SEQUENTIAL TEST & IMPACT TEST

TIGER DEVELOPMENTS & TRAVELODGE

LAND OFF LARCHWOOD AVENUE (FORMER STANTON'S YARD)
HAVANT
PO9 3QL

November 2018

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SUMMIT
PLANNING ASSOCIATES

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1. INTRODUCTION

1.1 Summit Planning Associates is appointed by the Applicant to prepare a Sequential Test and Impact Assessment in support of a planning application being submitted to Havant Borough Council for;

Construction of an 81-bed, four-storey hotel (use class C1), associated car-parking, landscaping and ancillary works.

1.2 The hotel will be operated by Travelodge.

1.3 This report includes an overview of the application site, the proposed development, relevant national and local planning policy, the site search criteria, the sequential assessment and the impact assessment of the proposed development.

2. OVERVIEW OF APPLICATION SITE

2.1 The application site is located in close proximity to the A3(M), which lies just beyond the western site boundary. The Design and Access Statement that accompanies the application submission has set out a clear narrative of the proposed development in terms of its detailed design, context, layout, setting, scale and appearance.

2.2 The buildings surrounding the site are largely commercial in nature. There is a large ASDA superstore located to the south and a B&Q store to the north. Beyond the wider eastern boundary the surrounding area becomes more residential in character.

2.3 See **Figure 1** for the location of the application site relative to its immediate surroundings.



Figure 1: Location of Application Site

3. PROPOSED DEVELOPMENT

3.1 The proposed development is for;

"Construction of 81-bed, four-storey hotel (use class C1), associated car-parking, landscaping and ancillary works."

3.2 The primary components of the proposed development are;

i) 2,670m2 (GEA) 81-bed, four storey hotel building;

ii) 85 car parking spaces;

iii) Servicing and dedicated service parking bay; and

iv) Associated Landscaping

3.3 The hotel will be operated by Travelodge.

4. NATIONAL AND LOCAL PLANNING POLICY FRAMEWORK

4.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004, states that any determination under the Planning Acts, should be made in accordance with the Development Plan unless material considerations indicate otherwise.

4.2 In this instance the Development Plan for Havant Borough Council currently comprises of the policy guidance set out in the National Planning Policy Framework (NPPF), supported by the National Planning Practice Guidance (NPPG); Havant Borough Local Plan (Core Strategy) (Adopted March 2011); Havant Borough Local Plan (Allocations) (Adopted July 2014). Within this policy framework, the guidance and policies relevant to the carrying out of the sequential test and impact assessment are set out below.

NATIONAL PLANNING POLICY FRAMEWORK (NPPF) (July 2018)

4.3 Applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The NPPF comprises part of the development plan for authority areas and must be taken into account in both the preparation of local and neighbourhood plans and in planning decisions.

4.4 An updated and revised NPPF was issued in July 2018.

4.5 At the heart of the NPPF remains the principle that the planning system is to contribute to the achievement of sustainable development. Insofar as decision-taking is concerned, this continues to mean;

1) approving development proposals that accord with an up-to-date development plan without delay; or
2) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:
    i) the application of policies in the Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

4.6 In general terms this continues to accord with the general principles of the previous version of the NPPF.

4.7 Insofar as decision-making is concerned, paragraph 38 of the revised NPPF also confirms that Local Planning Authorities should approach decisions on proposed development in a positive and creative way. They should use the full range of planning tools available, including brownfield registers, permissions in principle and work proactively with applicants to secure developments that will improve the economic, social and environmental conditions of the area. Decision-makers at every level should seek to approve applications for sustainable development where possible.

4.8 Insofar as ensuring the vitality of town centres is concerned, the NPPF states that planning policies and decisions should support the role that town centres play at the heart of local communities, by taking a positive approach to their growth, management and adaptation. Para. 85 identifies a number of criteria/ objectives to achieve this, including;

"where suitable and viable town centre sites are not available for main town centre uses, allocate appropriate edge of centre sites that are well connected to the town centre. If sufficient edge of centre sites cannot be identified, policies should explain how identified needs can be met in other accessible locations that are well connected to the town centre."

4.9 Para. 86 confirms that local planning authorities should apply a sequential test to planning applications for main town centre uses which are neither in an existing centre nor in accordance with an up-to-date plan. It further confirms that main town centre uses should be located in town centres, then in edge-of-centre locations; and only if suitable sites are not available (or expected to become available within a reasonable period) should out-of-centre sites be considered. Annex 2 (Glossary) of the NPPF confirms that 'Main town centre uses' are defined as;

"Retail development (including warehouse clubs and factory outlet centres); leisure, entertainment and more intensive sport and recreation uses (including cinemas, restaurants, drive-through restaurants, bars and pubs, nightclubs, casinos, health and fitness centres, indoor bowling centres and bingo halls); offices; and arts culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities)."

4.10 Para. 87 states that when considering edge of centre and out of centre proposals, preference should be given to accessible sites which are well connected to the town centre. Both applicants and local planning authorities are expected to demonstrate flexibility on issues such as format and scale, so that opportunities to utilise suitable town centre or edge of centre sites are fully explored.

4.11 Para. 89 confirms that when assessing applications for retail and leisure development outside town centres, which are not in accordance with an up-to-date plan, an impact assessment will also be required if the development is over a proportionate, locally set floorspace threshold. If there is no locally set threshold, the default threshold is 2,500m^2. This 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).

4.12 In the event that an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the considerations in para. 89, the NPPF states that the application should be refused.

NATIONAL PLANNING PRACTIC GUIDANCE (NPPG) (NOV 2016, Updated Sept 2018)

4.13 The NPPG supports the NPPF and the wider planning system.

4.14 Insofar as the sequential test relates to the vitality of town centres, the NPPG advises;

"It is for the applicant to demonstrate compliance with the sequential test (and failure to undertake a sequential assessment could in itself constitute a reason for refusing permission). Wherever possible, the local planning authority should support the applicant in undertaking the sequential test, including sharing any relevant information. The application of the test should be proportionate and appropriate for the given proposal. Where appropriate, the potential suitability of alternative sites should be discussed between the developer and local planning authority at the earliest opportunity.

The checklist below sets out the considerations that should be taken into account in determining whether a proposal complies with the sequential test:

- With due regard to the requirement to demonstrate flexibility, has the suitability of more central sites to accommodate the proposal been considered? Where the proposal would be located in an edge of centre or out of centre location, preference should be given to accessible sites that are well connected to the town centre. Any associated reasoning should be set out clearly.

- Is there scope for flexibility in the format and/ or scale of the proposal? It is not necessary to demonstrate that a potential town centre or edge of centre site can accommodate precisely the scale and form of development being proposed, but rather to consider what contribution more central sites are able to make individually to accommodate the proposal.

