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15 December 2015

Our ref: GES/1640CA/L0002

Martin Chandler
Planning Department
Cheltenham Borough Council
Municipal Offices
Cheltenham
GL50 9SA

Dear Mr Chandler

**Land at Former BMW Dealership, Tewkesbury Road, Cheltenham
Proposed Mixed Commercial Development by Hinton Properties Limited – Application Ref No
15/00321/OUT**

I understand that with regard to the above proposal by Hinton Properties, you require further information concerning the sequential test in relation to the potential development opportunity at North Place, Cheltenham.

Relevant Appeal Decisions and Case Law

At the outset I would highlight that recent appeal decisions and case law clearly demonstrate how the sequential test should be properly interpreted and applied. In the first instance, I would refer you to our previous submissions in response to queries raised by DPDS, which identify the key principles arising from these decisions, the most notable being the Supreme Court's "Dundee decision", the Secretary of State's "Rushden decision" and the High Court's "Zurich decision". Copies of these decisions are attached for ease of reference.

As you will see from Paragraph 29 of the Dundee decision, the Supreme Court confirmed that the correct approach towards applying the sequential test is to consider "...whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site". Moreover, Paragraph 38 of the Judgement clearly reinforces this point, making it very clear that it is the developer's proposal rather than an alternative scheme that might be suggested by the local authority, that is relevant for sequential test purposes.

The Secretary of State's Rushden decision similarly confirms the importance of the application proposal itself rather than some hypothetical alternative. At Paragraph 15 of his decision letter, the Secretary of State agreed with the Inspector that the sequential test relates, "...entirely to the application proposal and whether it can be accommodated on an actual alternative site", and, "...not whether the proposed development could be altered or reduced so that it can be made to fit the alternative site" (Inspector's Report, paragraph 8.45). Furthermore, the Secretary of State (Paragraph 16) also endorses the Inspector's view that there is no policy requirement to consider disaggregation of a development for sequential test purposes. Subject, therefore, to the policy requirement for an applicant to demonstrate a reasonable degree of flexibility, the Dundee and Rushden decisions clearly demonstrate that it is the development, as proposed, that needs to be considered when potential alternative sites are being assessed in the context of the sequential test. Moreover, the

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Rushden decision also confirms that for a potential site to be relevant for sequential testing, it must be available now rather than at some possible future date.

The Zurich case, which related to an out of centre retail proposal comprising several retail units together with an M&S department store, helpfully addresses suitability/viability considerations. Crucially, the only available unit in Scunthorpe town centre could not accommodate the size of store required in order for M&S to provide its full retail offer of both non-food and food goods. Consequently, this particular town centre unit was discounted by M&S as unsuitable and unviable. As you will see from Paragraphs 60-2 of Mr Justice Hickinbottom's decision, he afforded considerable weight to the business model/requirements of M&S and the implications thereof in terms of the unsuitability of the available town centre unit. Such considerations are of particular relevance in the context of the Tewkesbury Road proposal and the fact that the scheme's retail anchor is confirmed as being TKMaxx – which we address later in this submission.

The Application Proposal

As you will be aware, the application proposal is for a mixed commercial development comprising three retail units together with a gym and public house, on a site of approximately 1 hectare. Also included within the scheme are mezzanine floors and shared car parking – two important features when assessed in the context of the sequential test requirement to demonstrate flexibility in terms of scale and format. Importantly, the retail element of the scheme is supported by two confirmed named-operators, namely, TKMaxx and Brantano, whilst the gym and public house are also supported by confirmed named –operators (Pure Gym and Greene King). As previously confirmed in writing, TKMaxx require a second store in Cheltenham that will complement their existing store in the town centre, whilst Brantano require a unit that will complement their sister brand (Jones Bootmaker) that is also located in Cheltenham town centre. With regard to the proposed gym and public house, these regard the application proposal as ideal in terms of meeting their respective business requirements for units that will cater for the substantial number of employees in the surrounding area and pass-by traffic on the busy Tewkesbury Road. They are not targeted at meeting the needs of residents or employees and visitors in the town centre – an important point in that the sequential test should appropriately be considered in the context of the need that a proposal will meet.

Taking into account the aforementioned appeal decisions, it is clear that the Hinton Properties proposal as a whole must be considered for the purposes of correctly applying the sequential test.

North Place

In terms of its size, the North Place site totals approximately 1.3 hectares and, as such, it could potentially accommodate the proposed development on the basis that the application site has an area of about 1 hectare. Furthermore, whilst in locational terms, it is acknowledged that the North Place site is more centrally located than the application site, it is not located within the designated Central Shopping Area and, as such, is not well related to the retail core where most national multiples are represented and where pedestrian flows are concentrated.

