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CMS Planning Group

Structuring and Future-Proofing Complex Mixed-Use Developments

Understanding your challenges

Large mixed-use schemes are becoming increasingly common in the market. Local planning authorities are looking to maximise available space, benefit from economies of scale and create positive places where people can live, work, shop and play. This provides significant opportunities as it allows sites to be brought forward for much-needed housing while also providing developers and investors with a safer financial proposition. However, it is not without its challenges. By their nature, these developments can be extremely complex, involving multiple stakeholders, varying landownerships, competing interests and lengthy build-times. There is also the need to maintain scope for the project to evolve, to enable parcels of land to be sold or let on a phased basis whilst the remainder of the site is being built out and to future-proof the scheme by thinking about what flexibility is required at the application stage.

We set out below seven key areas that should be considered throughout the application, construction and operational phases of any development cycle. This has been derived from our experience on similar schemes, and through solutions that we have developed in partnership with our clients over many years. These suggestions can, of course, be combined to form a menu of options targeted to the specific outcomes and drivers of each development.

1. Start discussions with key stakeholders at a very early stage

- Identify all relevant landowners and stakeholders before progressing the application, and consider funding streams, development profit options and whether a CPO may be needed
- Stakeholders need to be happy with deliverability, timing, approach and interface
- Where necessary, enter into partnership agreements, JV agreements or development management agreements to clarify roles, responsibilities and benefits and to mitigate risks from the start
- Adopt early public engagement to identify and deal with issues up front

2. Choose options before the application is made which might allow further flexibility than a full planning permission

- Consider an application for outline planning permission subject to detailed reserved matters (planning permission in principle in Scotland)
- Consider use of Development Consent Orders which allow both approval of more 'conceptual' schemes with limits of deviation and flexibility to both the design and footprint, and the use of CPO powers

3. Deal with any infrastructure and transport issues head on

- Open up early discussions with statutory undertakers and highways authorities, as unexpected delays can occur in settling infrastructure agreements and dealing with interface issues
- Consider appointing specialist experts (e.g. rail surveyors)
- Ensure active progression of any required Highways Interface Agreements or Asset Protection Agreements
- Pursue stopping up order if needed in parallel with planning application

4. Build in flexibility during the planning application process

- Use a wider 'Rochdale envelope' and development description to provide flexibility in design options where details of the whole project are not available
- Make provision for an envelope masterplan to enable the development to be accelerated or slowed down depending on scheme changes and external factors
- Adopt a phased approach to the development and the discharge of conditions and parcel obligations
- Scope to use of 'unless otherwise agreed in writing' provisions in planning and reserved matters approvals

7. Consider the proportionate use of material and non-material amendment applications following grant of permission

- Always consider whether a full Section 73 application is actually needed. As the definition of 'non-material' depends on the context of the overall scheme, many seemingly significant changes may only require an application for a non-material change
- Consultation requirements are much less onerous and the usual notification procedures do not apply for Section 96A applications which can be extremely beneficial on sites with multiple landowners and stakeholders

6. Ensure flexibility in Section 106 Agreements

- Allow certain parcels of land to be bound only once they are acquired by the developer (i.e. use of after-acquired interest provisions)
- Draft each obligation so that it binds only specific areas of land, in particular where those obligations relate to specific classes of use (e.g. affordable housing provisions)
- Allow for future variations to the agreement without having to involve all of the original signatories, and smother sales or lettings of individual parcels

5. Use an innovative approach to drafting planning conditions

- Ensure planning conditions reflect what is planned and, in particular, apply to only set areas of the development or set use classes to avoid binding the whole site with, for example, retail use restrictions or infrastructure requirements
- Use a phased approach to the development, limiting conditions for each phase to what is specifically needed in that phase and making provision for phasing to change over time
- Avoid any site-wide conditions, any Grampian conditions or any onerous pre-commencement infrastructure requirements
- This will:
 - facilitate future sales or lettings without the need for complicated cross-indemnities or risk of breach. (This is particularly relevant for any early pre-lets which are necessary to make the remainder of the scheme viable or to open it up for development)
 - allow for variations to only one part of the consent without having to make a full Section 73 application

We act for clients in all sectors who are investing in, funding, developing or consenting large mixed-use schemes. As a future-facing law firm, we have a future-facing approach. Our aim is always to ensure that our clients' schemes are innovative, robust and forward-looking. Please come and talk to us if you have a development which you are thinking about, would like to get off the ground or which is already progressing.

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