- If there are no suitable sequentially preferable locations, the sequential test is passed.

4.15 Insofar as how locational requirements of the sequential test should be considered, the NPPG advises that the sequential test should recognise that certain town centre uses have particular market and locational requirements, which mean that they may only be accommodated in specific locations. It further advises that robust justification

must be provided where this is the case and land ownership in itself does not provide such a justification.

4.16 Insofar as promoting viability is concerned, the NPPG states that the sequential test seeks to deliver the government's 'town centre first' policy. However, as promoting new development in town centre locations can be more expensive and complicated than building elsewhere, local planning authorities need to be realistic and flexible in terms of their expectations.

4.17 Insofar as using the impact test in decision-taking is concerned, the NPPG states that it should be undertaken in a proportionate and locally appropriate way, drawing on existing information where possible. It also confirms that the impact test relates only to retail, office and leisure development (not all main town centre uses).

4.18 It is also confirmed that, as a guiding principle, impact should be assessed on a like-for-like basis in respect of that particular sector.

HAVANT BOROUGH LOCAL PLAN (CORE STRATEGY) (ADOPTED MARCH 2011)

4.19 **Policy CS4: Town, District and Local Centres**; concerns itself with accommodating approximately 13,000 square metres (net) of new comparison goods retail floorspace within town and district centres up to 2016. It further confirms that planning permission will be granted for appropriate town centre development proposals that:

1. Promote and enhance the following hierarchy of identified centres as shown on the Proposals Map:
   Town Centres (Havant and Waterlooville)
   District Centres (Cowplain, Emsworth, Leigh Park and Mengham/ Gable Head)
   Local Centres (Bedhampton, Crookhorn, Grassmere Way, Hambledon Parade, Middle Park Way, Milton Road, Purbrook, Rails Lane, West Town and Widley);
2. Enhance the evening economy of the town and district centres;
3. Retain and enhance local markets;
4. Support small and independent businesses; and
5. Encourage high quality, mixed-use development in designated centres that retain active ground floor frontages.

4.20 The supporting text to policy CS4 (Para 3.39) confirms that ***"All applications for the development of town centre uses and in particular new retail floorspace outside designated centres will need to demonstrate in a robust and transparent manner the application of the sequential approach to site selection, an impact assessment and all other relevant tests set out in current government policies"***.

4.21 **Policy CS5: Tourism**, states that planning permission will be granted for appropriate development proposals around the borough that;

1. Provide sustainable and small scale recreational opportunities;
2. Provide hotel and other types of tourist accommodation;
3. Safeguard existing tourist facilities, hotels, holiday centres and caravan parks; and
4. Improve existing tourist facilities, hotels, holiday centres and caravan parks.

4.22 The supporting text to policy CS5 (Para. 3.60) confirms that hotels are defined as a main town centre use. It further confirms that town centre locations will be favoured for new hotels in order to promote their vitality and viability, whilst recognising that market demand will influence hotel location. It reiterates the need for hotel proposals outside of a designated centre to satisfy the sequential test, to ensure there are no suitable sites in the centres identified in Policy CS4 on town, district and local centres.

HAVANT BOROUGH LOCAL PLAN (ALLOCATIONS) (ADOPTED JULY 2014)

4.23 Policy AL3: Town, District and Local Centres, confirms that planning permission will be granted for development proposals that;

1. Provide main town centre uses in the town, district and local centres as defined on the Policies Map, and so contribute to their vitality and viability;
2. Promote and enhance the primary shopping areas of the town and district centres;
3. Retain at least 50% of the units in an unbroken run of primary frontage as defined on the Policies Map in retail (A1) use;
4. Retain at least 25% of the units in an unbroken run of secondary frontage as defined on the Policies Map in retail (A1) use;
5. Generate pedestrian activity within the primary shopping area by being open during the day to visiting members of the public; and

6. Provide a shopfront within the primary shopping area with a well-designed and appropriate display window.

4.24 The supporting text to policy AL3 (Para. 2.12) reaffirms that main town centre uses such as shops, restaurants, hotels, offices, arts and community facilities should be located in town, district and local centres.

4.25 **Policy HB3: Havant and Bedhampton Mixed Use Allocations**, sets out a number of sites that are allocated for mixed use development within the defined Havant town centre area. **Figure 2** (below) identifies the defined Havant Town Centre boundary.

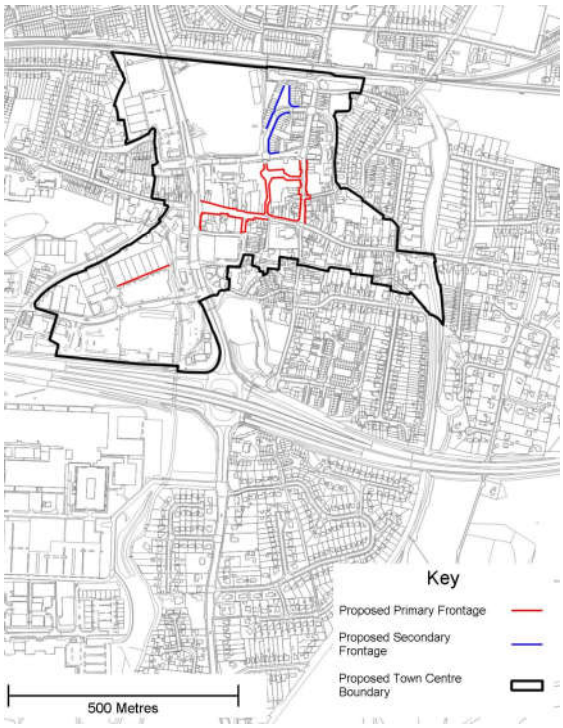


Figure 2: Defined Havant Town Centre Boundary

4.26 **Appendix 1** identifies the adopted policy allocations for the defined Havant town centre and wider surrounding areas, including edge-of-centre and out-of-centre locations.

