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# Appeal Decision

Hearing held on 31 July 2024

Site visit made on 30 July 2024

**by Ben Plenty BSc (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 07 August 2024**

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**Appeal Ref: APP/P1615/W/24/3338398**

**Land east of Perrygrove Road and South of Tufthorn Avenue, Perrygrove Road, Coleford, Gloucestershire GL16 8QB**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
  - The appeal is made by NNA Ltd against the decision of Forest of Dean District Council.
  - The application Ref is P1003/22/FUL.
  - The development proposed is for the delivery of 2 x restaurants with takeaway and drive through, along with the construction of associated infrastructure.
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## Decision

1. The appeal is dismissed.

## Applications for costs

2. An application for costs has been made by NNA Ltd against Forest of Dean District Council. Also, an application for costs has been made by the Council against NNA Ltd. These costs applications are the matters of separate decisions.

## Preliminary matters

3. Following an exchange of evidence, before the hearing, some further documents were submitted for my attention. These were discussed at the beginning of the hearing.
4. A Statement of Common Ground was submitted the day before the Hearing. This is a final copy signed by both main parties and sets out the main areas of agreement and conflict and has been accepted as additional document A.
5. A late representation was submitted by a local resident explaining some of the traffic issues found within the area. This included photographs of vehicles queuing along local roads and explained the resident's concerns with respect to traffic and noise. Following hearing from both main parties I determined to accept this evidence as additional document B.
6. Also, further ecological evidence has been submitted by the Appellant the day before the hearing. This includes several new surveys, lighting and drainage details and a biodiversity enhancement plan. At the Hearing I sought clarity as to why this information was submitted late in the process and its relevance to the Appellant's case. It was clear, following discussion, that it included material information that would assist me in making a robust decision and therefore should be taken into consideration. I therefore accepted a condensed version of

the submitted documents, focussing on sections 2, 3 and the conclusion of the ecological evidence and the lighting and drainage details.

7. The Council's ecologist was aware of the updated information and had been involved in discussions with the Appellant's ecologist prior to the Hearing to enable for the submission to be made in support of the appeal without being a surprise to the Council. Further comments have been submitted by the Council's ecologist, in reaction to this submission, raising no objection subject to the imposition of three conditions (document D). The effect of this evidence on the appeal is discussed below.

## **Background and Main Issue**

8. The proposal, the subject of this appeal, was refused for four reasons. These related to the suitability of location, the effect on protected species and two that related to the appropriate provision for pedestrians and the conflict raised on site between pedestrians, cyclists and motorists. Since the Council's determination of the planning application several additional material considerations have been brought to my attention.
9. A new planning application<sup>1</sup> was submitted, after the appeal scheme was refused, to attempt to resolve the Council's concerns. Of note, this included improved pedestrian linkages to the existing footways on Tufton Road, both towards the B4228 and Rock Lane<sup>2</sup>, and provided a Servicing and Delivery plan. This application was subject to the required notification, and I understand this was not subject to any comments from the local community. This revised scheme received no objection from the Highway Authority, subject to the imposition of five conditions. The Council refused the second scheme with two reasons for refusal (RfR) relating to the suitability of the location and the effect on protected species. The second refusal was therefore absent the highway related reasons found in the proposal the subject of this appeal.
10. The Appellant has submitted these additional details in support of the current proposal. The additional information would not alter the substance of the proposal and therefore has made no fundamental change to it. As such procedurally, there is no compelling reason for me not to accept the additional details, and by doing so, I must conclude that RfR3 and RfR4 are addressed.
11. With respect to RfR2, the effect on protected species, the Council's concerns relate to the effect of the proposal on dormice and bats. The effect on bats is a matter of heightened concern with the site being within the Wye Valley and Forest of Dean Bat Special Area of Conservation (SAC) for Horseshoe Bats. The Appellant has provided further details, both in the initial bundle of documents, and as late representations the day before the hearing.
12. The Council's ecologist provided initial comments<sup>3</sup> that the lighting assessment was inadequate and may not comply with IPL<sup>4</sup> guidance for Bats and artificial lighting. It was also stated that the Ecological Impact Assessment was inadequate as it found that the presence of dormice could not be ruled out and asked whether a tree on site formed a bat roost. More survey work was deemed necessary with respect to dormice, bats and lighting details. It was

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<sup>1</sup> Planning application reference: P0282/24/FUL

<sup>2</sup> Plan reference 210694-RAP-XX-XX-DR-TP-5000-P02

<sup>3</sup> Council's Statement of Case-appendix 3

<sup>4</sup> Institute of Lighting Professionals, General Guidance Note GN08/23

concluded that the proposal failed the Council's Appropriate Assessment (AA) and did not enable the Council to determine that harm to protected species could be avoided, mitigated or compensated as required by regulation 55 of the Habitat Regulations [2017].

