

SECTION '2' – Applications meriting special consideration

Application No : 18/03395/RECON

Ward:
Cray Valley East

Address : Unit 3 Nugent Shopping Park Cray
Avenue Orpington BR5 3RP

Objections: NO

OS Grid Ref: E: 547094 N: 168200

Applicant : Marks and Spencer plc

Description of Development:

Variation of Condition 13 pursuant to permission ref. 17/05868 to permit the linking of Units 3a and 3b

Key designations:

Areas of Archaeological Significance
Biggin Hill Safeguarding Area
London City Airport Safeguarding
Smoke Control SCA 26

Update

The application was deferred from Plans-Sub Committee on 15th November 2018 in order for the application to be considered on Agenda List 2 at a future Plans Sub-Committee. The submitted Unilateral Undertaking has been assessed by the Council's Legal department in the meantime and the report is repeated below, updated where necessary.

Proposal

Approval is sought for the variation of Condition 13 pursuant to permission ref. 17/05868 to permit the linking of Units 3a and 3b

Units 3a and 3b are currently both occupied by Marks and Spencer however they form two independent units in compliance with the original condition relating to the maximum unit sizes at the shopping centre, which states:

‘Within the development hereby permitted there shall be a restriction on the size of any one unit, or subdivision or amalgamation, so that the maximum size is no more than 3,000 sq. metres.’

The proposal would allow for an internal link in order for both units to operate as a single unit for Marks and Spencer only.

The application is accompanied by a Report on the change in Orpington town centre health, 2009-2017 along with a Unilateral Undertaking that outlines that only Marks and Spencer may operate the amalgamated units as outlined in the description of the application. Any future different occupier would not therefore benefit from planning permission.

Location

Nugent Shopping Park is an established retail park located to the North of Orpington. It is an out of centre site.

Comments from Local Residents and Groups

Nearby owners/occupiers were notified of the application and no representations were received.

Comments from Consultees

Highways Officer: In terms of trip generation to the retail park I do not think there would be a significant change if M&S operated as 2 adjacent units or as a single one. Concern would however be raised if a different occupier were to move into the premises as this could result in an increase in transport demand.

Policy Context

Section 70(2) of the Town and Country Planning Act 1990 (as amended) sets out that in considering and determining applications for planning permission the local planning authority must have regard to:-

- (a) the provisions of the development plan, so far as material to the application,
- (b) any local finance considerations, so far as material to the application, and
- (c) any other material considerations.

Section 38 (6) of the Planning and Compulsory Purchase Act (2004) makes it clear that any determination under the planning acts must be made in accordance with the development plan unless material considerations indicate otherwise.

The National Planning Policy Framework was published on 24th July 2018. According to paragraph 48 of the NPPF decision takers can also give weight to relevant policies in emerging plans according to:

- a) The stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
- b) The extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
- C) The degree of consistency of the relevant policies in the emerging plan to the policies in the NPPF

The Council is preparing a Local Plan. The submission of the Draft Local Plan was subject to an Examination In Public which commenced on 4th December 2017 and the Inspector's report is awaited. These documents are a material consideration. The weight attached to the draft policies increases as the Local Plan process advances.

The development plan for Bromley comprises the Bromley UDP (July 2006), the London Plan (March 2016) and the Emerging Local Plan (2016). The NPPF does not change the legal status of the development plan.

London Plan Policies

Policy 2.15 Town Centres

Policy 4.7 Retail and Town Centre Development

Policy 4.8 Supporting a Successful and Diverse Retail Sector and related Facilities and Services

6.3 Assessing the Effects of Development on Transport Capacity

6.9 Cycling

6.10 Walking

6.11 Smoothing Traffic Flow and Tackling Congestion

6.13 Parking

Unitary Development Plan

BE1 Design of New Development

S7 Retail and Leisure Development - Outside Existing Centres

T2 Assessment of Transport Effects

T3 Parking

T18 Road Safety

Draft Local Plan

37 General Design of Development

30 Parking

31 Relieving Congestion

32 Highway Safety

91 Proposals for Main Town Centre Uses

Additional Guidance

National Planning Practice Guidance (2014)

Town Centres Supplementary Planning Guidance (2014)

Planning History

The relevant planning history relating to the application site is summarised as follows

03/01807 - Redevelopment to provide a mixed use development comprising retail shops (Class A1), food and drink (Class A3), business units (Class B1), residential units (Class C3) and associated highway works and car parking OUTLINE. Permitted

04/04583/DET Details to enable the installation of mezzanine floorspace pursuant to conditions 24 and 26 attached to outline permission granted under ref. 03/01807 for the redevelopment to provide a mixed use development comprising retail shops (Class A1), food and drink (Class A3), business units (Class B1), residential units (Class C3) and associated highway works and car parking. Approved