4.27 **Policy WA2: Waterlooville Mixed Use Allocations**, sets out a number of sites that are allocated for mixed use development within the defined Waterlooville town centre. **Figure 3** identifies the defined Waterlooville Town Centre boundary

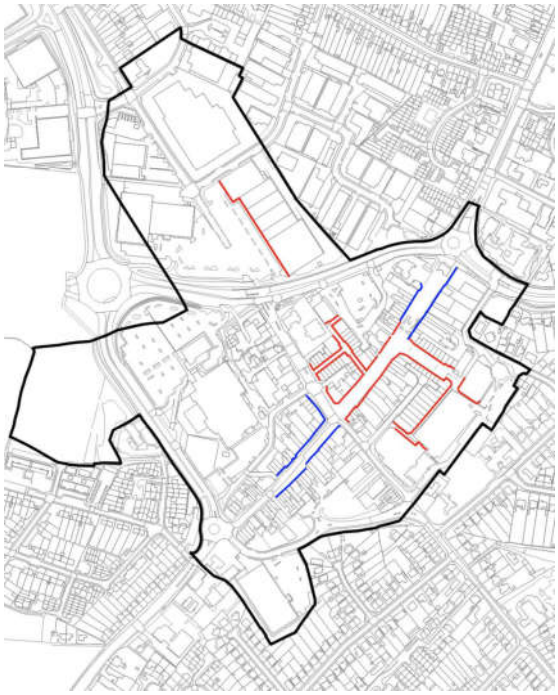


Figure 3: Defined Waterlooville Town Centre Boundary

4.28 **Appendix 2** identifies the adopted policy allocations for the defined Waterlooville town centre and wider surrounding areas, including edge-of-centre and out-of-centre locations.

4.29 In general terms and in accordance with adopted policy CS5 (Tourism) of the Havant Borough Local Plan (Core Strategy) (adopted March 2011), there is policy support, in principle, for appropriate new hotel accommodation within the wider Havant area. Policy CS5 supports development proposals for new hotel accommodation.

4.30 It is recognised that both the NPPF and adopted development plan policy support a town centre first approach, however, it is important to note that hotels locate in a variety of locations depending upon their proposed offer. Hotel businesses are demand driven in regard to their offer e.g. business or tourism. As a result the location of hotels across the UK is driven by a number of variables that ultimately see hotels located in areas of need, whether this is within town centres or outside of town centres, depending on the type of need, plus the availability of sites.

4.31 In terms of a sequential assessment, the proposed hotel site is located in an out-of-centre location. In other geographical terms it is located less than 2 miles outside of

Havant town centre and less than 3 miles outside of Waterlooville town centre. It enjoys very good connectivity to both owing to the local highway network and also to the nearby towns of Portsmouth and Chichester, as a result of being located almost immediately off the nearby junction of the A3(M). Given this, it is also appropriately located to serve both the tourism and business markets.

4.32 The following sequential assessment considers alternative options for the location of the application proposal.

5. SEQUENTIAL TEST ASSESSMENT

5.1 This section of the report considers the application proposal against the sequential test as outlined in the NPPF and as referred to in adopted development plan policy.

5.2 In accordance with the NPPF, there is a requirement to undertake a sequential test assessment for main town centre uses that are neither in an existing centre nor in accordance with an up-to-date development plan.

5.3 The approach requires applications for main town centre uses to be located in town centres, then in edge of centre locations, and only if suitable sites are not available should out-of-centre sites be considered.

5.4 The application site is located in an out-of-centre location, therefore a site search has been undertaken based on town centre, edge-of-centre and out-of-centre locations in line with the requirements of the NPPF. The definition of edge-of-centre sites is based on those 300m from the town centre boundary.

5.5 A plan showing the broad site search area, based on an approximate 300m from the town centre boundaries are shown in **Figure 3**. Only sites more sequentially preferable than the application site have been assessed.

5.6 The proposed development comprises an 81-bed, four-storey hotel with associated car-parking, landscaping and ancillary works. The proposal generates a floorspace requirement of 2,670m^2. This is the size of development required for viability.

5.7 There is no requirement in the NPPF for hotel operators to consider changes to their business model. Para. 87 states that both applicants and local planning authorities are expected to demonstrate flexibility on issues such as format and scale, so that opportunities to utilise suitable town centre or edge of centre sites are fully explored, however, para. 85 also confirms that meeting anticipated needs for retail, leisure, office and other town centre uses should not be compromised by limited site availability and town centre boundaries should be kept under review where necessary.



Figure 3: Broad Site Search Areas

5.8 Case law also demonstrates that there is no requirement for leisure operators to alter their business model. The Supreme Court ruling in the case of Tesco Stores Limited v Dundee City Council (2012) is of particular importance in relation to flexibility and represents the legal position when applying the sequential test. This established that 'suitability' of a site is very much related to the applicant's/ occupiers own requirements. Whilst this was a retail case, the principles relating to the sequential test are the same.

5.9 At paragraph 29 of the judgement, Lord Reed outlines that providing that the applicant has given consideration to the scope for accommodating the development in a different form and has thoroughly assessed sequentially preferable locations then the question remains, 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. The full copy of this judgement is enclosed at **Appendix 3**.

5.10 These legal principles were applied to English planning guidance by the Administrative Court Judgement in the case of R (on the application of Zurich Assurance Ltd T/A Threadneedle Property Investment v North Lincolnshire Council (2012) EWHC 3708 (Admin). The full copy of this judgement is enclosed at **Appendix 4**.

5.11 Paragraphs 61-63 of the Judgement reiterate the above principles. Paragraph 61 states;

"developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest in doing so."

5.12 The applicant anticipates commencement of construction works on site immediately after planning permission is granted with the hotel due to open late 2019. Given this, any appropriate sites need to be available in the short term for redevelopment or conversion.

5.13 The site search includes allocated sites identified in the Havant Borough Local Plan (Allocations) (adopted July 2014).

5.14 Sites have been identified through pre-application engagement with the Local Planning Authority and liaison with the applicant, including reviewing agency details of land/ properties for sale or let and through other market intelligence. It should be noted that Travelodge have identified a hotel requirement in both the Havant and Waterlooville areas and see the towns as two distinct markets. This application proposal is seeking to fulfil the market requirement of the Havant area and Travelodge remain open to the prospect of sites that may become available to suit the Waterlooville market.

5.15 The sites which are identified have been assessed against their suitability, availability and viability for redevelopment to accommodate the proposal. In order to establish both suitability and availability the sites are assessed against the following criteria;

i) Site Location (market area);
ii) Size;
iii) Sequential Status;
iv) Use;
v) Planning Policy/ Allocation; and
vi) Planning History.

5.16 The table below provides a summary of all the sites that have been assessed for inclusion in the sequential test. Those sites which do not meet the requirements of the scheme business model will not be included (identified in grey). The sites not highlighted in grey have been assessed further as part of the sequential test, as set out below.