13. Further survey work and lighting details have been provided as Additional Document C in support of the appeal. When taken together with the previous ecological assessment, the new submission has removed the Council's ecology objection. The additional surveys add to ecological details already submitted and have enabled the Council to conclude that an AA would find no adverse effects on the integrity of the SAC. As a result, the additional details and the Council's views are clearly material to my consideration of the proposal. These details do not alter the proposal itself and therefore do not alter the substance of the scheme. In consideration of the submitted evidence on this subject, there is no compelling reason not to accept the further details in support of the appeal. As such, I must also conclude that RfR2 has been satisfactorily addressed.
14. Accordingly, taking the above matters into account, the main issue is whether the site would be a suitable location for the proposed development taking into consideration local and national policies.

## **Reasons**

15. Policy CSP.14 of the Core Strategy [2012] (CS) relates to the Council's strategic policy for Coleford. This seeks to create 6.8ha of land for employment generating use, including service provision, and provides support for the continued redevelopment of the town centre. The Forest of Dean Council's Allocation Plan [2018] (AP) identifies a site on land to the south of the town, including the appeal site, for employment use under policy AP 61. This allocation, states that the site should be used to support employment uses. Supporting commentary identifies, at paragraph 7.17, the allocation provides two small areas of land that may be used for a variety of uses and that the site may be more suitable for B1 or commercial uses rather than B2 or B8 uses. There is no dispute between parties that the proposed use would comply with the allocation.
16. It is undisputed between parties that a drive through restaurant is defined by the National Planning Policy Framework (the Framework) as a main town centre use. In supporting the role of town centres, the Framework is clear that Local Planning Authorities should apply a sequential test to planning applications for main town centre uses which are not in an existing centre. It states, at paragraph 91, that such uses should be located in town centres, then edge of centres and then only if suitable sites are not available should out of centre sites be considered. The Framework states that an application that fails the sequential test should be refused.
17. The site is outside the town centre boundary, but within the settlement limits of the town. It is beyond the 300-metre edge of centre buffer defined by the Framework. Nonetheless, the Framework explains that the edge of centre boundary is not necessarily set by this prescribed figure and that local circumstances could affect an understanding to what should be regarded as the edge of the town. Coleford is a relatively small town. As such, the town's edge of centre buffer area may need to be reduced to align with the proportions of the town centre itself. Furthermore, footway linkages to the town are

sometimes narrow and involve a gradient change, reducing the general accessibility of the site. Therefore, despite the presence of surrounding development and being found within the settlement limits, the local characteristics do not create an environment that indicate that the site would be in an edge of centre location.

18. CS Paragraph 7.43 explains that the Council's spatial strategy seeks to promote the economic regeneration of the south of the district recognising the role of the three towns of Coleford, Cinderford and Lydney, together. It is agreed between main parties that people travel between these three centres to access goods and services. These three towns are geographically connected, with the River Severn to the south/east, and enclosing topography and roadways forming a natural grouping of these three mid-sized settlements. These seem to be within a 15-20 minute drive of each other and have good transport links between them, as confirmed by the Appellant in recognising that the use has the potential to attract customers from neighbouring towns.
19. The catchment area of the proposal was not subject to formal scoping between the Council and Appellant during the application process. This can often be difficult to define and depends on the size and type of use proposed. Defining a correct catchment area is fundamental to the proper completion of a sequential test. The catchment area for the proposed development would have to take into account where its customers would travel from. Being a largely car borne use, the catchment could be relatively extensive and is therefore likely to be greater than just Coleford. The stated catchment area is said to be focussed around Coleford as this is where the business opportunity exists. However, this alone is insufficient justification, and the sequential test therefore fails to provide adequate justification for the selected catchment area.
20. Furthermore, the sequential test searched for sites that were 0.4ha or larger. The application form explains that the site is 0.4ha, but this includes the land reserved for ecological mitigation to the south of the site and the two separate buildings each with separate drive-through facilities. The Appellant explained at the Hearing that some car parking would be shared between end users and there would be efficiency gains in the construction of both units together.
21. However, there is no guarantee that both buildings would be constructed together or would be undertaken by the same developer and to require this by the imposition of a condition would be unreasonable. Therefore, any identified linkage between both uses, and the need for both to be on the same site, can only be afforded limited weight. Furthermore, even if it were demonstrated that both units should be considered as one scheme, this would not adequately justify why the site search did not consider sites that excluded the proposed ecological zone.
22. The Appellant has provided robust justification for the drive-through part of the scheme and has demonstrated the economic benefits of this component in comparison to hot food takeaways without a drive-through. Consequently, I would not expect the drive-through element of the use of each building to be removed from the proposal. As a result, disaggregation of the scheme into its constituent parts, would not conflict with the findings of the Tesco ruling<sup>5</sup> as the drive-through element is clearly an integral part of the proposed business. Nonetheless, the consideration of a disaggregated scheme of two drive through

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<sup>5</sup> Case Law: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13

facilities, would enable a sequential test to consider whether the proposal could be accommodated on a smaller site either within the town or in an edge of centre location. This would not place an inappropriate business decision on the Appellant. The Framework seeks, when undertaking a sequential test, for the assessment to demonstrate flexibility on issues such as format and scale. Accordingly, without further justification for the sequential test, to only consider sites over 0.4ha, it is incomplete in it does not necessarily robustly consider all possible available sites.

