

Our Ref: PJF/nss/PF/9166
(Please reply to Banbury office)

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22nd October 2015

Mr R Duxbury
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By email

Dear Bob

**TOWN AND COUNTRY PLANNING ACT 1990
PLANNING APPLICATION REF: 15/00831/F
LAND AT SOUTHAM ROAD, BANBURY**

I refer to the consultation responses that have been received from CDC Policy Section, DPDS your Authority's appointed consultant and the views expressed by Turleys on behalf of Aberdeen Asset Management. I firstly address the comments made regarding the Sequential Test.

Sequential Test

In the particular context of the Sequential Test, it is essential that the Planning Committee has knowledge of the Secretary of State's own understanding of his sequential test policy. This understanding has recently been articulated in the 'Rushden Lakes' decision which I attach in full. In this case the Secretary of State appointed a senior Inspector to hold an Inquiry on a 'call-in' application. Harold Stephens BA MPhil DipTP MRTPI FRSA dealt with the approach to the Sequential Test at paragraphs 8.43 - 8.46. Paragraphs 8.43 - 8.46 are set out below;

'The sequential test relevant to decision-taking is found at NPPF [24]. From the evidence that is before me the application site is out of centre, and the test would be satisfied if "suitable [in or edge of centre] sites are not available". There are differences of approach

between the Applicant, as against the objectors in relation to the concept of “suitable” sites in the sequential test – in essence, “suitable for what” is the question which arises. The answer to this question of law is suitable for the development proposed by the Applicant. The Legal & General submissions in relation to the legal construction of “suitable” were somewhat opaque. It is, of course, correct that the meaning of the term should be construed in its context. That involves consideration of the question of “flexibility” which is referred to in the last sentence of NPPF [24]. However, that the terms are to be construed (and therefore applied) in the real world of real development is beyond argument. The real world is the context.

The Supreme Court has told us in Dundee what “suitable” means and it has expressly rejected the approach advocated by the LAC and Legal & General that the concept relates to need and/or identified deficiencies in retail provision in the area in question; and it has expressly rejected the notion that “suitable” means that one should alter or reduce the proposal so as to fit onto an alternative site. The policy concerning the sequential approach as set out in the NPPF, and (to the extent that it is still relevant) the non-policy PG that accompanied PPS4, must be applied in a manner which complies with the legally binding case law on the meaning of the sequential approach. Plainly the case in question (Dundee) is of seminal importance.

In summary it establishes [a] that if a site is not suitable for the commercial requirements of the developer in question then it is not a suitable site for the purposes of the sequential approach; and [b] that in terms of the size of the alternative site, provided that the Applicant has demonstrated flexibility with regards to format and scale, the question is whether the alternative site is suitable for the proposed development, not whether the proposed development could be altered or reduced so that it can be made to fit the alternative site. These points although related are distinct. Although much was made of the fact that the Dundee case was a Scottish case the Supreme Court’s decision applies in England (the Supreme Court is the Supreme Court for England too) as the High Court ruled in terms in the North Lincolnshire case at [61] and [62] in which it was read across and applied to the English sequential test then found in PPS4.

It is important to bear in mind that the sequential test as set out in NPPF [24] require applications for main town centre uses to be located in town centres and it then runs through the sequence, edge and then out-of-centre. This makes good the very simple point that what the sequential test seeks is to see whether the application i.e. what is proposed, can be accommodated on a town centre site. There is no suggestion here that the sequential test means to refer to anything other than the application proposal. So Dundee clearly applies to the NPPF.’

The Secretary of State agreed with his Inspector on the approach taken. At paragraph 15, the Secretary of State indicated:

‘The Secretary of State agrees with the Inspector that the application site is out of centre and that the sequential test would be satisfied if “suitable [in or edge of centre] sites are not available”, albeit that that involves consideration of the question of “flexibility” (IR8.43). Furthermore, having regard to the arguments put forward by the Inspector at IR8.44-8.48, the Secretary of State agrees with his conclusion at IR8.48 that the sequential test relates entirely to the application proposal and whether it can be accommodated on an actual alternative site (eg a town centre site). The Secretary of State agrees with the Inspector’s conclusions on the sequential test in IR8.48.’