Site	Proposed Allocation	Suitable for Inclusion	Comments	Sequential Status
HAVANT TOWN CENTRE AREA				
Bosmere Field (1.28ha)	Hotel and Commercial Uses.	No	Already Implemented. Applicant had identified this site and progressed negotiations to an advanced stage, but were subsequently outbid by Premier Inn.	Edge-of-centre
Wessex & Network Rail, New Lane (0.96ha)	Housing (circa 30 dwellings) and Employment.	No	Not specified for leisure/hotel use.	Edge-of-centre
Market Parade (1.55ha)	Housing (circa 225 dwellings); Offices (circa	No	Large proportion of site is located in Flood Zone 3, which is	Town Centre

	1,500m^2); and main town centre uses.		unsuitable for hotel use. (Hotels = 'More Vulnerable Use' requiring Exceptions Test to be passed.	
East Street (0.93ha)	Housing (circa 40 dwellings); Community use; and other main town centre uses.	No	Multiple site constraints (land assembly needed; not currently available; multiple Listed Buildings; loss of public car parking; and loss of existing community facilities.	Town Centre
Former Oak Park School (2.70ha)	Housing (circa 90 dwellings); Care Home; and Community Health.	No	Not specified for leisure/hotel use.	Out-of-centre
Town End House (0.49ha)	Housing (circa 19 dwellings) and other main town centre uses.	No	Small site. Insufficient land would remain after housing provision.	Town Centre
WATERLOOVILLE TOWN CENTRE AREA				
Former Curzon Rooms, Curzon Road (0.24ha)	Housing (circa 14 dwellings); and other main town centre uses.	No	Small site. Insufficient land would remain after housing provision.	Town Centre
Asda/ Clock Tower (3.22ha)	Housing (no net dwelling increase); and other main town centre uses.	Yes	Site not currently available (requires relocation of existing Asda store). Could become available in the longer term.	Town Centre

Wellington Way (1.11ha)	Housing (no net dwelling increase); and other main town centre uses.	Yes	Needs comprehensive redevelopment brief that includes re-provision of existing uses. Not currently available. Planning Application currently under consideration by LPA for residential redevelopment of shopping parade, including gym and café uses.	
West of Asda/ Blue Star Site (1.91ha)	Housing (circa 50 dwellings); and other main town centre uses.	Yes	Linked to the future development plans of the Asda/ Clock Tower site to achieve successful integration with the wider Major Development Area (MDA). Not currently available. Could become available in the longer term.	Town Centre
Land at BAE Systems Technology Park (5.38ha)	Economic Development; Hotel and Leisure.	Yes	Needs comprehensive redevelopment brief that includes redevelopment of existing vacant buildings and large car park. Could become available in the longer term, but not currently being progressed.	Edge-of-centre

DUNSBURY HILL FARM ALLOCATION SITE	Strategic Business Park site, including Hotel Provision	Yes	Hotel provision at this site is to be circa 5,500m^2 and include conference facilities, to complement *"a high quality Business and Technology Park in a generous landscape setting"*.Currently lacks business drivers to support implementation of the hotel use, however, provision of the approved scale and nature will cater for a different market than the application site will provide for.	Out-of-centre
ADDITIONAL SITES				
Langstone Technology Park	Large Business Centre located immediately west of Bosmere Field	No	Applicant has had discussions with the owner's agent and a prospective purchaser. Process stalled until outcome of the future ownership of the investment is known. Not currently available and not anticipated to become available in short term.	Edge-of-centre
Langstone Gate, Solent Road	Small office complex at north east segment of A27 roundabout.	No	Applicant has considered this site, but not progressed further due to issues over financial viability	Town centre

			and practical conversion of the existing building.	
Solent Road, West of Tesco PFS		No	Applicant approached site owners before they undertook their own development, which has now been successfully completed. No further interest in applicant's enquiry.	Edge-of-Centre
North Street, Havant		No	Site suggested to applicant already has planning permission for residential development. Not progressed by applicant as financial viability of a hotel project cannot compete with the residential development residual value.	Town Centre
Grainger Development Site, Waterlooville	Residential development under construction (Berewood Village – Also providing other facilities).	No	Terms agreed with a pub/restaurant operator on one of two plots. Exclusivity clause prevents potential for a hotel development on the second site. Not currently available and not anticipated to become available in short term.	Edge-of-centre
Waterloo Park, Waterlooville	Established retail/ trade location.	No	Extent of area potentially available for leisure type use is too small and	Edge-of-centre

			inaccessible for hotel use.	
Land between Bartons Road & Martin Road, Havant	Vacant commercial premises.	No	Location too tucked away for hotel use.	Out-of-centre

Asda/ Clock Tower, Maurepas Way/ Portland Road, Waterlooville, PO7 7XR



5.17 This site comprises of an existing Asda store and surface parking. It is an allocated site identified in the Havant Borough Local Plan (Allocations) (adopted July 2014) (Site Ref. W109) and is located within the defined Waterlooville town centre. As such, the site would be more sequentially preferable than the application site at Larchwood Avenue. The site has been identified as an opportunity through the Waterlooville Town Centre Framework SPD (Jan 2003). It is considered to represent an important development opportunity for the town centre that has the potential to transform it in terms of urban design and shopping facilities. The Waterlooville Major Development Area (MDA) to the west represents an opportunity for integration with the rest of the town centre.

5.18 The development of this site requires the relocation of the existing Asda store. It is understood that the Asda store is still currently operating in-situ with no indication of any intention to move. As such, the site is currently not available. Whilst the site could

become available in the longer term, this conflicts with the applicant's current timeframe of bringing forward a proposed hotel use in the short term.

Wellington Way, Waterlooville, PO7 7ED



5.19 This site comprises of a 1960's single storey shopping precinct and car park. It is an allocated site identified in the Havant Borough Local Plan (Allocations) (adopted July 2014) (Site Ref. W110) and is located within the defined Waterlooville town centre. As such, the site would be more sequentially preferable than the application site at Larchwood Avenue. The site has been identified as an opportunity through the Waterlooville Town Centre Framework SPD (Jan 2003).

5.20 The development of this site needs a comprehensive redevelopment brief that includes re-provision of existing uses. It is not currently available. A planning application is currently under consideration by the LPA for the residential redevelopment of the shopping parade of build-to-rent properties, including gym and café uses. As such, it is not considered to be available for the development of a hotel.

West of Asda/ Blue Star Site (Maurepas Way), Waterlooville, PO7 7XR



5.21 This is a greenfield site on the opposite side of the road to the Asda store, adjacent to the Waterlooville Major Development Area (MDA). It is an allocated site identified in the Havant Borough Local Plan (Allocations) (adopted July 2014) (Site Ref. W135) and is located within the defined Waterlooville town centre. As such, the site would be more sequentially preferable than the application site at Larchwood Avenue. The development of the site is considered important to the successful integration of the MDA and the town centre.

5.22 The development of this site is linked to the future development plans of the Asda/ Clock Tower site to achieve successful integration with the wider Major Development Area (MDA). As explained at para. 5.19, the development of the Asda/ Clock Tower site requires the relocation of the existing Asda store. The Asda store is still currently operating in-situ with no indication of any intention to move. As such, that site is currently not available and it is reasonable to assume that other nearby sites will unlikely come forward until such time as the relocation of the Asda store triggers development consideration of associated sites. Whilst this site could become available in the longer term, it is not expected to come forward in the short term and therefore does not meet the applicant's timescale requirements. As such, it is not considered to be available for the development of a hotel.