04/04740/DET Details of siting, design, appearance (retail units only), access, landscaping, external materials and parking layout pursuant to conditions 1, 2, 3 and 5

of 03/01807 granted outline permission for redevelopment to provide a mixed use development comprising retail shops (Class A1), food and drink (Class A3), business units (Class B1), residential units (Class C3). Approve

05/00216/DET Details of siting, design and appearance of residential units and landscaping pursuant to conditions 1 and 2 of 03/01807 granted outline permission for redevelopment to provide a mixed use development comprising retail shops (Class A1), food and drink (Class A3), business units (Class B1), residential units (Class C3) and associated highway works and car parking. Approve

05/00663/VAR - Variation of conditions 22, 24 and 30 of outline permission ref. 03/01807 for redevelopment comprising mixed use development comprising retail shops (Class A1), food and drink (Class A3), business units (Class B1), residential units (Class C3) and associated highway works and car parking to allow (i) a maximum 363 car parking spaces within the development for the retail and residential uses (condition 22), (ii) an increase in unrestricted retail floor space from 2,322sq.m to 5,822sq.m and a minimum of 4 smaller units, each with a maximum floor space of 400sq.m. (condition 24), (iii) provision of 69 residential flats comprising 10 one bedroom and 59 two bedroom (condition 30). Approve

06/00495/VAR - Variation of conditions 24 (i) (iii) of permission ref 05/00663 for mixed use redevelopment to allow 6715 square metres unrestricted retail floorspace. Approve

07/02689/VAR - Variation of conditions 12 of planning permission DC/06/00495 to allow for a 74 square metres increase in allowance of retail floor space. Approved

07/02997/VAR - Variation of condition 17 of planning permission ref DC/06/00495 to allow the use of Units 3A and 3B as a single Retail Unit - Refused

08/01802/VAR - Variation of condition 17 of planning permission ref 06/00495 to allow increase in maximum unit size for units 3A and 3B - Refused

12/03879/VAR - Appeal allowed for planning permission for the variation of condition No. 8 of planning permission DC/07/02689/VAR, as applied to unit 4A

14/03950 - Variation of Condition 8 of planning permission reference 07/02689 to enable health and beauty / pharmacy operation at Unit 12. Approved

17/05868 - Variation of Condition 8 of Planning Permission ref. DC/14/03950/VAR - Approved

Considerations

The main issues relating to the application are as follows:

- Impact on Orpington Town Centre
- Highway Safety

Impact on Orpington Town Centre

Policy S7 of the UDP states that proposals for new or extension to existing retail or leisure development outside the centres to which Policy S6 relates will be expected to meet the following criteria:

(i) there is a need for the proposal;

(ii) all potential sites within the town, district, local or neighbourhood centres and parades have been thoroughly assessed, followed by an assessment of edge of centre sites within easy walking distance of the primary shopping area; and

(iii) the applicant can demonstrate that they have been flexible about the format, scale, design, car park provision and the scope for disaggregation in the sequential search for sites

If the sequential test above is met the proposal will be expected to:

(iv) be easily accessible to those cycling or walking and is, or will be, well served by public transport;

(v) not harm the vitality or viability of existing centres, either by itself or in conjunction with other proposals; and

(vi) the scale of the proposal will be appropriate to the size of the centre within which it is to be located.

There have been two previous applications to amalgamate the units as set out in the planning history section above.

When dismissing appeal ref. 07/02997, the Inspector states:

“by conjoining two adjacent units of limited size, the appeal proposal would enable a single operator of relatively large scale to dominate the Nugent Shopping Park, changing the character of the development and potentially attracting more customers and retailers from the town centre. The proposed development should therefore be subject to the well-established principle of national policy in Planning Policy Statement 6, as applied generally in the adopted UDP, that town centres should be protected. In my judgement, the established 3000sqm size limit should be retained unless there is evidence that it is no longer necessary to safeguard retail viability and vitality in central Orpington. I consider this justified on the basis of the professional advice on which the Council rely in their evidence, notwithstanding it predates the physical removal of M&S to the appeal site, as the principle of avoiding decentralisation of the primary retail function still applies.”

The Inspector in dismissing appeal ref. 08/01807 also attached significant weight when considering the amalgamation of units to the potential undermining of confidence in the policies geared to encouraging town centre retailing.

The application is accompanied by a report on the change in Orpington town centre health, 2009-2017 that summarises that the overall vacancy rate within Orpington Town Centre has fallen to 7.7% since 2013, the lowest level since 2009, thereby evidencing recovery across the retail sector.

Para 89 of the NPPF also states that such development outside of a town centre is subject to an impact assessment that should include assessment of:

a) the impact of the proposal on existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal; and

b) the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and the wider retail catchment (as applicable to the scale and nature of the scheme).