It is self-evident that the proposal for investment by Waitrose in a new store at Southam Road Banbury will not fit on the Spiceball site. I enclose an overlay drawing which demonstrates that the Waitrose proposal cannot be accommodated on the Spiceball site. The CDC Policy response suggests that there may be a possibility of an alternative scheme being promoted. Such a comment is conjectural only and has no evidential basis. No suggestion has been made that the site is capable of being developed for the proposal with surface level parking of the scale sought by Waitrose.

It is submitted that the issue for consideration within the Sequential Test is whether or not Waitrose has been sufficiently flexible within the meaning of the relevant policy. In this context, paragraphs 8.49 - 8.50 of Mr Stephens’ Report are instructive, stating:

‘The NPPF requires developers to demonstrate flexibility on issues such as format and scale. No indication as to what degree of flexibility is required is contained in the NPPF. Such a requirement was previously contained in PPS4 and so any relevant PG advice continues to be material. PPS4 PG is of assistance: flexibility in a business model, use of multi level stores, flexible car parking requirements or arrangements, innovative servicing solutions and a willingness to depart from standard formats. No serious complaint by the LAC or by Legal & General has been made in respect of these matters.’

In relation to flexibility the Applicant has demonstrated flexibility on format – a large part of the retail element of the scheme, namely the two anchors and the associated unit shops – anchors B8 and C1 and terraces B and C have full cover mezzanines thus reducing very significantly indeed the footprint of the development. Mr Burnett also referred to flexibility in relation to “scale” and explained that the Applicant could readily have placed far more retail floorspace on the site than has been proposed – in this way the floorspace of the development is reduced. It is clear from the layout that this is correct. A significant part of the scheme is taken up by the hotel and leisure club and various lakeside buildings i.e. by non-retail uses. It is absolutely clear that the whole scheme could not realistically be moved to another location.’

The context of flexibility cannot ignore the realities of the convenience goods market. I attach a letter prepared by Cushman and Wakefield that summarises the changes that have recently occurred in the retail market particularly for large floorspace occupiers. Mr Lunn on behalf of Cushman and Wakefield confirms that the Southam Road site satisfies the locational criteria sought by Waitrose, whereas the Spiceball site does not.

It is of course acknowledged that Waitrose has existing stores within town centres, with customer car parking provided in a multi-storey format. However a decision to invest in a new store in Banbury has to be made on the basis of current market conditions; the trading potential of Banbury; an analysis of the strength of offer of competitors; and the forecast performance of a particular store on a particular site, all of which is informed in part by the experience of Waitrose across its entire retail store portfolio.

The recently opened Waitrose store at Aylesbury is an example where the trading performance is lower than anticipated and one of the reasons for this, in Waitrose's view, is that the attraction of the store to customers is compromised by the multi-storey layout of the car parking, and the consequent less convenient means of access for shoppers between car and store when compared with its local competitors with at grade parking and level access. The requirement for lifts and / or escalators for access to the store is considered by Waitrose to present an undesirable disincentive to shoppers visiting their stores - thereby adversely impacting upon trade turnover.

Clearly this is a case where a planning judgement has to be made by your Authority. In forming such a planning judgement a proper understanding has to be made of the application of the Sequential Test - as expressed by the Secretary of State through his Inspector in the recently decided Rushden Lakes decision and in the Supreme Court decision Tesco Stores Limited (Appellants) v Dundee City Council (Respondents) (Scotland) where Lord Hope commented at paragraph 38 on the Sequential Test criteria:

'these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.'

The application of the Sequential Test is not intended to be applied so as to 'beat Waitrose into submission' so as to locate in a town centre site or edge of centre site. Waitrose has explained in the correspondence dated 20th May 2015 that careful consideration has been given to the opportunities that exist in the town centre of Banbury. Given Waitrose's requirements for a store in Banbury (in terms of store size, layout and car parking) it became apparent to Waitrose that whilst some of its requirements could be met on the Spiceball site, meeting any one of those requirements would result in unacceptable compromises on the others. A small store with surface level, at grade parking would not deliver the size of store required by Waitrose to succeed in this catchment. A larger store with remote parking or parking on different levels would not appeal to customers and would not trade sufficiently well, and the store layout would be unacceptably compromised. Waitrose considered the

options but, in Waitrose's opinion, none of these would deliver a successful store or achieve the desired return on investment.