23. The Sequential test<sup>6</sup> and its supplementary report considered available sites within the town centre of Coleford. Two sites considered were Lords Hill and Lawnstone House. Both of these were discounted in reference to their size, but it is unclear whether a disaggregated version of the scheme could be accommodated on either or both of these. In addition, the Appellant considered five sites within the allocation plan. These seem to have been largely discounted due to distance from the centre or having incompatible neighbouring uses, where size was therefore not a factor. A further two sites were suggested by the Council, being the Doctors' Surgery and Pyart Court. The first was eliminated due to a delay in the new doctors' surgery being delivered elsewhere, the second site was discounted as it was deemed to be unavailable. The Council has accepted these assertions and I see no reason to disagree with these findings.
24. However, the sequential test does not demonstrate that after in centre sites were eliminated it then considered edge of centre. No edge of centre boundary is provided on a plan and no clear evidence has been submitted to demonstrate that a comprehensive site search for an edge of centre site was undertaken. At the Hearing the Council considered that sites to the north of the town, within a 300m buffer may be available, although it did not specifically identify any such sites. However, the Appellant's assertion that the Council has not suggested any edge of centre sites and thus none must exist is flawed logic. Although the Council should collaborate in scoping the requirements of a sequential test, this does not absolve the requirement for the sequential test to be rigorous and thorough in its consideration of all potential available sites.
25. Accordingly, in summary the sequential test uses a catchment area that is too tightly drawn around Coleford alone, the site search only considered sites over 0.4ha and edge of centre sites have not been adequately considered.
26. For these reasons the proposal fails to demonstrate that there are no sequentially preferable locations for the proposal. Consequently, the proposal would fail to comply with CS policy CSP.14 and the Framework. These seek, among other matters, to support the growth of the town centre and to direct main town centre uses towards a sequentially preferable site.

### **Other Matters**

27. The site is well located in terms of access to the highway network, being alongside the B4228, and is within the settlement boundary. Furthermore, the site has been subject to approved commercial development in the past including office use and a dental surgery, but these appear to be old and expired consents that I can only attribute limited weight.

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<sup>6</sup> Sequential Test – Site search June 2022 and updated May 2023

28. The proposal would also provide a biodiversity net gain of 37% in compliance with paragraph 180(d) of the Framework which seeks development to provide net gains for biodiversity. The scheme would also include two electric charging points, promoting climate change initiatives of national policy.
29. The Appellant suggests that new business in the area would deliver employment for around 40 people and by delivering new economic activity would increase the vitality of Coleford. Furthermore, it is identified that the proposal garners support from the Council's policies for economic growth such as CS policy CS.7 and Policy CE2 of the Coleford Neighbourhood Plan. Nonetheless, national policy is clear that a sequential approach supports the viability and vitality of town centres by placing existing town centres foremost in decision making. Furthermore, a similar scheme within the town, or its edge, would provide similar economic benefits as those proposed for this appeal.

### **Planning balance and conclusion**

30. The proposed scheme would add investment into the local economy during both construction and upon completion through new economic activity. The proposal would also deliver biodiversity net gain. These benefits weigh in favour of the proposal.
31. In contrast, having failed to demonstrate the scheme could be accommodated on an available site within the town, or its edge, the proposal fails the sequential test. As such, the proposal would harm the vitality of the town centre resulting in conflict with both local and national policies. This conflict is of substantial weight. Despite finding no conflict with policy for most of the Council's reasons for refusal, an absence of harm in these respects can only be considered as neutral factors in the planning balance.
32. Consequently, the proposal would conflict with the development plan when taken as a whole and there are no other considerations, including the provisions of the Framework, which would outweigh this finding. Therefore, for the reasons given, the appeal should not succeed.

*Ben Plenty*

INSPECTOR

## APPEARANCES

### For the Appellant:

|                        |                                                 |
|------------------------|-------------------------------------------------|
| Mr Nathan Maddox       | - SF Planning Ltd                               |
| Ms Liz Shield          | - SF Planning Ltd                               |
| Mr Julian Arthur       | - Tyler Grange, ecology consultant              |
| Mr Harry Du Bois-Jones | - Tyler Grange, ecology consultant              |
| Mr Jonathan Senkbeil   | - Rappor, transport consultant                  |
| Mr John Peach          | - Peach Projects, project management consultant |

### For the Council:

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|---------------------|-------------------------------------------------------------------------------|
| Mr Stephen Colegate | - Principal Planning Officer and Team Leader, Forest of Dean District Council |
| Ms Suzanne Hares    | - Senior Planning Officer, Forest of Dean District Council                    |
| Ms Caroline Lidgett | - Lead Biodiversity Officer                                                   |

### Interested parties:

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|-------------------|-------------------------|
| Cllr Marilyn Cox  | - Coleford Town Council |
| Mr Michael Crofts | - local businessman     |
| Miss Karen Macko  | - Resident              |

### Additional documents

- A – Statement of Common Ground
- B – Objection from local resident
- C – Appellant's supplementary Ecological Information Report, dated 24/7/24
- D – Council's updated ecologist's comments 31/7/24