Land at BAE Systems Technology Park, (Brambles Business Park), Waterberry Drive, Waterlooville, PO7 7SG



5.23 The BAE Systems Technology Park is located in Brambles Business Park and comprises of several largely vacant buildings and a large car park. It is an allocated site identified in the Havant Borough Local Plan (Allocations) (adopted July 2014) (Site Ref. BD54) and is in an edge-of-centre location. As such, the site would be more sequentially preferable than the application site at Larchwood Avenue.

5.24 This site needs a comprehensive redevelopment brief that includes redevelopment of existing vacant buildings and large car park. The site could become available in the longer term, but it is understood that the site is not currently being progressed. As such, it is not considered to be available for the development of a hotel.

Dunsbury Hill Farm Allocation Site

5.25 Dunsbury Hill Farm is an allocated site in the Havant Borough Local Plan (HBLP) 2011, under the provision of policy CS18. It is allocated as a strategic employment site and includes a hotel allocation. It is located in an out-of-centre location, in as sequentially preferable a location as the application site at Larchwood Avenue.

5.26 A hybrid Planning Permission was granted on 19th February 2014 for part outline approval relating to development for employment uses and a hotel with conference facilities; and part full permission for a new access link road with bus gate to Woolston Road; together with landscaping, infrastructure and associated works.



5.27 The approved hotel provision at the Dunsbury Hill Farm site is to be circa 5,500m^2 and includes for conference facilities, to complement *"a high quality Business and Technology Park in a generous landscape setting"*. As such the anticipated hotel provision to be catered for at the Dunsbury Hill Farm site is not a comparable facility to that proposed at the Larchwood Avenue site. These two facilities would each cater to their own specific markets. Whilst development is underway at the Dunsbury Hill Farm site and the first unit has now been occupied by Fat Face, with a further occupation to follow by the end of 2018 (VW Breeze Motor Group), the site currently lacks the necessary business drivers to support implementation of the approved hotel use. There is no indication of this coming forward in the immediate future. In any event, the outline hotel provision of the approved scale and nature is aimed at a different market than the application site at Larchwood Avenue will provide for and there is no reason to consider that the ability to bring forward an appropriate hotel facility at the Dunsbury Hill Farm site will be prejudiced by the proposed hotel development at Larchwood Avenue.

Conclusions

5.28 The sequential test search has revealed a handful of sites requiring due consideration regarding their development potential for hotel development.

5.29 It has demonstrated that, at the current time, there are no other more sequentially preferable sites available for the type of hotel development being proposed at the site at Larchwood Avenue, Havant.

5.30 As such, the application proposal passes the sequential test, as there are no sequentially preferable sites within the identified search area.

6. TOWN CENTRE IMPACT ASSESSMENT

6.1 Under the provisions of the NPPF, there is also a requirement to consider the impact of the proposals on the centres in the catchment area of the proposal. The NPPG confirms that this is only required in relation to retail, office and leisure development, as defined at Annex 2 (Glossary) to the NPPF. In this context the proposed use is defined within 'Arts, Culture and Tourism Development'. However, in the interests of robustness, an assessment has been made of the impact of the proposed hotel development on Havant and Waterlooville town centres. The impact of the development on the town centre, having regard to out of town hotel development being at the expense of potential town centre hotel development, was raised by the Council at pre-application stage.

6.2 Para. 89 of the NPPF states that an assessment of impact should include assessment of;

i) 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

ii) 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).

6.3 In the event that an application is likely to have significant adverse impact on one or more of the considerations in para. 89, the NPPF states that the application should be refused.

Existing and Proposed Hotel Development

6.4 The table below provides a summary of existing hotels in Havant and Waterlooville, in town centre locations, edge-of-centre locations (within 300m of the town centre); and out-of-centre locations. There is currently only one hotel within the defined town centre boundary of Havant. There are no hotels within the defined town centre of Waterlooville.

Hotel Name	Location	Number of Bedrooms
Bear Hotel	Town Centre (Havant)	42 (3*)
Premier Inn, Portsmouth (Havant South) (Langstone Technology Park)	Edge-of-Centre (Havant)	82 (Budget)
Premier Inn, Portsmouth (Havant)	Out-of-Centre	58 (Budget)
The Langstone Hotel	Out-of-Centre	148 (4*)
The Brookfield Hotel	Out-of-Centre	42 (3*)
Travelodge, Chichester	Out-of-Centre	36 (Budget)
The Jingles	Out-of-Centre	28 (B&B Hotel)
The Crown	Out-of-Centre	9 (3*Inn)
Premier Inn, Horndean	Out-of-Centre	25 (Budget)
Waratah Lodge	Out-of-Centre	9
Newtown House Hotel	Out-of-Centre	28 (3*)
Travelodge, Havant (Rowlands Castle)	Out-of-Centre	21 (Budget)
Sinah Warren	Out-of-Centre	258 (3*)

6.5 It is understood that currently, there are no plans / planning applications for further hotel uses in either the defined town centre boundaries of Havant or Waterlooville.

6.6 Travelodge is not currently represented in the immediate Havant area, close to the main highway network. The selection of the town and site has been subject to separate in-depth assessment by Travelodge and they have concluded that there is demand in the locality for additional bed spaces.

6.7 The 'Havant Hotel Fact File' prepared by 'Hotel Solutions' in 2015 concluded that corporate demand for hotel accommodation in Havant looked set to increase given the number of sites where new employment uses were planned. In particular, it identified that contractor demand for budget hotel accommodation looked set to increase over the next few years, given the planned level of construction activity.

6.8 Travelodge considers that Havant is a growing area that will continue to grow in importance as a commercial and residential location in the future.

6.9 There is no known committed or planned public or private investment in leisure or hotel development in Havant or Waterlooville town centres, that the proposed development could otherwise adversely impact upon. No such proposals have been advised by the Local Planning Authority as part of the pre-application process that it has engaged in prior to the submission of the planning application.

6.10 It is therefore considered that there is demand for a hotel of this scale in this location and the proposed development would not have an adverse impact on existing hotels, or existing committed or planned investment in the defined town centre areas.

7. SUMMARY AND CONCLUSIONS

7.1 This sequential test and impact assessment has been prepared to support a full planning application for;

"Construction of 81-bed, four-storey hotel (use class C1), associated car-parking, landscaping and ancillary works."

7.2 The site is located outside of Havant and Waterlooville defined town centres and is currently a vacant site. The town centres of Havant and Waterlooville are located circa 2 and 3 miles away, respectively. The site can be considered a roadside location.