With regard to its development plan status, the North Place site is allocated for a mixed use development under Policy PR2 of Cheltenham Borough's Local Plan Second Review (adopted 2006). In terms of specific land uses, the site is identified for a minimum of 100 residential units (including 50 affordable), together with public car parking and possibly other public uses. Taking into account the characteristics of this general location and surrounding land uses, we concur with the appropriateness of this site's allocation. Notwithstanding the Council's previous decision, having undertaken the necessary planning balance, to grant planning permission for a food superstore on this site, the Tewkesbury Road proposal would clearly be non-compliant in land use policy terms given the North Place site's development plan allocation. Furthermore, it is our understanding that with regard to housing land availability in Cheltenham, there is a serious shortfall in respect of providing the necessary 5 year supply, as evidenced by the information provided both by the Council and the appellant at a recent Inquiry in respect of land at Leckhampton. This acknowledged shortfall reinforces the importance of safeguarding sites such as North Place, which are allocated for residential purposes in the development plan, and which can make an important contribution towards reducing the

serious shortfall in housing land supply in Cheltenham. Whilst for the reasons set out below, the North Place site is discounted as a credible alternative to the Tewkesbury Road application site, were a hypothetical non-conforming land use proposal to come forward, it should be rejected on the grounds of conflict with the development plan. Given, therefore, its development plan allocation and the serious housing land shortage in Cheltenham, the North Place site is demonstrably unsuitable for an alternative mixed commercial development, as proposed.

Furthermore, a suitably designed housing-led development at North Place would accord well with the role and character of the surrounding area which, importantly, falls within a designated Conservation Area. Whilst for the reasons set out in this submission, we believe that the North Place site can be discounted as a credible alternative to the application site, we would also seriously question the site's suitability in urban design terms for a retail warehouse-led development with associated surface level car parking.

In terms of availability, the North Place site is currently not available and remains "under contract" with Morrisons pending the outcome of an arbitration hearing which, we understand, is programmed to take place early in the new year. Presently, the North Place site can reasonably be discounted as unavailable. If, however, it becomes available to the market in the future, it will not represent a suitable and viable sequentially preferable alternative to the subject Tewkesbury Road site for the following reasons.

Turning to suitability and viability-related considerations, on the basis that TKMaxx are the anchor retail operator supporting the application proposal and, importantly, have confirmed that they would not occupy a hypothetical unit at North Place, because such a store would unacceptably "cannibalise" the trading performance of its comparatively near-by existing town centre store, the North Place site, clearly does not represent a suitable alternative development opportunity that is capable of accommodating the application proposal. Put simply, the North Place site does not represent a viable business proposition for TKMaxx, a view previously accepted by DPDS in their advice to the Council. In light of the Zurich decision, this non-viability represents an important material consideration that should be afforded due weight. Importantly, a refusal of planning permission for the application proposal would not have the effect of re-directing the TKMaxx requirement to a hypothetical unit at North Place. Similar considerations apply in relation to Brantano – a refusal of planning permission would not have the effect of re-directing this element of the scheme to a hypothetical unit at North Place. Given these findings, and taking into account the relevant restrictions/obligation offered by the applicant, Officers and Members can reasonably conclude that the North Place site does not represent a suitable and viable alternative to the Tewkesbury Road site.

Also relevant in terms of the potential suitability of the North Place site is its relative remoteness in relation to the town centre's retail core and the lack of any significant road-side prominence and associated pass-by trade. For these reasons the site does not, in our judgement, offer an attractive and viable business opportunity for non-food retailers. In sharp contrast to the Tewkesbury Road site, the absence of a critical mass of significant neighbouring retail uses and major pass-by traffic, severely constrains the site's relative attractiveness and viability – a view endorsed by our named-operators and leading commercial marketing agents. Whilst a major retailer previously considered the site to be suitable, this was in respect of an essentially main (bulk) food shopping role, undertaken predominantly on a weekly basis. This does not in any way demonstrate the site's wider suitability and/or viability with regard comparison goods retailing, which is typically undertaken far less frequently and which generally generates far lower sales densities per square metre. The fact that Morrisons no longer wish to pursue a development at North Place, further calls into question the site's locational credentials even for a food superstore development, thus further reinforcing our view that North Place is fundamentally not a viable location for a potential retail development, as proposed.

With regard to the non-retail elements of the application proposal, these too have confirmed that the North Place site does not represent a suitable development opportunity. On the basis that it would serve a materially different core catchment area to that associated with the Tewkesbury Road proposal. Again, a refusal of planning permission on sequential grounds would not re-direct the two named-operators to a hypothetical development at North Place.

For the reasons stated, the North Place site does not therefore represent a suitable and viable development opportunity that could realistically be expected to accommodate the application proposal and its confirmed named-operators. In these circumstances, the North Place site can reasonably be discounted and the sequential test deemed to be satisfied.

The Planning Balance

Whilst national policy states that non-compliance with the sequential test would normally dictate a refusal of planning permission, such a presumption must, nevertheless, be considered in the light of all material considerations. In undertaking the necessary planning balance and examining a proposal's relative merits, the benefits associated with a proposal could, as in the Zurich case referred to above, outweigh any failure to fully comply with the sequential test.

