

Please Reply to: Swindon
Our Ref: DAM/C10244
Your Ref:
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Town Planning
Development
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Mr Martin Chandler
Senior Planner
Environmental & Regulatory Services
Cheltenham Borough Council
Municipal Offices
Promenade
Cheltenham
GL50 9SA

Dear Martin

Application No 15/00321/OUT Proposed Retail Warehouse Units, Gym and Public House, former BMW site, Tewkesbury Road, Cheltenham

I refer to DPP's letter of 15th Dec 2015 regarding the availability and suitability of North Place in the sequential test. It might be useful to have a brief resume.

The application as submitted was for an open A1 use together with a pub and gym. The main retail tenants were identified as TK Maxx and Brantano, neither of which could be considered as bulky goods retailers. The application has, rather unusually for such applications, led to objections from the owners of both the main indoor shopping centres in the town centre. The proposal is seen as contrary to the town centre first policy and there is a concern that TK Maxx would move out of the Regent Arcade. In addition, granting planning permission would set a precedent which would make it difficult for the Council to resist other open A1 retail proposals.

We concluded that the proposal would not cause a significant adverse impact on the town centre, but the applicant had failed the sequential test. The trade diversion would be limited and while TK Maxx's longer term intention must be uncertain, if it were to move out of the town centre, there would be a reasonable prospect in Cheltenham of re-letting to a good tenant and a relocation could not be said to undermine the town centre as a whole. With regard to the sequential test, although some sites were ruled out by the applicant as unsuitable for TK Maxx because of the proximity of the alternative sites to the existing store in the Regent Arcade, any planning permission would not be restricted to TK Maxx or any other retailer to which special considerations might be applicable.

The applicant responded with suggestions for conditions and a proposed S106 agreement which would prevent, for a period of five years, the closure of the town centre TK Maxx while the unit in the proposed development remained trading. The conditions would aim to limit the retail activity to bulky goods with specific exceptions to allow TK Maxx and Brantano to trade from units A and C.

The latest letter from DPP sets out what it sees as the main points in recent decisions including the Dundee and Zurich (North Lincolnshire) judgments and the Rushden Lakes decision. Our previous advice has taken

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Swindon

Old Bank House
5 Devizes Road
Old Town Swindon
Wiltshire SN1 4BJ
Tel: 01793 - 610222
Fax: 01793 - 512436
email: dpds.swindon@dpds.co.uk

Derby

3 Gleneagles House
Vernon Gate
Derby
DE1 1UP
Tel: 01332 - 206222
Fax: 01332 - 206012
email: dpds.central@dpds.co.uk

DPDS Consulting Group comprises:
Development Planning & Design Services Group Ltd (Company Registration No 1907209); DPDS
Consulting Ltd (Company Registration No 02091153); Development Planning & Design Services
Ltd (Company Registration No 2091708) and DPDS Architecture Ltd (Company Registration No
2937191)

Registered Office: Old Bank House, 5 Devizes Road, Old Town, Swindon, SN1 4BJ
www.dpds.co.uk



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Cheltenham Borough Council

these into account and it is fair to say that the Dundee judgment in particular defines the way that the Council should implement the sequential test; It needs to ask itself whether alternative sites are suitable for the development proposed, and not whether there are sites which could meet a different, hypothetical development. However, the judgment did not address the specific requirements of named users and did stress the requirement in policy for developers to show flexibility. It was clear that whether the flexibility shown is sufficient is, in the first instance at least, a judgement for the LPA to make. In both cases the challenge came from objectors to the permission and the challenges failed – LPAs are entitled to exercise judgement in assessing developer's flexibility and the Courts will only intervene if they act unreasonably.

The Rushden Lakes decision gives some indication of how national policy is likely to be interpreted if the application were to be determined at appeal. The decision indicates that that the disaggregation of the development is not a requirement and that sites should be available - without any indication of the timescale. The North Lincolnshire judgment sets out the principles relevant to the proper approach to local and national policy in para 16. This notes that national policy is a material consideration but the weight to be given to material considerations is a matter of planning judgement and that the part played by any particular material consideration is a matter for the planning authority. However, an Inspector or the Secretary of State is likely to give considerable weight to the NPPF, particularly where the local plan is not up-to-date.