7.3 A need for further hotel development within the wider Havant area has been identified by Travelodge.

7.4 A wide search area has been considered for the sequential test, comprising of both Havant and Waterlooville defined town centres and the surrounding areas to ensure a thorough and robust search.

7.5 A total of 5 sites were identified in the search area which have been appropriately considered and dismissed on the grounds of lack of availability, suitability and deliverability within the timescales required by the applicant.

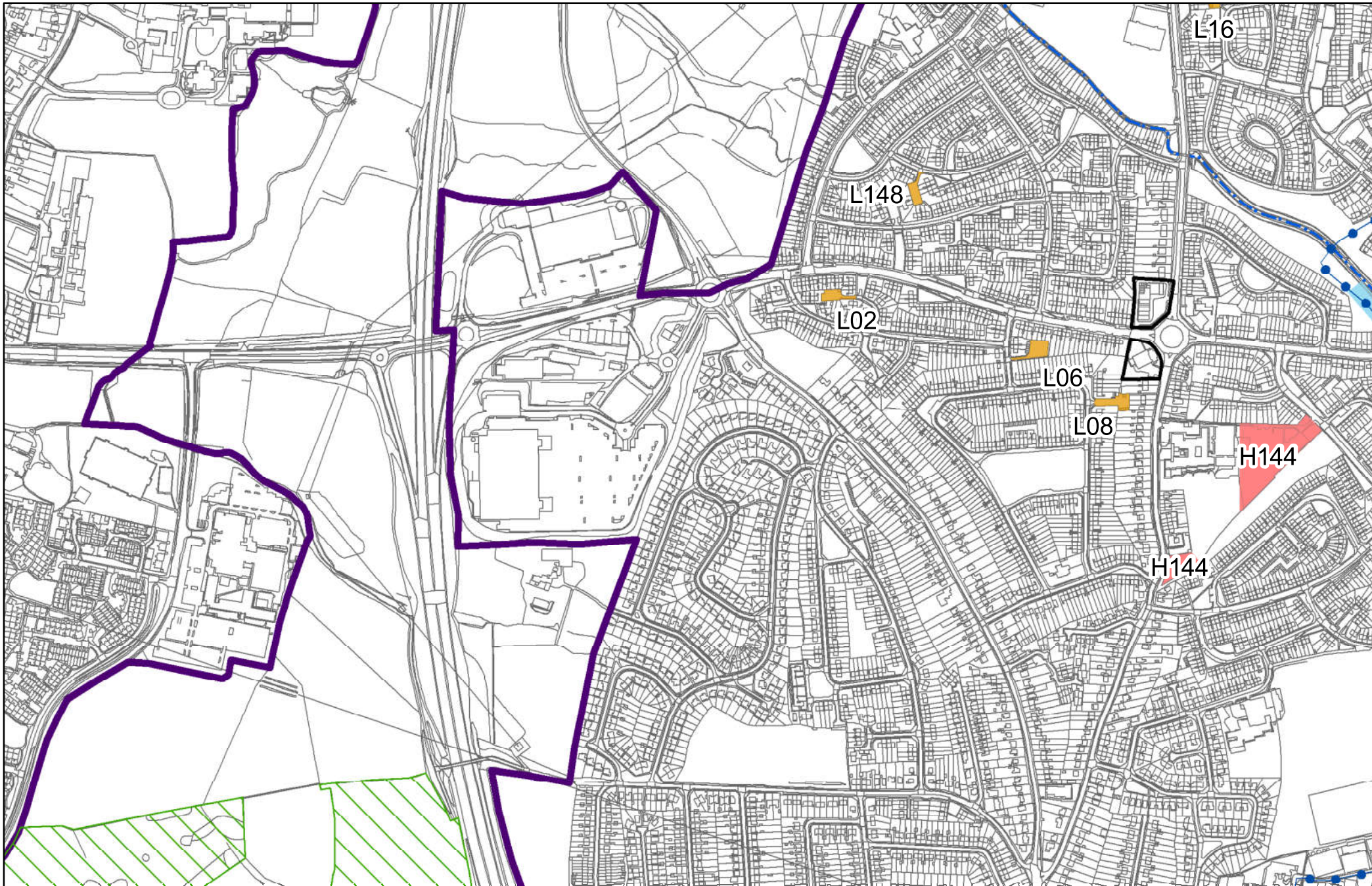
7.6 Given the above, it is considered that there are no alternative sites for the proposed development in either a town centre; or edge-of-centre location; and that the policy tests of the sequential test have been robustly tested and accord with the adopted local planning policy framework and the NPPF.

7.7 The proposal will support both business and industry in close proximity to the site, as well as the wider business and tourism markets. It will also help to complete the roadside service facilities in this location.

APPENDICES

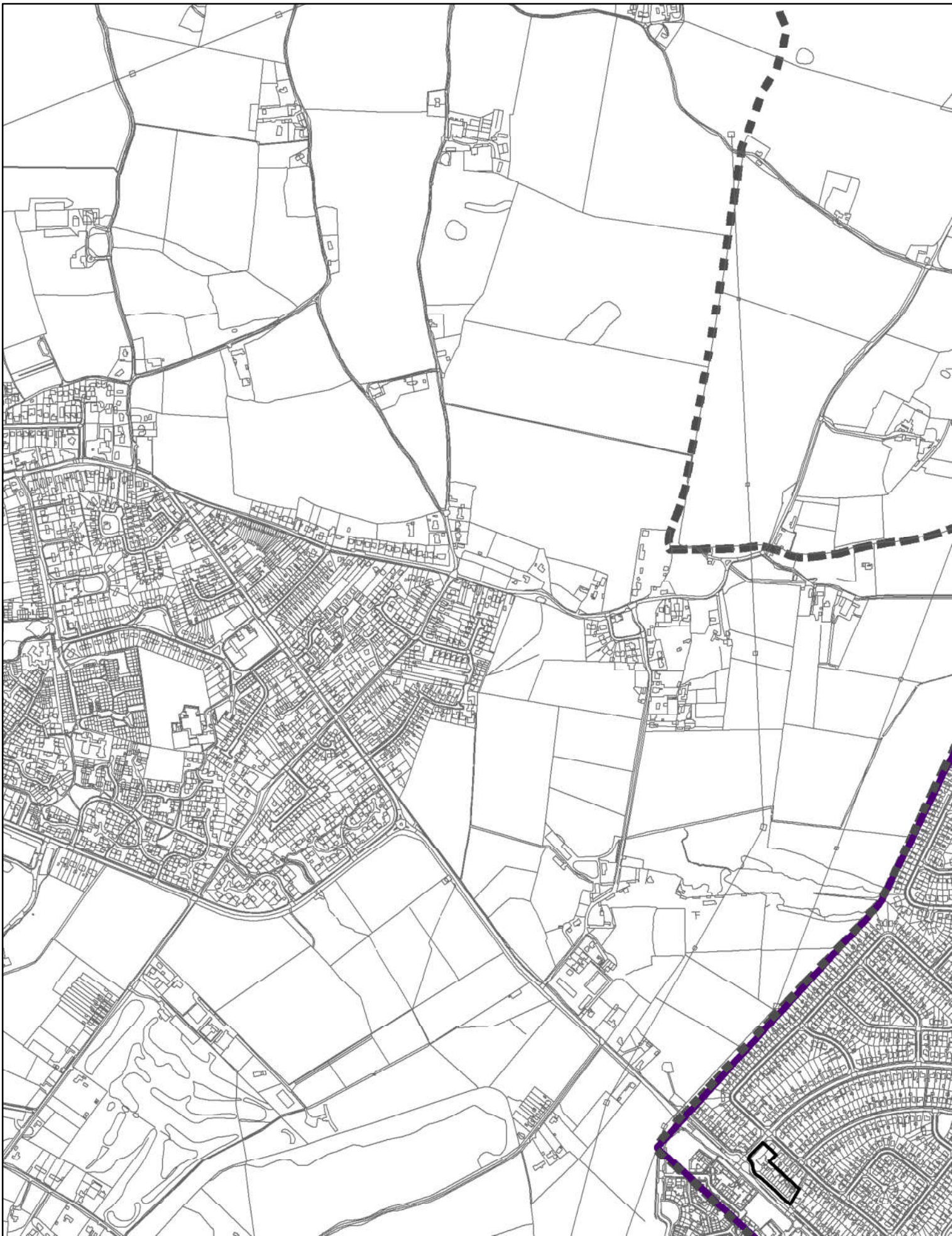
APPENDIX 1: Adopted policy allocations for the defined Havant town centre

