

21 Garlick Hill,
London, EC4V 2AU



Date: 12 April 2017
Your Ref: A/11/17/OUT
Our Ref: SP/9349B

Mr David Innes
Arun District Council
Arun Civic Centre
Maltravers Road
Littlehampton
West Sussex BN17 5LF

Dear David

OBJECTION TO A/11/17/OUT – APPLICATION AT LAND SOUTH OF NEW ROAD AND EAST OF BROOK LANE

Further to our letter to you dated 15th February 2017 we note that the applicant has now submitted a planning statement and a retail statement relating to their application and that these documents were both published online on 29th March 2017. Now that the applicant has provided the details we wish to formally object to the planning application on behalf of our client Store Property Investments Limited. Given that the Retail Statement introduces very little new information, it isn't clear why the Retail Statement was not submitted with the application package (as required by the validation procedures), and subsequently why there was substantial period of delay for this information to be submitted.

In summary, we consider that the application proposes out-of-centre retail development for which there is a sequentially preferable site. The proposals therefore should be refused on this basis. We also have considerable concerns regarding the Retail Impact analysis, and we await the comments of your retail auditors in this regard before providing further comments. We have also sought to highlight some other planning issues with the proposals within the note below, which also lead us to the conclusion that the application should be refused.

Partners

A M Davis FRICS IRRV
N P Draper FRICS IRRV
N M Fennell BSc MRICS

R J Greeves BSc (Hons) MRICS
A R Holden BSc (Hons) FRICS
G Bullock BA (Hons) BPI MRTPI

A Vickery BSc MRICS IRRV
G Denning B.Eng (Hons) MSc MRICS
B Murphy BA (Hons) MRUP MRTPI

A Meech BSc MRICS
S Page BA MA (Cantab) MSc MRTPI



Sequential test and retail impact

At paragraph 1.3 of the Retail Statement the applicant considers that matters of retail policy were fully considered by the Council as part of the 'Original' application. This paragraph goes on to state that "In granting planning permission the Council accepted that there are no sequentially preferable sites for the proposed foodstore..." This is plainly not the case. Arun District Council clearly acknowledged that this aspect of the application had not been properly assessed. As a consequence the Original Application' is a pending application and does not benefit from planning permission. This is acknowledged later in the March 2017 Retail Statement.

In paragraph 1.5 of the Retail Statement the Planning Agent considers that there hasn't been a material change in circumstances locally since permission was granted that should lead the Council to reach a different conclusion in respect of the Revised Proposal. This is a misleading statement. The decision making leading to the grant of permission was flawed and as a result of which the permission was quashed. It is not relevant to refer to the conclusion reached in relation to the Original Application.

We also disagree with the view that there has not been a material change in circumstance since the previous Retail Statement. As explained later in this letter there has been a number of changes since the initial retail assessment was undertaken, and changes in case law relevant to the assessment. For the avoidance of doubt we agree that the 2016 Retail Study is a further material consideration. However, it is clear that this retail study was commissioned by ADC in order to answer specific issues raised by the Local Plans process and did not constitute a full update, which would potentially resolve a number of the deficiencies in the impact assessment presented by the applicant in the Original and Revised application. The Revised application should be accompanied in our view by a new retail impact assessment which takes account of relevant changes to shopping patterns in the intervening period. For a scheme of this scale and importance it is surprising that the applicant has not sought to update their retail impact assessment in full, not least because the Council's review highlighted that the previous retail model was itself questionable in terms of its reliability owing to the expanse of time since the last household survey and the changes that have occurred in the town centres. The applicant is relying instead on the responses to the 'original' application.

Section 6 of the Retail Statement does not acknowledge the implications of the Aldergate decision¹, which we consider to be a serious omission. This decision confirms the priority to be accorded to properly understanding, interpreting and applying the sequential test in making decisions in respect of retail proposals outside of existing town centres. In particular the Judge's analysis of 'suitable' and 'available' are particularly relevant as follows:

".....In my judgment, "suitable" and "available" generally mean "suitable" and "available" for the broad type of development which is proposed in the application by approximate size, type, and range of goods. This incorporates the requirement for flexibility in [24] NPPF, and excludes, generally, the identity and personal or corporate attitudes of an individual retailer. The area and sites covered by the sequential test search should not vary from applicant to applicant according to their identity, but from application to application based on their content. Nothing in *Tesco v Dundee City Council*, properly understood, holds that the application of the sequential test depends on the individual corporate personality of the applicant or intended operator."