In terms of the specific response on North Place, DPP claim that the site is unsuitable because of Local Plan policy which favours residential development, the unsuitability of a retail warehouse-led development in a conservation area; the remoteness of the site from the retail core and the lack of road-side prominence and pass-by trade. In DPP's view the lack of critical retail mass of neighbouring retail uses and major pass-by traffic "*severely constrains the site's relative attractiveness and viability*". Lastly DPP claims that the proximity of the existing TK Maxx store makes it unviable for the proposed development. DPP also claims that the site is under contract and therefore not available.

I shall take each in turn. In relation to the Local Plan the site is allocated for a mixed use development although the text indicates residential development on the site, other uses were also expected and a solely residential development is unlikely to be acceptable, or the site would have been allocated for residential use. Non-residential development could not be considered contrary to the local plan policy for the site. Perhaps most significantly the Local Plan is now rather dated and other considerations are now likely to be more significant. Planning permission has been granted for a mixed residential and retail development. This suggests that the Council's views are open on the use of the site but you will of course have a better idea of what would be acceptable on the site.

In relation to design and appearance, the adjacent land has been developed as a multi-storey car park and the modern Brewery development has gone ahead nearby in the conservation area. Retail warehouses are no longer "tin-sheds" and reasonable design standards could be expected and will be required on any site. You will be more aware of what would be acceptable on the site in design terms.

I do not believe the site is commercially unattractive for retail development. It is very close to the retail core of the town centre and clearly much closer than the application site. While it might not support a shopping mall development, few sites now would. There is no reason why it would not be attractive for the

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development of larger retail units for which there is generally a shortage in town centres. There are examples nearby. I do not accept that the site lacks prominent road frontage or pass-by traffic; Fairview Rd is a continuation of Tewkesbury Rd which carries most of the traffic around the north of the town centre and to the main town centre car parks. There is no noticeable reduction in traffic compared with on the application site and it would need traffic counts to establish a difference. In my view, these objections to the North Place site are weak and its unsuitability has not been established.

In terms of availability, I understand that the Council has been told by the site owner that the dispute between it and Morrisons will be settled shortly and it is open to approaches for retail development. There is nothing to suggest that it is not available.

That leaves the objection based on the proximity of TK Maxx's existing store. DPP points out that in the North Lincolnshire judgment the fact that the Council gave weight to the requirements of a named operator (M&S) and that this was found an acceptable approach in law. However, the nature of the occupier was given weight outside the sequential test. It was common ground that the applicant had not passed the sequential test and the nature of the occupier was considered as another material consideration. The conclusion on the sequential test was, however, based on the failure of the applicant to show sufficient flexibility with regard to disaggregation in the context of the policy at the time (PPS4) and the NPPF does not mention the need to consider disaggregating the uses within a development. The judgment indicates that the Council is entitled to give weight to TK Maxx as an occupier but not that it was obliged to do so.

Returning to the present case, I think it is unlikely that TK Maxx would wish to operate a second store so close to its existing one. It has also been questioned whether it would, in the long term, wish to operate two outlets in Cheltenham, a point I will come back to. It is also likely that the development would need an anchor retailer to make the development viable, or at least that the letting of other units would be much easier with a retailer such as TK Maxx committed to it. However, there has been no evidence presented to establish that the development would be viable only with TK Maxx and the permission would, as submitted, not be restricted to TK Maxx.

To allay the Council's concerns on the latter point, the applicant proposed a S106 agreement and a number of conditions. The latest version of the suggested conditions I have seen is the email from Hunter Page dated 22nd September. I have a number of concerns.

The condition suggested for the TK Maxx unit is based on a condition from Llandudno, but it is clear from the retail planning statement submitted with that application that it amended a condition originally dating from 1991. I question the need to list all the bulky goods that can be sold, and it is so particular that there is risk of a retailer having to amend the condition to sell its normal range of goods or to start selling a new line of goods.

