



Our Ref: P1571/JP/kk
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BY EMAIL:

Dear Lewis,

APP/18/01072 Elettra Avenue, WaterlooVille

Thank you for sending through the comments from Planning Policy dated 26th January 2022 to the Addendum Sequential Test that we submitted on behalf of the Applicant. The comments can be summarised as:-

1. Site suitability for a specific occupier is not a consideration
2. The site can be made suitable for the occupier
3. Suitability of servicing/potential for redevelopment of the site
4. Flexibility/Disaggregation

We have now reviewed these comments and wish to respond as follows.

1. Site Suitability for a Specific Occupier

The Council note that for a site to be considered suitable, the site does not need to be suitable for the requirements of a specific operator. Whilst there is nothing in the Framework or PPG that states that sites specific requirements of occupiers need to be considered when determining whether a site is suitable or not, we refer you to the Judgment in (CBRE Lionbrook (General Partners) Limited on the application of (vs Hammerson (Rugby) Limited [2014] EWHC646 (Admin)(14 March 2014)). In this case the Courts confirmed that although the identity of a potential operator may not be relevant, it was still necessary to apply "pragmatism" when applying the Sequential Test (Paragraph 173). Pragmatism is defined as "the quality of dealing with a problem in a sensible way that suits conditions that really exist, rather than following fixed theories, ideas nor rules." This must by definition consider the operational

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needs of retailers operating in a real world situation which requires them to trade profitably considering the components which comprise their underlining business model.

2. The Waitrose Store can be Adapted to Suit the Occupier

The Council have indicated that the landlord is open to discussing how the unit could be adapted to meet the intended occupier's requirements. This would be required as the existing store is larger than the intend occupier requires and it would, therefore, need to be replanned/subdivided at the outset. However, to achieve this, we note that there is a significant difference to 'being open to discussion' to do works to the store and actually getting to a contractual position where the works will be undertaken, to an agreed standard and specification and more importantly at the right time. We understand that Waitrose's lease runs until January 2026, until which time they are paying rent under the terms of their lease agreement with the landlord. Whilst the landlord may be "open to discussing" a new lease with the proposed occupier, whether one can be agreed or not is far from certain, not least because the unit itself is not suited to the operational needs of a discount food store or indeed any major grocery retailer as confirmed by the inability of Waitrose as a premier food store operator, to successfully trade from the site.. We comment on this fundamental problem in more detail below but first wish to place in context the position of the landlord.

Firstly, the landlord is unlikely to accept a surrender of the current lease unless the intended occupier agrees to pay an equivalent or better rent, or agrees to an acceptable lease length. If these fundamentals cannot be agreed the landlord would be unlikely to accept a surrender of the current lease by the current leaseholder as they would be no better off than the current status quo. There is no guarantee that the intended occupier would be prepared to offer such terms, nor is there any compulsion on the landlord to accept terms which are commercially unattractive. Finally, even if terms could be agreed, the landlord has a guaranteed income until January 2026 which leaves a substantial period within which access to the building may or not be granted. The timing of when a new lease can, therefore, be secured provides uncertainty for the intended occupier of the application site and would not meet their own investment and development goals.

Secondly, to secure the intended occupier, this will necessitate significant changes to the existing store which will impose a substantial financial cost to the landlord. To make it worthwhile the landlord will again need to agree a lease that makes it financially viable and attractive to undertake such works, particularly when there is live lease in place until January 2026. This reinforces the uncertainty associated with the claim that the landlord is "open to discussion" and provides no guarantee that a new lease will be agreed or granted.

Additionally, what efforts has the landlord made to attract to a new occupier to the site? Our investigations confirm that the building wasn't even being marketed on any of the commercial property websites which would indicate that the landlord is not actively seeking a new tenant. Thus, the 'open to discussion' claim is not matched by their actions and it would appear that finding a new tenant for their store is not a priority.