At paragraph 37 of the case *Ouseley J* stated "NPPG cannot therefore be interpreted as requiring 'suitability' and 'availability' simply to be judged from the retailer's or developer's perspective, with a degree of flexibility from the retailer, and responsiveness from the authority." Paragraph 38 goes on to say:

"....still less can it be interpreted as envisaging that the requirement or preferences of an individual retailer's trading style, commercial attitudes, site preferences, competitive preferences whether against itself or greater competition should dictate what sites are 'suitable' or 'available' subject only to a degree of flexibility. NPPF [23] and [24] are simply not couched in terms of an individual retailer's corporate requirements or limitations. That would be the antithesis of planning for land uses and here its default policies..."

¹ *Aldergate Properties Ltd v Mansfield District Council and Regal Sherwood Oaks Ltd* [2016] EWHC 1670 (Admin)

The Retail Statement for the revised application continues to rely on a dated board decision, and therefore cannot be said to have been taken retailer blind.

At paragraph 7.3 of the Retail Statement the applicant claims that Retail Impact of ‘the Original Proposal was thoroughly assessed and deemed not to be significant’. We do not agree that the strength of the retail auditor’s response was so strong, in fact it was clear from the auditors response then that the cumulative impacts of the development were of cause for concern. In the overall conclusions for the ‘Original’ application DPDS stated:

“there would be some advantages in producing a new retail impact assessment from scratch, because many of the assumptions about trade draw go back to impact assessments carried out some time ago and based on assessments which should be reviewed in the context of changes since....a new household survey which would include the trading patterns following implemented planning permission is becoming necessary to that the developments can be omitted from the cumulative impact assessment.”

Importantly DPDS were not able to conclude that the cumulative impacts would be acceptable, nor that the proposed development would have a significant impact on planned investment in Rustington. On the basis that this is a new application, and all of the contextual changes are known, and have been for some time, the applicant should be required to provide a full assessment of the retail impact of the proposal based on best available information, including a new household survey. There have been dramatic changes in circumstances since the assessment was first undertaken by Montagu Evans, and it is not clear why, for this new revised application the applicant has not sought to model the impacts of the proposal in light of the current retail context.

We disagree with the applicant at paragraph 3.5 that the operator’s trading format is a material consideration. The trading format is of relevance to the analysis concerning the sequential approach, which is in turn a criterion within the Development Plan. Likewise the Applicant’s belief that the sequential assessment previously carried out for the Original Application should be the starting point for the revised proposals is incorrect, as the decision has been quashed. It is unclear why the applicant would in section 7 consider that the former Waitrose site would or should be developed

for residential use. The site does not have planning permission for redevelopment, nor is the site allocated for this purpose in the current or emerging Local Plan. The comment in this section that there is an artificial barrier to re-occupation is entirely unjustified, but is also irrelevant to the impact assessment. Within section 7 the updates to the retail model are very limited, extending to the base and design years and the turnover of commitments. This is wholly unsatisfactory in the context of the changes in the town centre. The survey derived turnover that the applicant refers to are entirely unreliable in the current context because they were undertaken prior to a number of changes in town centres, and the opening of a number of out of centre retail facilities.

Analysis of Availability

Needless to say we disagree with the Applicant's own view of the process of determining what they refer to as 'the Original Application', however, we do not consider that it would be correct process for us to get drawn into these areas of disagreements as part of this application. This is a new application, and the Applicant's Assessment should be considered as a stand-alone document, which we assume will in due course be tested by the Council's chosen retail consultants. We would urge the Council to require the applicant to produce an assessment of the current application that is not simply an account of their previous assessment (for an application which is currently pending following legal challenge). For example paragraph 6.19-6.22 considers the area of search for the sequential assessment. Instead of setting out in factual terms what the area of search is for the current application the applicant has merely provided a historic account of what was undertaken previously for a different application. It is a clear indication that the applicant has not undertaken a new assessment for the current application but is instead relying on the same assessment as that undertaken for a previous application. Accordingly there is a lot of information that is completely irrelevant to this application.