Furthermore it does not ensure that a mix of goods was sold and a high street clothes retailer would be able to trade from the unit selling only fashion clothes. The same would be true for any of the products listed.

I also note that the Brantano unit would be restricted to the sale of shoes and associated goods with no fall-back position.

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I suggest that, if permission is to be granted, it would be better to have a general bulky goods condition, as proposed for Unit B, applied to all three retail units with exceptions to allow a footwear retailer to operate from Unit C, and a TK Maxx type outlet from Unit A. This would provide the developer with a fall-back position without necessarily the need to seek to amend the conditions.

In relation to the TK Maxx unit, I consider that there would be a need to include a provision requiring that no single named category of goods should occupy more than a certain percentage of floorspace. I am not familiar enough with the offer or layout of TK Maxx, to suggest an appropriate figure, and it might be necessary, if for instance, the percentage of floorspace for clothing display was set at one level with no other category comprising more than a much smaller percentage. Only to give an idea of the format of such a condition as an example, it could stipulate that not more than 60% of the floorspace should be used for clothing and footwear sales and not more than 10% for any other permitted category. The actual figures would have to depend on the number of categories listed in the condition and the product mix.

I agree with DPP that a condition preventing the subdivision of units without consent would be necessary to protect the vitality and viability of the town centre.

In relation to the reasons for the condition, I am not sure that the conditions would ensure that the offer was complementary to the town centre, and suggest that the reason would simply be to ensure that the development did not prejudice the town centre's vitality and viability.

I conclude that the conditions proposed by the applicant would not be adequate to limit development to the special circumstances applying in this case. This should limit the weight that should be given by the Council to the proposed occupation by TK Maxx. However, I would not think that it would be impossible to devise suitable conditions.

Subject to legal advice, the S106 agreement would appear to offer some comfort on the impact on existing town centre retailers, but would be restricted to period of five years. As I understand it, this is about the maximum that would be considered reasonable in such an agreement. I am not aware of the remaining length of the lease on the TK Maxx unit in the Regent Arcade and whether this would offer any protection to the owners of the unit.

DPP also suggests that that the North Lincolnshire judgement makes it clear that, if the Council concludes that the sequential test is not passed, it should consider whether any other material considerations should override the conflict with policy. DPP do not set out what these other material considerations might be in its latest letter, but did so in the original assessment. We commented on these in our main report and DPP responded in its letter of 23rd June 2015. It is a matter for the Council what weight it should give to these, but in my view, the benefits in this case are not exceptional and accepting them as sufficient to outweigh the town centre first policies would undermine those policies.

Conclusion

I conclude that the application only passes the sequential test if it is accepted that TK Maxx is required as the anchor tenant. This is a matter of the flexibility shown by the developer and the Council is entitled to conclude that insufficient flexibility has been demonstrated. The Council should show considerable caution in accepting, as a matter of principle, that the requirements of specific, named retailers should attract great weight in the sequential test.

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However, with retail planning policy focussed on the short term and being implemented as it is, with suitable conditions and the legal agreement now proposed, I consider that the applicant would have a good chance of a successful appeal. The Rushden Lakes decision indicates how the previous Secretary of State was likely to approach the NPPF planning policy, and there is little indication that a different approach would be adopted now. As noted the flexibility expected by the Council is a matter of planning judgement, and at appeal, that judgement would fall to the Inspector. In the context of what would be seen as successful and thriving centre, the limited impact and lack of any clear harm to the centre arising from the proposal itself, (rather than as a precedent) there is, in my view, a significant risk that an appeal would be allowed. That is not to say that a refusal could not be defended on appeal or that the outcome of any appeal would be a forgone conclusion.

I trust you find this response helpful, but please get in touch if you would like to discuss the matter further

Yours sincerely,



Duncan McCallum
Consultant
Development Planning & Design Services Ltd