The requirement for car parking for the store's customers again needs to be considered on a pragmatic basis in light of the CBRE Lionbrook judgement referenced above. Again, Waitrose were clearly unable to trade at a commercially acceptable level in part we suspect by the restricted access to dedicated car parking for its customers.

3. Suitability of Servicing/Potential for Redevelopment

The policy response acknowledges that shared servicing arrangements would not be ideal. Again, whether such an arrangement would be acceptable or not to the occupier must be related to the business models of discount food retailers who operate on very narrow margins. A dedicated service area is an operational requirement of the occupier. Whilst the landlord could grant this to secure the occupier and grant a new lease it would be at the expense of the other occupiers who may wish to take the remaining units/floor space within a sub-divided re-development/refurbishment. Again, there is no guarantee that such an arrangement would be secured or would be satisfactory to the landlord.

The policy response states that no evidence is provided as to how the frontage arrangement may work. Conversely the landlord has not proposed or provided an option to as how they see it working. Again, being "open to discussions" does not provide any comfort that such an arrangement would happen.

It is suggested that the Waitrose store could be redeveloped. Whilst this is always a possibility we return to the point made above about the length left on Waitrose's existing lease. Whilst the landlord is still receiving rent and will continue to do so for approximately another 46 months it can reasonably be concluded that there would be little financial incentive to redevelop the site in the short term. Clearly to go to the cost of redeveloping the site and foregoing the rental income whilst the new store is constructed, is considered to be commercially unrealistic reflecting the need to forego guaranteed income but also the capital expenditure required to effect a redevelopment in the absence of key anchor tenants. It would in addition take a number of years to undertake, and could not therefore be considered to be available within a reasonable period of time. Again, there is no guarantee that this would occur, nor in the changing retail landscape that it is referred to later on in the response whether this would ever be achieved.

Turning to the CBRE Lionbrook judgement again, the issue of timing was also a consideration when determining whether the Sequential Test had been carried out in an appropriate manner. The existing unit is too large for the potential operator and is not suitable in its current condition. In contrast the application site is available for development now as confirmed by the existing permission. The Waitrose store given the technical, operational and commercial disadvantages we have identified, is clearly not available now nor is it likely to become available within a reasonable period of time, In this context the confirmed interest by a national

grocery retailer to locate in Waterlooville, reinforces the need for sites to be available over a short timeframe. For the reasons given and applying the need for pragmatism, the former Waitrose store is not considered to be realistically available.

Finally, the Council has set out a number of reasons as to why the Waitrose store was unable to trade from the site such as the impacts of the Pandemic and consolidation of the wider store portfolio due to the restrictions in the retail industry. The Retail Impact Assessment submitted in support of the current application confirms on the basis of the results of a telephone household survey conducted in May 2020, that the Waitrose store in 2019 had achieved a turnover of £16.77 million (2018 prices). This equates to a sale density of £7,326 per sqm and may be compared with the Waitrose company average in 2019 of £12,940 per sqm. The latter is comparable with Aldi's company trading levels of around £11,000 per sqm indicating that it would not wish to open a store which was likely to achieve significantly sub-optimal trading levels. The evidence indicates that the store was trading well below what was expected before the onset of the pandemic, thus demonstrating that factors other than Covid-19 were responsible for its poor performance.

Thus, the store was operating at only 57% of the company average which in large part no doubt explains why the decision was made to close the store. This suggests that the site does not offer a suitable location for the sale of food and convenience goods by a large format grocery retailer. Operationally Waitrose concluded that the store was not viable and been able to trade profitably is a key requirement in the choice of sites by any grocery retailer which operate on very small net margins. Since Waitrose was unable to achieve a commercially viable trading level, there is no evidence to demonstrate that the site is suitable for this type of retailing.

4. Flexibility/Disaggregation

The Addendum Sequential Test looked at why the scheme had not been disaggregated and I don't propose to repeat that again here. We reiterate the point that if the Government had intended to retain disaggregation as a requirement it would have explicitly stated this in the National Planning Policy Framework. It did not. This point was considered in the Rushton Lakes Secretary of State Appeal Decision (APP/G2815/V/12/2190175).