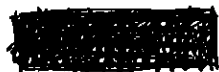
Whilst we are strongly of the view that the Tewkesbury Road proposal satisfies a sensible interpretation and application of the sequential approach towards site selection, should the Council conclude otherwise, it would still need to undertake the planning balance and weigh, for example, the scheme's major employment and consumer choice benefits together with the absence of any "significant adverse effect" on the town centre, as accepted by DPDS, against any perceived non-compliance with the sequential test. Whilst the evidence in this case does not support such a scenario, were the Council to conclude otherwise, it is our judgement that the planning balance would be, in any event, firmly in favour of the proposed investment and development by Hinton Properties.

Conclusion

The appeal decisions and case law referred to, clearly demonstrate how the sequential test should properly be interpreted and applied. A flexible approach has been adopted, as demonstrated by the applicant's use of mezzanine floors and shared car parking, and disaggregation of the application proposal into its constituent parts is no longer a policy requirement. Moreover, it is the overall development proposal advanced by the applicant that is relevant for the purpose of considering potential alternative sites, and not some hypothetical variant thereof. Furthermore, as demonstrated by the Zurich decision, potential alternative sites can be discounted where a named-operator considers these to be neither commercially viable nor suitable for their commercial requirements. Assessed in terms of the general principles set down in the cases referred to, it is clear that the North Place site does not represent a suitable or viable alternative that is capable of accommodating the proposal and its associated named-operators. In these circumstances, the North Place site can reasonably be discounted as a sequentially preferable alternative to the Tewkesbury Road site.

I trust you find these supplemental comments to those previously submitted to the Council, helpful. Should you require anything further to assist in preparing your Committee Report, please do not hesitate to contact me.

Yours sincerely,



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cc James Hinton, Hinton Properties Limited
Peter Harris
Paul Fong, Hunter Page

Our Ref: JG/3982
14th January 2016

Dear Councillor,

**Planning Application Ref: 15/00321/OUT Former Cotswold BMW garage,
Tewkesbury Road, Cheltenham**

I am sorry to burden you with additional papers in advance of next week's planning committee. However, I thought you would find the following information of help in your consideration of the planning application for the redevelopment of the soon to be vacant Cotswold BMW, Tewkesbury Road site.

The construction of the new flagship BMW/MINI store at Grovefield Way has progressed well and is due to open this summer. The existing store, which is prominently sited, will soon become vacant unless a new use is found. Our research has not revealed any demand for a replacement car showroom. The proposed development will provide a mix of uses including a gym, restaurant/pub and three retail stores.

We are strongly of the view that the scheme presented will deliver the best solution for the site whilst also complementing the adjacent Gallagher and Kingsditch Retail Parks which already provide comparable uses.

User restrictions

We have worked closely with officers to allay their clear concerns regarding the impact of out of town retail. My client (Hinton Properties) has taken a flexible approach by suggesting the imposition of 4 restrictive planning conditions in addition to a tightly worded S106 agreement to ensure the retail vibrancy and vitality of the town centre does not suffer but is strongly protected.

The conditions are commonly used in the retail sector and would ensure new units could not sell items outside of those specified. Also, units could not be subdivided to create a greater number of stores. To further safeguard the town centre, my client is willing to enter into a S106 agreement to ensure (for a period of 5 years) our anchor tenants must retain their existing town centre units (in addition to the new stores) or that any new retail trader has not traded in Cheltenham town centre before. The above user restrictions would ensure a strong level of control for retail traders on the site and would prevent existing town centre stores moving out to this site thus forcing a store closure.

Unique opportunity

It is important to recognise that both TKMaxx and Brantano ("aka Jones Bootmakers"), have chosen a new business model for Cheltenham where both prestige retailers have identified a need for both a town centre and an out of town centre store.

This unique business model represents the current strength and resilience of Cheltenham as an important retail centre and supports our view that the town centre will not be disadvantaged by this development.



In reality, the strength of the town centre will be substantially boosted this year by the arrival of John Lewis, the knock on effects of which are already being seen.

Range of benefits

This development will deliver a range of benefits for the site and wider area. It will;

- provide solid **economic growth** through a range of uses complementing those already found on the Gallagher and Kingsditch retail parks;
- provide between **71-120 full time equivalent jobs** for the town;
- **reinvigorate** a soon to be redundant gateway site; and,
- **enhance** the visual amenity of the site through a well-designed building and introduction of landscaping that the site currently lacks.

Summary

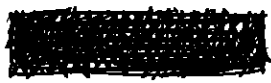
The planning application before you is a result of many hours of discussion with your Officers during the application process. The new development will deliver a wide range of benefits whilst ensuring the existing retail offer in the town centre is protected.

It is imperative that a new use for this soon to be vacant site is found - the uses proposed are the only realistic selection suitable for this site given its location and existing neighbours.

Naturally we are pleased with the recommendation to permit. Your Officers have dealt extensively with the retail impact element covering some five pages of your report. We believe that paragraphs 6.4.12, 6.4.22, 6.5.7 and 6.6.6 are particularly relevant and confirm the need to determine this application as it stands, with anchor tenants identified and continued town centre presence guaranteed, and not as a speculative or hypothetical application.

We hope therefore, for all the reasons set out in your Officer's report, you will be able to support the development proposed and deliver a further economic boost for Cheltenham.

Yours sincerely,



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