No Impact Assessment has been submitted and no sequential test has been submitted to evidence the lack of suitable sites in the nearby Orpington town centre, as required by Policy S7.

Policy 91 of the Draft Local Plan states that the Council will require main Town Centre uses to be located within designated Town Centres or, if no in-centre sites are available, sites on the edge of centres. Only if suitable sites are not available in Town Centres or in edge of centre locations should out of centre sites be considered.

Proposals for new main Town Centre uses outside of existing centres will be required to meet the sequential test as set out in the NPPF.

Proposals for retail, leisure and office development outside of the Town Centres, over 2,500 sqm should include an assessment of:

a - the impact of the proposal on existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal, and

b - the impact of the proposal on Town Centre vitality and viability, including local consumer choice and trade in the Town Centre and wider area, up to five years from the time the application is made.

The proposal involves the removal of a wall separating Units 3a and 3b to create a single retail unit amounting to 3,650 sqm GIA. The key policy issue is whether the proposed amalgamation would result in an unacceptable adverse impact on the viability and vitality of the surrounding town centre network. This potential impact formed the central argument for refusal in similar previous applications on the site (07/02997/VAR and 08/01802/VAR).

Whilst the proposal would not create any additional floorspace, the significant size of the amalgamated unit has the potential to alter the nature of the site's use. The sequential and impact assessment requirements under paras 86, 87 and 89 of the NPPF arguably apply in this instance.

The applicants have failed to carry out either a sequential or impact assessment, but have provided an updated retail assessment. This contains two main observations in support of the proposal: firstly, that retail conditions have improved substantially in Orpington town centre since the previous application (08/01802/VAR) and secondly, that there is a general preference by retailers towards smaller units across the UK. The applicants claim these observations demonstrate that the current occupant (M&S) can remain at an amalgamated Unit 3 without affecting the vitality or viability of Orpington centre.

Further, the applicants contend that the occupant will remain at the site for the foreseeable future and propose that a condition be imposed allowing the unit to revert to a divided format in the event that the occupant vacates.

The NPPG makes clear that robust justification must be provided where it is argued that the use has particular market and locational requirements and that land ownership is not a justification. This guidance could be interpreted to mean that an existing tenure should not in itself be a factor in any decision. Irrespective of this, granting a special exemption to the current occupant would likely precipitate new applications at the end of the occupancy, given that the Council, should it grant permission, would have agreed that the proposed use was acceptable in principle. Therefore, the Council is obliged to consider all possible outcomes resulting from an amalgamated unit, including future occupation by other large-scale retailers.

Nugent Shopping Park comprises one site in a loose cluster of town centre uses currently operating in the St Mary Cray locality. Other sites include Springvale Retail Park (incorporating Argos Extra and Currys PC World) and Orpington Retail Park (currently occupied by Sports Direct and Home Bargains) to the north, Pilgrim House (currently occupied by TK Maxx and Nike Factory Outlet) to the west and two Class D2 uses including a trampoline park immediately to the south.

This cluster occupies a corridor of about 800m and comprises over 36,000 sqm of retail and related floorspace. By way of comparison, Orpington town centre consists of around 86,000 sqm of retail and related floorspace. Whilst the cluster is not at parity with Orpington town centre quantitatively, further diversification of the retail offer here may encourage more casual shoppers to travel to this area instead of the centre and eventually threaten the retail primacy of the centre.

Individually, Units 3a and 3b are among the largest in Nugent Shopping Park. An amalgamated Unit 3 would be by far the largest unit in the shopping park and also the largest retail unit in the wider St Mary Cray area. Regardless of the apparent existing preference among retailers for smaller units, the proposed unit size, and floor plate, would clearly represent a step change in the St Mary Cray area's retail offer.

Whilst conditions are in place restricting the overall quantum of floorspace used for unrestricted retail and specifically for the sale of food and drink products in the shopping park, the proposed unit is nonetheless likely to be an attractive location for a greater range of large anchor tenants providing both comparison and convenience goods, whose presence could themselves attract further investment interest in the shopping park. The full potential impact of these effects has not been assessed in the applicants' submission. On a practical level, assuming the existing quantities of comparison and convenience goods remain at the unit, the preferred formats of some potential future tenants may make the current trade and floorspace restrictions extremely difficult to enforce.

The NPPF and London Plan provide the strategic support for the Council to explicitly promote a 'town centres first' policy. The Council is currently undertaking major regeneration initiatives in Orpington Town Centre as part of its Town Centres Development and Growth Programme. On 18 September 2018, the Cushman and Wakefield "Orpington Town Centre: Stage 1 (Evidence Base)" report was considered by the Council Renewal, Recreation and Housing Committee. This report, endorsed in full by members, provides the Council with an evidence base to inform decisions about future investment and development in Orpington Town Centre.