Whilst we do not disagree with the fact that Lidl and McDonalds came forward under separate planning applications, this is more of a reflection of market demand at the time. The Applicant is in the fortunate position of having occupier demand from three different users all at the same type, hence why a composite planning application has been submitted. The scheme has been designed on the basis that all three occupiers want to come forward at the same time in terms of creating a shared single access and use of shared parking areas for example. Clearly, if we didn't have this occupier demand we would have submitted a different planning application. However, the application is for what it is and whilst the Waitrose site could accommodate the development in part, it is not suitable to accommodate the whole development. We refer you to the decision in the Tesco Stores v Dundee City Council (2012) which considered the issue

of alternative suitable sites and whether an alternative site needs to be suitable for the proposed development, and not whether the proposed development could be altered or reduced so that it can be made suitable to fit the alternative site.

We also note that the site benefits from an outline planning permission which grants permission for A3 and A5 uses. In light of the uses currently proposed as part of the application these could feasibly come forward under the extant outline permission for the site. Similarly, the site also has permission for retail use which as we have touched on previously presents a viable fall back position.

In light of the above, we maintain that the sequential test has been passed as the alternative site (the former Waitrose store) is not considered genuinely available, nor is there any certainty that it could become available within the timescales that the intended occupier is working to within their own development programme. Whilst we do not disagree that the site may become available at some point, it cannot be considered sequentially preferable at this time. We refer to another High Court case (*The Queen on the Application of Sainsbury's Supermarkets Ltd v London Borough of Hillingdon v Albemarle Developments Ltd, Arla Foods UK Property Company Ltd* [2015] EWHC 2571 (Admin)) where Mr Justice Dove concluded that failure to comply with the sequential test did not lead to automatic refusal and that any failure of the sequential test should be considered in the context of other material considerations and whether these outweighed the conflict and that this should be factored into the overall planning balance. In paragraph 43 of the judgment, the court concluded:

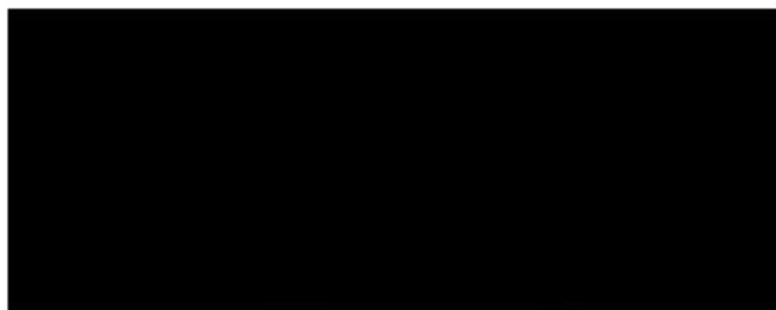
"...I am not satisfied that that effectively means that there is some kind of special presumption when paragraph 27 is engaged. The language of paragraph 27 is not unique in the Framework. For instance, at paragraph 64 the Framework provides that poor design "should be refused". There is no doubt that for very good reason the town-centre-first principle is the bedrock of national retail planning policy. If proposals breach it, they should be refused. But that does not mean that the weight to be attached to such a breach could not be outweighed on the facts of an individual case by other matters."

In other words any failure to comply was rebuttable by evidence which supported the grant of planning permission. In this particular case there are significant benefits to the town as whole not only in terms of increasing the town's self-containment, by increasing choice, reducing the length and number of food shopping trips out of the area, but also it would deliver new employment opportunities and encouraging private sector investment which would regenerate a brownfield site. And importantly there is an extant permission for a food store on the application site.

We would welcome any further comments from your planning policy colleagues and if you feel it necessary we would be happy to meet with both and yourself to discuss matters if this is deemed to be a beneficial use of everyone's time.

In the interim, if you have any questions or would like to discuss please do not hesitate to contact Patrick Downes or myself.

Yours sincerely



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