Havant and



APPENDIX 2: Adopted policy allocations for the defined Waterlooville town centre

Waterloov



APPENDIX 3: Tesco Stores Limited v Dundee City Council (2012)



Hilary Term
[2012] UKSC 13
On appeal from: [2011] CSIH 9

JUDGMENT

Tesco Stores Limited (Appellants) *v* Dundee City Council (Respondents) (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Kerr
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

21 March 2012

Heard on 15 and 16 February 2012

Appellants
Martin Kingston QC
Jane Munro
(Instructed by Semple Fraser LLP)

Respondents
Douglas Armstrong QC
James Findlay QC
(Instructed by Gillespie Macandrew LLP)

Interveners (Asda Stores Limited and MacDonald Estates Group PLC)
Malcolm Thomson QC
Kenny McBrearty
(Instructed by Brodies LLP)

LORD REED (with whom Lord Brown, Lord Kerr and Lord Dyson agree)

1. If you drive into Dundee from the west along the A90 (T), you will pass on your left a large industrial site. It was formerly occupied by NCR, one of Dundee's largest employers, but its factory complex closed some years ago and the site has lain derelict ever since. In 2009 Asda Stores Ltd and MacDonald Estates Group plc, the interveners in the present appeal, applied for planning permission to develop a superstore there. Dundee City Council, the respondents, concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. Their decision to grant the application is challenged in these proceedings by Tesco Stores Ltd, the appellants, on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan: a misunderstanding which, it is argued, vitiated their assessment of whether a departure from the plan was justified. In particular, it is argued that the respondents misunderstood a requirement, in the policies concerned with out of centre retailing, that it must be established that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres.

The legislation

2. Section 37(2) of the Town and Country Planning (Scotland) Act 1997, as in force at the time of the relevant decision, provides:

> "In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Section 25 provides:

> "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise –
>
> (a) to be made in accordance with that plan..."

The development plan

3. The development plan in the present case is an "old development plan" within the meaning of paragraph 1 of Schedule 1 to the 1997 Act. As such, it is defined by section 24 of the 1997 Act, as that section applied before the coming into force of section 2 of the Planning Etc. (Scotland) Act 2006, as including the approved structure plan and the adopted or approved local plan. The relevant structure plan in the present case is the Dundee and Angus Structure Plan, which became operative in 2002, at a time when the NCR plant remained in operation. As is explained in the introduction to the structure plan, its purpose is to provide a long term vision for the area and to set out the broad land use planning strategy guiding development and change. It includes a number of strategic planning policies. It sets the context for local plans, which translate the strategy into greater detail. Its preparation took account of national planning policy guidelines.

4. The structure plan includes a chapter on town centres and retailing. The introduction explains that the relevant Government guidance is contained in National Planning Policy Guidance 8, *Town Centres and Retailing* (revised 1998). I note that that document (NPPG 8) was replaced in 2006 by *Scottish Planning Policy: Town Centres and Retailing* (SPP 8), which was in force at the time of the decision under challenge, and which was itself replaced in 2010 by *Scottish Planning Policy* (SPP). The relevant sections of all three documents are in generally similar terms. The structure plan continues, at para 5.2:

> "A fundamental principle of NPPG 8 is that of the sequential approach to site selection for new retail developments … On this basis, town centres should be the first choice for such developments, followed by edge of centre sites and, only after this, out of centre sites which are currently or potentially accessible by different means of transport."

In relation to out of centre developments, that approach is reflected in Town Centres and Retailing Policy 4: Out of Centre Retailing:

> "In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that:

- no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres;

- individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres;

- the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres;

- the site is readily accessible by modes of transport other than the car;

- the proposal is consistent with other Structure Plan policies."

5. The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues, at para 52.2:

> "As part of this approach planning authorities should adopt a sequential approach to new shopping developments with first preference being town centres, which in Dundee's case are the City centre and the District Centres."

That approach is reflected in Policy 45: Location of New Retail Developments:

> "The City Centre and District Centres will be the locations of first choice for new or expanded retail developments not already identified in the Local Plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that:
>
> a) no suitable site is available, in the first instance, within and thereafter on the edge of the City Centre or District Centres; and

b) individually or cumulatively it would not prejudice the vitality and viability of the City Centre or District Centres; and

c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and

d) the site is readily accessible by modes of transport other than the car; and

e) the proposal is consistent with other Local Plan policies."

6. It is also relevant to note the guidance given in NPPG 8, as revised in 1998, to which the retailing sections of the structure plan and the local plan referred. Under the heading "Sequential Approach", the guidance stated:

"12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses … First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge-of-centre sites, and only then by out-of-centre sites in locations that are, or can be made easily accessible by a choice of means of transport …

13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre …

14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town

centre which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time …

15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out-of-centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an out-of-centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable …"

The consideration of the application

7. The interveners' application was for planning permission to develop a foodstore, café and petrol filling station, with associated car parking, landscaping and infrastructure, including access roads. The proposals also involved improvements to the junction with the A90 (T), the upgrading of a pedestrian underpass, the provision of footpaths and cycle ways, and improvements to adjacent roadways. A significant proportion of the former NCR site lay outside the application site. It was envisaged that vehicular access to this land could be achieved using one of the proposed access roads.