A health check of the Orpington Town Centre found that vacancies are declining (consistent with the applicants' retail assessment), but that the centre had fallen in the overall national rankings since 2012 (whereas Nugent Shopping Park had risen). It also found that occupancy was heavily weighted towards service-based retail, with a clear underrepresentation of major retailers and specific comparison retail sectors. The report

urges the Council and town centre stakeholders to be proactive and work together to influence, rather than react to, future drivers of change, noting as an example the strong membership established by the Orpington First Business Improvement District. It identifies a need for qualitative improvements to the centre including greater provision of modern, larger units and better conditions to attract underrepresented comparison retail sectors and improve convenience retail choice.

In the absence of more thorough assessments by the applicant, the full consequences of a merged unit are unclear. It is clear however that the proposal is aimed at retaining the existing occupant and would certainly attract the type of major retailers that the Council is actively seeking to lure to Orpington Town Centre. Further, it is likely that the granting of permission will set a precedent to further encourage incremental qualitative improvements at this out of centre site, at the expense of the existing town centre network. For these reasons, the proposed development is unjustifiably inconsistent with current and proposed town centres policies.

Unilateral Undertaking

The applicant has submitted a Unilateral Undertaking in support of the application which stipulates that the amalgamation of the two units may only be undertaken by M&S and the conjoined unit occupied only by this operator. Should the unit be vacated by M&S and operated by a different operator, the undertaking stipulates that the unit would need to be separated into the original two smaller units. Whilst the Unilateral Undertaking may be considered to be feasible from a legal perspective, its implementation would not address the fundamental concerns outlined above and the failure of the application to meet the required policy tests. In addition, the granting of consent would agree the merging of the units in principle and it is considered that there are no individual circumstances relating to M&S that would preclude a different future operator applying for the same merge with a similar Unilateral Undertaking.

Highway safety

The NPPF recognises that transport policies have an important role to play in facilitating sustainable development but also in contributing to wider sustainability and health objectives. The NPPF clearly states that development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe.

London Plan and UDP Policies encourage sustainable transport modes whilst recognising the need for appropriate parking provision. Car parking standards within the London Plan, UDP and emerging draft Local Plan should be used as a basis for assessment.

Whilst the operation of the two units by the current operator would not necessarily impact significantly in terms of traffic generation as it would be insignificantly different from the current operation, concern would be raised if an unrestricted A1 use were to operate from the conjoined units as this could in future attract different retailers with different traffic generation. Also, the potential change in retail offering possible by the current occupier, including a larger food hall, may have different traffic impacts to the current split operation between food and clothing. Both scenarios would need to be considered and supported by suitable assessment of traffic impacts.

The application is not supported by evidence to demonstrate that an unrestricted A1 use across both joined units would not have a potentially harmful impact in terms of additional traffic generation, parking and general conditions of highway safety. The

proposal is therefore contrary to Policies T2, T3 and T18 of the Unitary Development Plan.

Sustainability

The NPPF requires Local Planning Authorities to adopt proactive strategies to mitigate and adapt to climate change. London Plan and Draft Local Plan Policies advocate the need for sustainable development. All new development should address climate change and reduce carbon emissions.

Policy 5.3 Sustainable Design and Construction of the London Plan states that the highest standards of sustainable design and construction should be achieved in London to improve the environmental performance of new developments and to adapt to the effects of climate change over their lifetime. Policy 5.2 Minimising Carbon Dioxide Emissions of the London Plan states that development should make the fullest contribution to minimising carbon dioxide emissions in accordance with the hierarchy; Be Lean: use less energy; Be clean: supply energy efficiently and Be green: use renewable energy.

CIL

The Mayor of London's CIL is a material consideration. CIL is not payable on this application and the applicant has not completed the relevant form.

Conclusion

Having had regard to the above it was considered that the proposal is unacceptable in that it would result in a potentially detrimental impact on the retail functioning and viability of Orpington Town Centre and would have the potential to impact detrimentally on parking and highway safety.

Background papers referred to during production of this report comprise all correspondence on the files set out in the Planning History section above, excluding exempt information.

Recommendation: APPLICATION BE REFUSED

For the following reasons:

01: In the absence of sufficient evidence, including sequential and impact assessments, the proposed variation of Condition 13 would result in a single retail unit of inappropriate size in relation to the retail function of the Nugent Shopping Park and would cause potential harm to the vitality and viability of Orpington Town Centre and potential for further such amalgamations within the development, contrary to Policy S7 of the Unitary Development Plan, Policy 91 of the Draft Local Plan and the guidance in Paras 86, 87 and 89 of the NPPF.

02: In the absence of evidence to demonstrate otherwise, the proposal has the potential to introduce different parking demands and traffic generation at the site that may be detrimental to conditions of highway safety, thereby contrary to Policies T2, T3 and T18 of the Unitary Development Plan and Policies 30, 31 and 32 of the Draft Local Plan.