the UNESCO Durham City World Heritage Site, which includes Durham Castle and Durham Cathedral, is within an area of high landscape value and within flood zone 3.
10. Direct vehicle access to the Site is from Freeman's Place, which itself is primarily accessed from the A690, either via Claypath / Gilesgate or Walkergate. The A690 as it passes through the centre of Durham and crosses the river Wear was designated an air quality management area (an AQMA) by an order dated 9 May 2011 and made under section 83(1) of the Environment Act 1995³. The AQMA was subsequently extended in 2014 to include Walkergate and Claypath⁴. In both cases the orders were made "in relation to a likely breach of the nitrogen dioxide (annual mean) objective as specified in the Air Quality Regulations 2000 and Air Quality (Amendment) Regulations 2002".

² Transport Assessment prepared by Optima Intelligent Highways Solutions (July 2018 – Revision 2) (the TA), at para 3.4.5

³ see Durham County Council Air Quality Management Area (Durham City) (No 1) Order 2011

⁴Durham County Council Air Quality Management Area (Durham City) (No 2) Order 2014

The Aykley Heads Strategic Employment Site

11. As you will be aware, the Application is a key step in realizing the Council's own ambitions to redevelop Aykley Heads, a 32 hectare site and the current location of County Hall, as a strategic employment site.
12. The Council's vision for the Aykley Heads SES is set out in the cabinet report dated 17 January 2018 (the Report). The Report notes (at paragraph 43) that Durham needs a central business quarter and goes on to state that:

“43 Aykley Heads presents a high quality city-based site, ... the potential it offers for the economy of the country and the North East region is important and therefore in order to achieve the economic ambitions of the city, county and wider region *it is necessary to consider the relocation of the council's headquarters ...*

44 *Should the large and dominant County Hall remain on the Aykley Heads site, its location dominates phase 2 of the site, thereby reducing the likelihood of the development achieving critical mass, or establishing the brand and image that are essential to its overall delivery. There is a consequent impact on the employment levels that can be achieved and whilst employment would clearly remain in County Hall, this would displace a large proportion of the circa 2700 jobs that are expected to be delivered as part of phase 2 of the development.*” (emphasis added)
13. Paragraph 55 of the Report identifies the part of the Aykley Heads site occupied by County Hall and its parking as “Park Gateway - Phase 2” and notes that once redeveloped, this part of the site is expected to accommodate 2,787 full time jobs. This is just under half the 6000 jobs expected to be created altogether by the redevelopment of Aykley Heads (Report paragraph 65).
14. The ‘Durham County Council Headquarter Full Business Case’ contained in Part 2 of the Report notes that:
 - “County Hall is an outdated building that is three times bigger than the Council requires” (paragraph 106)
 - “Five options that were identified and tested at the OBC stage were further tested at FBC” (paragraph 109)
 - “... the most cost effective option for providing a civic and administrative centre for the council over the next 35 years is a new build HQ this option offer the best opportunity to maximize private sector jobs on the Aykley Heads site” (paragraph 110)
15. Paragraphs 115 – 119 describe the options that the Council considered in both the outline and full business cases. These included the full refurbishment of County Hall, a new build County Hall at Aykley Heads, and three new build options within Durham city centre (albeit, no sites are

mentioned). Of these, paragraph 119 records that option 3 was the best option for a number of reasons.

16. As is evident from the above, the relocation of the existing County Hall is an integral, and indeed key step in achieving the Council's ambitions for the Aykley Heads Strategic Employment Site. We will explain the significance of this below.
17. The Report also describes the Council's process for procuring a development partner to "[deliver] a new headquarters for the council" (at paragraph 140) (emphasis added). It also goes on to note that the developers were expected to bring forward sites either under their own control or under Council control. The Council identified three sites in its own ownership, of which only the Sands site could accommodate the HQ and replacement car parking" (at paragraph 141). The point here is that, while Keir may be promoting the Application, this is in effect the Council's own Application, made to a strategy agreed with the Council.