The information contained within paragraph 6.38 is fundamentally flawed in that the applicant states that they 'have concerns over the genuine availability' of the former Waitrose site. In the first instance the applicant should in accordance with the NPPF provide an assessment and provide a firm view in this regard. Subjective concerns are not appropriate for this type of assessment. Secondly it is clear that the former Waitrose site (in Littlehampton) is vacant, on the market, and that there has

been numerous attempts to offer the unit to M&S to accommodate the proposed trading format. Agents for the landlords commented on the 'Original Application:

“we duly request that the Council gives consideration to our client’s willingness to work with, and provide a realistic proposition for M&S to accommodate the retailer within Littlehampton, in a location where it would provide a positive contribution to the overall vitality and viability of the town centre in accordance with the objectives of the NPPF.”

The former Waitrose site is clearly, and without doubt available for the use proposed. Arun District Council will be aware from the previous application that the landlord had objected to the proposal, clearly indicating that the site is available for occupation. In summary, there is no indication that the site is not available to Marks and Spencer.

Analysis of Suitability

The sequential test relies heavily on the fact that M&S had the opportunity to acquire the Littlehampton unit in 2011 and did not do so. The previous advice of the retail expert DPDS stated that *“it should be noted that this conclusion on sequential test only applies if M&S is the occupier and a condition restricting the occupier accordingly might be appropriate.”* The applicant makes no reference in the application submission to accepting a condition to this effect. On the contrary in paragraph 3.5 the applicant states: ‘the revised proposal must be considered on the basis that it is a Class A1 foodstore proposal and that any permission would not be personal to M&S.’

At paragraph 6.39 the applicant reiterates their view from the previous application that ‘there are significant viability issues relating to the trading location’. Yet as with the previous application there is no evidence that this is the case. The applicant appears to be using retail churn as a measure of viability, when in fact the consideration of the changes in operator have not been considered specifically. The changes in fascia discussed are in our view not a marker of economic failure, but are instead a product of other external factors. The unit was purpose built for convenience use, and had been in continuous use for this purpose until Waitrose vacated. It is incorrect and misleading to suggest that that previous supermarkets have failed in this location. The Co Op group purchased Somerfield in July 2008 for £1.57 billion. The store (along with hundreds of others) simply changed name from Co-op to Somerfield. This change was not geographically specific to Littlehampton.

Somerfield then sold over 100 of its stores to various supermarket chains to satisfy the Office of Fair Trading over competition concerns. Waitrose purchased several sites across the country, including Littlehampton.

It is clear from the Waitrose objection to the Original Application that their trading position in Littlehampton was a viable one, in their representations, agents for Waitrose wrote to Arun District Council to emphasise the former Waitrose site as a sequentially preferable site for example:

“we share their [Ropemaker’s] concern that the applicant has failed to properly assess the suitability for the former Waitrose store in accordance with the sequential test as set out in the NPPF, particularly as the letter demonstrates that the unit is capable of being subdivided and highlight the fact that no evidence is presented to demonstrate that the unit is unviable for convenience retailing”.

This is furthermore underlined by the Council’s retail study which in its analysis of trading patterns did not contain any concerns about the future trading performance of the then Waitrose in Littlehampton. An element of under-trading compared to benchmark figures was acknowledged, however Waitrose was not singled out as significantly under-trading, and in fact was performing better compared to company averages relative to other food operators in the town centre. However, using bench-marks to assess the relative performance has limitations as acknowledged by DPDS in their study, and it is notable in this regard that the Co-Op in Rustington was shown to be under-trading to a greater extent than Waitrose. The site’s relatively long history of foodstore use is evidence of one thing, that the site is suitable for a foodstore. Similarly the lack of demand cannot be used as evidence of the site not being suitable. Marks and Spencer appear to be the only operator with a requirement for a store of the floorspace proposed. The applicant’s consideration for the future use of the site likewise has no evidence base or any policy support, and is completely irrelevant therefore to the application of the sequential test. The former Waitrose site in Littlehampton meets all of the operator requirements set out in the March 2017 Retail statement and therefore it is very easy to demonstrate that the site is suitable for the trading format proposed.