DPDS state in their report that (paragraph 3.25) that 'Waitrose is unlikely to take up the Spiceball option even if planning permission is refused on the Southam Road site. That, however is a commercial decision for Waitrose; for the sequential test, the question is whether it is being sufficiently flexible' Of course such a decision is a matter of commercial judgement- but it is a matter of planning judgement for the Planning Committee as to where the overall public interest lies. In summary form, the Committee may make a planning judgement that securing the investment and retail presence of Waitrose in Banbury in an out of centre, but highly accessible location, is in the benefit of the wider public interest.

There are fundamental disadvantages with the Spiceball scheme which have been explained in the correspondence from Waitrose. None of the sites identified within the town centre of Banbury or edge of centre fit the Waitrose scheme with flexibility being applied to the scheme. The position of Waitrose is that the Spiceball site imposes a range of constraints on operating a store, some of which, for instance the size of store and the shape of the store may be acceptable in applying flexibility. However it is the concentration of issues impacting upon the trading of a Waitrose store in Banbury, particularly the disincentive to customers from the impact of multi-storey car parking and the reliance on lifts and escalators that has led Waitrose to conclude that there is insufficient confidence in investing in such a location within Banbury.

I have asked Waitrose to provide further clarification as to the reason why investment in the Spiceball site would not be suitable to Waitrose. I attach correspondence dated 21st October 2015 together with a plan that identifies the key areas of concern.

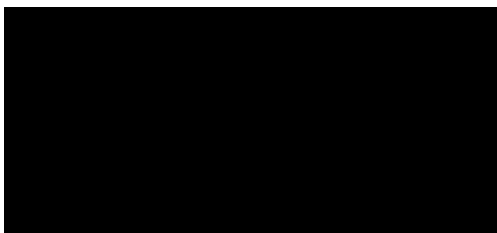
Such decision-taking is influenced by the trading potential of a particular town. Waitrose considers that the trading potential in Banbury is not sufficiently strong to withstand the operational deficiencies in the opportunity for a store at the Spiceball site. As such a decision by Waitrose to operate a store in Bath, London, Cheltenham and Southsea, should not be relied upon as an assumption that any town centre location will be acceptable to a retailer such as Waitrose. Such a generalisation misses the fundamental point that different towns have different trading characteristics upon which an individual trading assessment is formed. It should be recognised that for Waitrose to invest in Banbury, the company needs to have confidence the store will provide a shopping experience – including the convenience of car parking – which will encourage trade diversion from the existing retailer completion, which in Banbury is of a very high standard. A number of stores within the Waitrose portfolio underperform against expectations. Most of these situations occur where surface parking is not available, and customers have to access the store via decked car parking. The challenges in the convenience goods market is now such that compromises in store locations are given very careful consideration. Where the location gives rise to concerns that trading activity will not be realised, the decision is now generally taken to avoid investment in the particular town.

Waitrose has identified that the decision for investment in Banbury is a choice between the application site at Southam Road or no investment in Banbury based on the other sites that are potentially available. I urge you to form your planning judgement in reporting to the Planning Committee having regard to these considerations, as well as the comments made by the Policy Section at CDC; DPDS and Turleys.

Retail Impact Assessment

I welcome the overall conclusion expressed by DPDS (paragraph 5.8) that ‘the proposed development is unlikely to have a significant adverse impact on Banbury Town Centre, or any other centre’. As such I conclude your retail consultants are content the assessment required by paragraph 26 of the Framework is satisfied by this proposal. I consider that the detailed comments which have been made under various sub-headings of the DPDS report amount to professional differences of opinion, which do not alter the fundamental conclusions. I welcome the recommendations made by DPDS particularly at paragraphs 4.20 – 4.25; 4.32; 4.34, and 4.35.

Yours sincerely



Peter J Frampton

Encl: Rushden Lakes decision APP/G2815/V/12/2190175
Letter prepared by Cushman & Wakefield, dated 10th September 2015
Overlay drawing
Letter prepared by Waitrose, dated 21st October 2015, and accompanying plan

Cc: Mr C Matthews
Mr T Webster
Mr M Gorman