The Environmental Statement

18. In a screening opinion dated 1 May 2018 the Council confirmed that the proposal comprised EIA development requiring an environmental impact assessment under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations). A subsequent scoping opinion recommended that the environmental statement focus on seven environmental chapters, including landscape and visual impacts, flood risk and drainage, transport and air quality.
19. The Environmental Statement is dated August 2018 (the ES). Paragraph 1.8.8 notes with reference to the redevelopment of Aykley Heads that "*the future development of Aykley Heads is not yet subject to a planning application, nor is it an existing or consented development as specified by the Regulations. As such it has not been considered within this ES as part of the cumulative assessment*". For the reasons we will explain, this conclusion is wrong.
20. The ES summarises at Chapter 9 the results of a transport impact assessment carried out by Optima and dated July 2018 (the TA). The results of this TA are also reported in the Non-Technical Summary to the ES of the same date.
21. The TA is fundamentally flawed for a number of reasons. In particular, it assumes that:
 - Notwithstanding the substantial reduction in long stay staff car parking spaces within the new MSCP, the same number of staff (as a proportion of the available car parking spaces) will travel to the new MSCP at peak periods (0.5 trips per car parking space).

- Because the net increase in car parking spaces at the new County Hall is only 81, only the movements associated with those 81 spaces need to be added to the existing baseline traffic within the vicinity of the site.
22. The first of the above assumptions ignores the fact that total number of cars driving to and parking at the existing County Hall during peak periods is greater than the total dedicated long stay car parking available in the new MSCP. Without understanding precisely who is driving, why and whether they will continue their employment at the new Site, there is no reason to assume anything but that current drivers will continue to drive to the new Site, to the extent that they can find a car parking space, either within the MSCP or in nearby on-street or covered car parking.
 23. The TA's approach also fails to consider the level of usage of the existing long stay car parking spaces at the Sixth Form College or the usage of the 34 additional car parking spaces proposed in application reference DM/17/02606/FPA. It would be much more robust to at least assume that those school or County Hall staff currently driving to and parking in the Sixth Form Centre long stay car park or at the existing County Hall will continue to do so when County Hall relocates. Employees will only be deterred from driving to work to the extent that there is no long stay car parking available for them, either within the scheme, in nearby streets, or in other long stay car parks within a reasonable walking distance of the Site.
 24. Moreover, the ES recognizes at paragraph 1.9.9 a number of committed developments whose effects must be taken into account in the cumulative impact assessment. However, the TA only considers the cumulative impacts of the proposed development at Milburngate House, justifying this approach on the basis that there is either no or inadequate traffic information for other committed developments (TA, paragraph 6.5.3).
 25. Finally, the materiality of the transport impact is assessed against 2028 base flows. There is no explanation of why this particular design year is adopted and not the more appropriate opening year of 2021 (given that this is an existing organisation transferring 'whole-sale' to a new site in its opening year, not a development that will not be fully occupied for a number of years).
 26. In September 2018, a 'Traffic Generation Sensitivity Test' also prepared by Optima was submitted (the Sensitivity Test). The Sensitivity Test adopts a different and more robust approach to assessing the level of traffic likely to be generated by the proposal, and as a result concludes that the traffic generation of the scheme at peak periods will be at least twice the amount envisaged in the TA.
 27. It is notable that the Sensitivity Test, notwithstanding that it answers a number of concerns about the TA and contains environmental information, is not included within the ES, nor summarised in the non-technical summary to the ES. Indeed, it is a matter of significant concern, that this document is entitled 'Sensitivity Test', when in reality it is a wholly new assessment. The

title downplays the significance of the document, and appears to be an attempt to 'bury bad news'.

Air Quality Assessment

28. An air quality impact assessment carried out by SLR Consulting Ltd is contained at Chapter 10 of the ES (the AQIA).
29. Paragraphs 10.25 and 10.26 of the AQIA suggest that the traffic modelling on which the assessment is based is taken from the TA (notably, not the Sensitivity Test), in that the assumptions underlying it are a net increase of 81 car parking spaces and existing traffic flows are used as its baseline.
30. Paragraph 10.2.53 states that "[t]he traffic flows for all future year scenarios ('With Development and Without Development') include predicted flows with committed development in the locality of the site" and then lists 7 developments. The list of 7 developments, is essentially the same as that contained at paragraph 6.5.1 of the TA⁵. There is no evidence that an independent traffic impact assessment of any of these 7 developments was carried out in support of the AQIA. Therefore, and in the light of the comments at paragraph 6.5.2⁶ and 6.5.3⁷ it is unlikely that traffic related air quality impacts of any of these developments, other than the Milburngate developments has been taken into account as part of the cumulative impact of the development.
31. Put simply, the air quality assessment adopts the mistakes of the TA without any recognition of the updated position set out in the Sensitivity Assessment. Therefore, any flaws in the TA are carried across to the Air Quality Assessment. To the extent that the TA is flawed (and as summarized above, and as implicitly recognized in the Sensitivity Test, it clearly is), then the Air Quality Assessment is equally flawed.

