



tel: [REDACTED]
ask for: [REDACTED]
email: [REDACTED]
our ref: NST/PH/KEN002:000979
your ref:
date: 2 February 2022

Dear Rory

19/05000/HYB - Fort Halstead - Draft s106

1. Please find enclosed KCC's comments on the current draft s106 agreement, in as far as it does secure contributions towards KCC services. Please note that the comments are being provided on the basis set out below.

Failure to take into account a material planning consideration

2. We repeat KCC's position i.e. that it is noted with concern that KCC's requirements were not reported in the committee report. KCC do not accept the explanation given by Sevenoaks officers, namely, that because KCC didn't respond to the last round of consultations, an assumption was made that the impact of this development would have would no longer apply. If that is indeed the case, this was clearly an error on the part of Sevenoaks' officers.
3. KCC's assessment of the impact of the development that would need to be alleviated in order to make it acceptable in planning terms was clearly set out in their consultation response dated 15 November 2019 ('Request Letter'). The contributions sought were all set out on a per Dwelling basis and it is plainly inexplicable how this application could have been reported to planning committee without any reference to KCC requirements. Section 70(2) of the Town and Country Planning Act 1990 inter alia requires a decision maker to take all material considerations into account. I refer you to *Bolton Metropolitan Borough Council v SSE (1990) 61 P & CR 343*.
4. KCC consider that there is a real possibility that had the failure to mitigate the impact of this development been fully explained to members of the planning committee, the application for planning permission may have been refused. The planning committee ought to have taken into account KCC's requests for contributions and may well not have approved the application had it been fully apprised of the facts.
5. The total contributions sought amount to approximately £8.1m towards primary education, secondary education, secondary education land, community learning, youth services, libraries, social care and waste. These are not trivial or of small importance in relation to the decision to grant planning permission for this development. KCC is a statutory consultee and their

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representations and requirements should have been properly reported to the planning committee.

CIL/s106

6. I also reiterate KCC's position that it is wrong as a matter of law to assert that Sevenoaks, as a CIL charging Authority, cannot agree to off-site contributions being paid for County Council infrastructure pursuant to a s106. The Community Infrastructure Levy Amendment Regulations 2019 made a number of changes to the operation of the CIL and s106 planning obligations. The regulations allow both CIL and contributions to be secured under s106 for the same infrastructure project, whilst the tests in regulation 122 CIL continue to apply. I again refer you to the DfE Developer Contributions Guide and Gloucestershire Appeal decision (inter alia para 75) where this is made abundantly clear and which I have provided to you previously.
7. It is KCC's view that Sevenoaks' position in this regard is completely untenable as a matter of law, following the position they adopted at the recent Former Broke Hill Golf Club Public Inquiry. In respect of that appeal, KCC entered into a s106 agreement with the developer to secure the contributions needed to make that scheme acceptable in planning terms. KCC was represented by leading counsel at that Inquiry and Sevenoaks' counsel did not make any representations to the Inspector to the effect that the contributions being secured by way of a s106 alongside the CIL Charging regime was not permissible as a matter of law.
8. I therefore reiterate what was set out in my previous correspondence to you, namely that the starting point is to look at what infrastructure is required to make this development acceptable in planning terms. The next question is if CIL can deliver all of the infrastructure requirements. KCC's position is that there is no guarantee that CIL receipts will as a matter of fact alleviate the impact of this development on County services. There is no need to look at the estimated CIL receipt figures for this purpose, because without certainty that KCC will actually receive the monies that make this development acceptable in planning terms, whether from CIL or through a planning obligation, this development is unacceptable/not sustainable.
9. Given that it is not possible to give such a guarantee through CIL receipts now, as none of the infrastructure that is currently sought by KCC is identified in Sevenoaks' Annual Infrastructure Funding Statement, which sets out details of the infrastructure projects or types of infrastructure that Sevenoaks intends to fund wholly or partly through CIL, KCC objects to the development.
10. Notably, none of the purposes towards which KCC seeks contributions are stated to be a priority in Sevenoaks' most recent Infrastructure Funding Statement ('IFS') (April 2020-March 2021). Remarkably, key services that KCC has a statutory duty to provide to residents in Sevenoaks are not stated to be a priority e.g. education in the IFS. Sevenoaks failure to ensure that the impact of every development in the area alleviates its own impact is therefore a systemic issue.
11. I am informed that a meeting took place between senior officer of Sevenoaks and Kent in December 2021. Whilst the discussions were positive, they did not conclude with a firm commitment to address the issues outlined in this letter. KCC very much wish to continue to engage with Sevenoaks to address the issues outlined in this letter, but that is likely to take time. As KCC have been asked to comment on this s106, I have been instructed to set out KCC's position to you by way of this letter now.

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12. During the meeting that took place in December, two points were made, which I would like to take the opportunity to address. Firstly, Sevenoaks' officers were of the view that KCC treats Sevenoaks differently to other districts in the county in respect of their approach to securing planning obligations. As an example, Canterbury City Council was referred to.
13. However, on closer examination the position in Canterbury CC, is very different to that in Sevenoaks. Canterbury CC has an adopted Local Plan which provides for s106 obligations to be entered into on strategic sites (as the Fort Halstead site would be considered). No reliance is placed on Canterbury's CIL Charging Schedule to fund development in respect of strategic sites. KCC therefore always secures contributions in respect of strategic sites in Canterbury. This is in stark contrast to the position in Sevenoaks where reliance is placed wholly on their CIL Charging Scheme to secure contributions towards all types of development.
14. The second issue that was raised during the meeting between officers in December 2021 was that KCC's stance towards s106/CIL has changed in respect of Sevenoaks. However, it is important to appreciate that Fort Halstead is one of the first strategic sites to come forward in recent years, which is why the issue has arisen now. Secondly, the legislative regime changed in 2019, as outlined in paragraph 6 of my letter above, but Sevenoaks appear to have failed to properly consider the current legislative framework that clearly allows for both CIL charges to be levied and s106 contributions to be sought and secured, where appropriate.
15. At your request, we have not so far informed the developer of the issue that needs to now be resolved in respect of their application. Whilst KCC was content to adopt this position whilst there was the anticipation that the issues could be resolved between the authorities swiftly, that is not a tenable position to maintain indefinitely.
16. Without the s106 contributions that are required by KCC and secured by way of a s106 agreement, KCC considers that this development is unacceptable in planning terms, and objects to the grant of planning permission.

Action KCC invites you to take

17. KCC therefore invites the District Council to take this application back to committee to address the failures identified above and requests confirmation thereof on or before Friday, 11 February 2022, please.

Negotiation

18. KCC appreciates the opportunity for ongoing dialogue agreed between officers, and in particular, the plan to hold a specific workshop before 11 February 2022 with a view to resolving the issue.

If KCC do not hear from you within the aforementioned timescales with confirmation as requested, I have been instructed to provide a copy of this letter to the solicitors acting for the developer so that they are aware of KCC's position.

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I look forward to hearing from you.

Yours sincerely


Principal Lawyer
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