It is clear from the Applicant's submission that the Waitrose site has not been considered seriously by M&S for at least 6 years (when the site was last available), this clearly runs contrary to the application of the sequential test. The fact that a site was discounted by a board 6 years ago, should not mean that in planning terms it is unsuitable for food retailing. It merely serves to show that insufficient flexibility and rigour has been shown in the assessment. There is no indication that the site has been re-considered, it has merely been discounted because another operator has moved to an alternative site in the same catchment area. Furthermore the evidence presented in the March 2017 report is most certainly not tenant blind. In the real world the site has been occupied by food retailers consistently and for a long period of time and is perfectly capable of accommodating the proposed development. There would need to be considerably more evidence in our view to demonstrate that the site is not 'suitable'. If the sequential approach followed the logic presented in the 2017 retail assessment then the sequential approach clearly could not function as a test. In order for a site to be available for development it needs to be vacant or about to become vacant, but if vacancy is automatically considered to indicate a lack of suitability then it would clearly be impossible for any town centre site to be both suitable and available.

Locating a Simply Food in this location would be an excellent opportunity for the centre, we note from the minutes of the latest Parish Council meeting that Littlehampton Parish Council considers: "that Littlehampton as a vibrant Town Centre was most certainly at risk if out of town developments continued to be approved...." The landowners for the site have demonstrated a desire to adapt the unit to M&S' specifications. There is strong policy support at the national and local level to direct M&S to this town centre site, and the applicant has not shown sufficient flexibility and properly considered more central sites.

The NPPG Guidance states that the potential suitability of alternative sites should be discussed between the developer and the local planning authority at the earliest opportunity. This has not been undertaken for either the 'Original' or the 'Revised' application. In the case of the 'Original' application, a number of parties with an interest in the former Waitrose site sought to engage with M&S, their agent and the Local Planning Authority regarding the site. The responses to the letters and representations were short and certainly did not represent a meaningful engagement.

Safety concerns regarding railway crossing

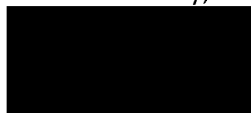
The applicant incorrectly states that the Brook Lane crossing point over the railway is not a public right of way, however, the crossing itself is designated as a public right of way. Pedestrians use the route and will continue to use the route to access the proposed development. The PERS Audit does not ascertain the amount of pedestrian traffic which currently uses the crossing and/or Brook Lane. Network Rail's safety report shows 24 safety incidents have been recorded at the crossing, four of which involved people setting out in front of trains.

The proposed development (both the pub and the retail store) will significantly increase the use of this crossing thereby directly resulting in an increase in safety risk which must be mitigated appropriately in order that the overall scheme is acceptable in planning terms. On the basis that the applicant has not proposed adequate mitigation we consider that the proposed development does not comply with the NPPF paragraph 32 which requires "*safe and suitable access to the site can be achieved for all people*" which would also constitute a reason for refusal.

Conclusion

We would urge Arun District Council to refuse the application. The application proposals continue to be contrary to the NPPF and the development plan, and therefore our objections to the previous application continue to be relevant to this application. At the very least we would urge Arun District Council to require a revised Retail Statement to be submitted, with considerably more evidence to support their claim that the Former Waitrose site is unsuitable and unavailable for development, and with a considerably revised retail assessment based on an updated household survey. We would be grateful if you could keep us updated on the progress of this application, and also for the 'Original Application', of which the timescales for determination are unknown at this stage.

Yours sincerely,



Serena Page BA MA (Cantab) Msc MRTPI
Partner
Dalton Warner Davis LLP