Alternatives

32. Alternatives are addressed in Chapter 2 of the ES. This states that two main alternatives were studied; the 'do nothing' scenario and the 'do something' scenario. Within the 'do something' scenario, the ES refers to the 13 sites assessed in the sequential site assessment carried out in the context of the flood risk assessment, of which only 3 sites were regarded as of an appropriate size to meet the Council's requirements. No proper assessment of the likely environmental impacts of delivering the development at an

⁵ With the addition of permission reference DM/18/00894/FPA for Milburngate Hotel, which replaces part of the residential development at Milburngate).

⁶ "... with the exception of the Milburngate House applications (DM/16/01228/FPA & DM/1800896/VOC), all other applications did not include any off-site junction capacity analysis and were either supported by a Transport Statement (rather than a Transport Assessment) or had no transport documentation at all"

⁷ "... it has been agreed that only the Milburngate House application needs to be included within this Transport Assessment for the reasons identified above"

alternative site appears to have been considered (other than an assessment of their flood risk impacts). Indeed, the one alternative site that appears to be realistic would be within the committed development at Milburngate. In respect of this development, paragraph 2.4.8 of the ES states:

“With regard to heritage and visual impact, the Milburngate development forms part of the cumulative assessment within this ES, the scale and massing of this development was subject to its own separate assessment and has further established a benchmark in design terms for what can be accommodated within the wider townscape. The Proposed Development responds to this and neighbouring buildings and as such, it is not considered that there would be a substantial difference to the visual impact of the Proposed Development had it been delivered on the adjacent side of the river, or within such proximity to the City Centre in any case.”

33. It appears from the above comment, that the only assessment of the visual impact of development at Milburngate is as part of a cumulative impact assessment of the proposal. There does not appear to have been an assessment of the impact of delivering the development at Milburngate (a committed development) *instead* of delivering the development at the Sands.
34. Furthermore, the alternatives considered in the ES do not match the alternatives outlined in the Report, which are evidently alternatives that were actually considered by the Council as at the date that report was prepared. Hence, a number of alternatives actually studied by the Council, a key stakeholder in the scheme, have not been properly considered.

Legal Background

35. The Application falls within the scope of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations)⁸. As a result, the Council may not grant planning permission before an environmental impact assessment of the Application has been carried out (EIA Regulation 3), before examining the ES, reaching a ‘reasoned conclusion on the significant impacts of the proposed development’ and unless it has integrated that conclusion into their decision (EIA Regulation 26).
36. To satisfy this requirement, the ES must include the details specified in Schedule 4 of the EIA Regulations, including:
 - A description of the development
 - A description of the reasonable alternatives (for example in terms of development design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the

⁸ which implement EU Directive 2011/92/EU (the EIA Directive)

chosen option, *including a comparison of the environmental effects.*
(emphasis added)

- A description of the likely significant effects of the development, including “the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources”;
- A non technical summary of the information provided.

37. A particular concern in this case is, what is the development to be assessed? In the case of *R v Swale Borough Council e.p. RSPB [1991]*, Simon Brown J held that in considering the likely environmental effects of a proposed development for the purposes of the EIA Directive and Regulations:

“The proposals should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development ... developers could otherwise defeat the object of the Regulations by piecemeal development proposals”. (at 16E)

38. The same approach was adopted by the ECJ in the case of *Ecologistas en Accion-CODA v Ayuntamiento de Madrid [2008] ECR I – 6097*. In her opinion, Advocate General Kokott stated:

“... the objective of the EIA Directive cannot be circumvented by the splitting of projects. Where several projects, taken together, may have significant effects on the environment within the meaning of Article 2(1), their environmental impact should be assessed as a whole. It is necessary to consider projects jointly in particular where they are connected, follow on from one another, or their environmental effects overlap.

39. The approach in *Swale Borough Council* and *Ecologistas* was approved by Lang J in the case of *Larkfleet Ltd v South Kesteven DC (2014)*, where she held that in considering whether a proposal falls within the scope of Schedule 2 to the EIA Regulations:

“... the starting point will always be the proposed development. However, the planning authority ought also to go on to consider whether there are other proposed developments in the vicinity and if so, whether they should be assessed jointly with the proposed development, as if they comprised a single Schedule 2 development. The test is whether they ought to be regarded “as part of the same substantial development” (per Davis LJ in *Burridge*) or whether the proposed development is “an integral part of an inevitably more substantial development” (per Simon Brown J in *Swale*)” (at paragraph 54).

40. Recent guidance on the requirement to consider reasonable alternatives has been given by the European Court of Justice in the case of *Holohan (and others) v*

An Board Pleanála (C-461/17). With specific reference to the requirements in the EIA Directive 2011/92/EU, the Court held (at paragraphs 65 -69) that:

- a main alternative is an alternative that would influence the environmental effects of the project
- as a result, the point in time when an alternative is rejected by the developer is not relevant;
- main alternatives should include alternatives initially envisaged by either the developer or recommended by a key stake holder;
- The alternatives do not themselves need to be the subject of an EIA, but the reasons for the choice of not pursuing an alternative must at least take account of the environmental impacts.

41. As regards the form of the environmental statement, in the case of *Berkeley v Secretary of State for the Environment and Others* (2000), the House of Lords held that an environmental statement as contemplated by the EIA Directive (and by extension, by the Regulations) must constitute “a single and accessible compilation produced by the Applicant”. It may not be comprised of disparate documents, which require a third party (or indeed, the determining authority) to embark on a paper chase.

Discussion

42. As currently submitted and as we will explain below, the Application materials are not sufficient to enable the Council to discharge its obligations under the EIA Regulations.

43. As already explained, the TA is fundamentally flawed. The methodology adopts an unrealistic baseline and unrealistic assumptions. In addition, it fails to account for the cumulative impacts of other committed schemes other than Milburngate House.

44. Furthermore the TA adopts a design year of 2028. By this date, and on the Council’s own predictions, the Aykley Heads redevelopment is likely to be well advanced. The Council has produced an indicative masterplan of the Aykley Heads development which is informing the emerging Local Plan, has firm expectations of the likely employment levels at that development and (using its current data), is able to model travel patterns for future employees at that site. Nonetheless, there is no attempt to build any traffic flows from the Aykley Heads redevelopment into the TA.

45. To the extent that the TA is flawed, the AQIA equally flawed, as it bases its conclusions about the air quality impacts of the scheme once operational, on the traffic modelling contained in the TA.

46. This in turn, infects the Non-Technical Summary, which merely summarises the incorrect positions set out in the TA and the AQIA. The Non-Technical Summary is therefore itself inadequate.
47. The result, is that the ES as a whole does not meet the requirements of either the EIA Regulations or the EIA Directive. Should the Council decide to approve the Application on the materials currently in front of it, it will be in breach of its duties under the EIA Regulations and be acting unlawfully.
48. Some (but by no means all) of these objections may be answered, at least in part, by the more robust traffic impact assessment contained in the 'Sensitivity Test'. However, that Sensitivity Test is not incorporated either into the ES as an update, nor have its conclusions been used to update either the AQIA or the Non-Technical Summary. Applying the principle established in the case of *Berkley*, the ES at best, comprises a 'paper-chase' and is therefore by definition inadequate. Again, any attempt to approve the development on the basis of the current materials would be unlawful.
49. There is a further objection to the ES as it stands. It is clear from the full business case, that the application is being promoted, through Kier, by the Council on its own land. The Council is a key stake holder in the application, and as such, the alternatives to the proposal considered by the Council and discussed in Report and the reasons for rejecting them (taking account of their environmental impacts), must also be considered in the ES.
50. Moreover, even where the ES has considered alternatives (for example, the consideration of the Milburngate development as an alternative), it has not carried out the required exercise of comparing the relative environmental impacts. Indeed, the only possible conclusions that can be drawn from the approach in the ES to Milburngate as an alternative (i.e. that its Landscape impacts were adequately assessed as part of the cumulative assessment of the Application) is that the Applicant assumed that even were the Council to occupy the committed development at Milburngate, an office development of the Sands site would take place in any event.
51. The consideration of alternatives within the ES is therefore either absent (in respect of the alternatives considered in the Council's Full Business Case) or fundamentally flawed, thereby again rendering the ES inadequate.
52. Finally, and as explained above, the Application is clearly the first step in the much larger redevelopment scheme for the Aykley Heads site, which will itself be EIA development, the impacts of which in traffic terms at least will overlap with the impacts of the Application.
53. In this situation (i.e. the Application is an integral part of the wider redevelopment of Aykley Heads and the environmental impacts of the two developments overlap) and applying the principles endorsed in the case of

Larkfleet, it is incumbent on the Applicant to carry out an environmental impact assessment of the whole development. This will of course explore the combined traffic impact of the Application together with the likely traffic flows of the redeveloped Aykley Heads site. That will give a true picture of the likely traffic impacts within the AQMA of relocating County Hall to the centre of Durham and allow the Council to properly consider those impacts when it determines this application.

Other Issues

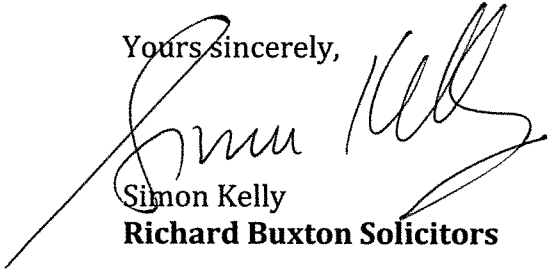
54. It is a truism of planning, that decisions on planning applications must be made in accordance with the development plan unless material considerations indicate otherwise (Town and Country Planning Act 1990, s 70, and Planning and Compulsory Purchase Act 2004, s. 38(6)).
55. In addition, where, as here, a planning application is for development within a conservation area, when determining the application, the LPA must give “considerable importance and weight” to the desirability of enhancing the character or appearance of the area.⁹
56. At this stage of the Application, no committee report has been drafted, and no recommendations have been made. It is therefore not the purpose of this letter to address whether or not Council has properly addressed the above statutory duties when it determines the application.
57. However, we note that the Application is within a very sensitive area (for reasons of landscape, heritage, flooding traffic and air quality), is extremely controversial, and, on the basis of what we have read to date, does not conform either with adopted local plan policy or with the requirements of the NPPF. Given the inadequate consideration of traffic and air quality impacts, and the inadequate consideration of whether or not there are alternatives, which would be preferable in planning terms, we do not consider that the Council currently has sufficient information on which to reach a view that the material considerations in favour of the application outweigh its disbenefits.
58. We would also note that where the Council is the beneficiary of an application both as land owner and future occupier, the moving force behind the scheme, and the eventual decision maker, it is particularly incumbent on the Council to be seen to act in good faith, and to comply with all relevant legal requirements, both as applicant, and as determining authority. Otherwise, there is a real risk that the Council will bring the planning system as a whole into disrepute.

⁹ c.f. the case of *Barnwell v East Northamptonshire DC* (2014)

Conclusions

59. In summary, we have advised our client that the Environmental Statement which currently supports the application is inadequate for the reasons outlined above. Should the Council proceed to approve the application on the basis of the current ES it will breach its obligations under the Regulations, and its decision would be unlawful
60. Moreover, on the basis of the information we have seen to date, we do not consider that the Application is policy-compliant. Nor do we consider that the Council has sufficient information to reach a decision that the material considerations in favour of the Application outweigh the policy breaches (which are in any event, more than merely technical). Should the Council decide to approve the application on the basis of the current information as currently advanced, then we consider that the Council would have failed to either understand or apply both NPPF policy and its own local plan policy, have failed to have regard to material considerations, and have acted unlawfully.
61. We should be grateful if you would confirm at your earliest convenience that you will use your powers under Regulation 25 of the EIA Regulations to require the Applicant to revise and update its Environmental Statement, addressing the issues identified above, and that the Council will re-consult on the statement in accordance with the requirements of the EIA Regulations.

Yours sincerely,



Simon Kelly

Richard Buxton Solicitors

cc. Stuart Timmiss (Stuart.Timmiss@durham.gov.uk)
Helen Lynch (helen.lynch@durham.gov.uk)