8. In his report to the respondents, the Director of City Development advised that the application was contrary to certain aspects of the employment and retailing policies of the development plan. In relation to the employment policies, in particular, the proposal was contrary to policies which required the respondents to safeguard the NCR site for business use. The Director considered however that the application site was unlikely to be re-developed for business uses in the short term, and that its re-development as proposed would improve the development prospects of the remainder of the NCR site. In addition, the infrastructure improvements would provide improved access which would benefit all businesses in an adjacent industrial estate.

9. In relation to the retailing policies, the Director considered the application in the light of the criteria in Retailing Policy 4 of the structure plan. In relation to the first criterion he stated:

> "It must be demonstrated, in the first instance, that no suitable site is available for the development either within the city/district centres or, thereafter on the edge of these centres … While noting that the Lochee District Centre lies within the primary catchment area for the proposal, [the retail statement submitted on behalf of the interveners] examines the potential site opportunities in and on the edge of that centre and also at the Hilltown and Perth Road District Centres. The applicants conclude that there are no sites or premises available in or on the edge of existing centres capable of accommodating the development under consideration. Taking account of the applicant's argument it is accepted that at present there is no suitable site available to accommodate the proposed development."

In relation to the remaining criteria, the Director concluded that the proposed development was likely to have a detrimental effect on the vitality and viability of Lochee District Centre, and was therefore in conflict with the second criterion. The potential impact on Lochee could however be minimised by attaching conditions to any permission granted so as to restrict the size of the store, limit the type of goods for sale and prohibit the provision of concessionary units. The proposal was also considered to be in conflict with the third criterion: there was no deficiency in shopping provision which the proposal would address. The fourth criterion, concerned with accessibility by modes of transport other than the car, was considered to be met. Similar conclusions were reached in relation to the corresponding criteria in Policy 45 of the local plan.

10. In view of the conflict with the employment and retailing policies, the Director considered that the proposal did not fully comply with the provisions of the development plan. He identified however two other material considerations of particular significance. First, the proposed development would bring economic benefits to the city. The closure of the NCR factory had been a major blow to the economy, but the re-development of the application site would create more jobs than had been lost when the factory finally closed. The creation of additional employment opportunities within the city was considered to be a strong material consideration. Secondly, the development would also provide a number of planning benefits. There would be improvements to the strategic road network which would assist in the free flow of traffic along the A90 (T). The development would also assist in the re-development of the whole of the former NCR site through the provision of enhanced road access and the clearance of buildings from the site. The access improvements would also assist in the development of an economic development area to the west. These benefits were considered to be another strong material consideration.

11. The Director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and retailing

policies. There were however other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

12. The application was considered by the respondents' entire council sitting as the respondents' Development Quality Committee. After hearing submissions on behalf of the interveners and also on behalf of the appellants, the respondents decided to follow the Director's recommendation. The reasons which they gave for their decision repeated the Director's conclusions:

> "It is concluded that the proposal does not undermine the core land use and environmental strategies of the development plan. The planning and economic benefits that would accrue from the proposed development would be important to the future development and viability of the city as a regional centre. These benefits are considered to be of a significant weight and sufficient to set aside the relevant provisions of the development plan."

The present proceedings

13. The submissions on behalf of the appellants focused primarily upon an alleged error of interpretation of the first criterion in Retailing Policy 4 of the structure plan, and of the equivalent criterion in Policy 45 of the local plan. If there was a dispute about the meaning of a development plan policy which the planning authority was bound to take into account, it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and failed properly to understand the policy. In the present case, the Director had interpreted "suitable" as meaning "suitable for the development proposed by the applicant"; and the respondents had proceeded on the same basis. That was not however a tenable meaning. Properly interpreted, "suitable" meant "suitable for meeting identified deficiencies in retail provision in the area". Since no such deficiency had been identified, it followed on a proper interpretation of the plan that the first criterion did not require to be considered: it was inappropriate to undertake the sequential approach. The Director's report had however implied that the first criterion was satisfied, and that the proposal was to that extent in conformity with the sequential approach. The respondents had proceeded on that erroneous basis. They had thus failed to identify correctly the extent of the conflict between the proposal and the development plan. In consequence, their assessment of whether other material considerations justified a departure from the plan was inherently flawed.

14. The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a "suitable" site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

15. In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

16. So far as concerned the assessment of "suitable" sites, the interveners' retail statement reflected a degree of flexibility. There had been a consideration of all sites of at least 2.5 ha, whereas the application site extended to 6.68 ha. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 ha, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The Director, and the respondents, had accepted that it was not a suitable site for these reasons.

Discussion

17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 219, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it

cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:

> "In the practical application of sec 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted

objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in *R v Derbyshire County Council, Ex p Woods* [1997] JPL 958 at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."

By way of illustration, Brooke LJ referred to the earlier case of *Northavon DC v Secretary of State for the Environment* [1993] JPL 761, which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of *R (Heath and Hampstead Society) v Camden LBC* [2008] 2 P & CR 233, where a planning authority's decision that a replacement dwelling was not "materially larger" than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase "materially larger" referred to the size of the new building compared with its predecessor, rather than

requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in *City of Edinburgh Council v Scottish Ministers* 2001 SC 957 the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

21. A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.

22. It is of course true, as counsel for the respondents submitted, that a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion, on the question whether the proposal was in accordance with the policy, as it would have reached if it had construed the policy correctly. That is not however a complete answer to a challenge to the planning authority's decision. An error in relation to one part of a policy might affect the overall conclusion as to whether a proposal was in accordance with the development plan even if the question whether the proposal was in conformity with the policy would have been answered in the same way. The policy criteria with which the proposal was considered to be incompatible might, for example, be of less weight than the criteria which were mistakenly thought to be fulfilled. Equally, a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion as it would otherwise have reached on the question whether the proposal was in accordance with the development plan. Again, however, that is not a complete answer. Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.

23. In the present case, the Lord Ordinary rejected the appellants' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in

which the sequential approach could reasonably be applied ([2010] CSOH 128, para 23). For the reasons I have explained, that approach does not correctly reflect the role which the court has to play in the determination of the meaning of the development plan. A different approach was adopted by the Second Division: since, it was said, the proposal was in head-on conflict with the retail and employment policies of the development plan, and the sequential approach offered no justification for it, a challenge based upon an alleged misapplication of the sequential approach was entirely beside the point (2011 SC 457, [2011] CSIH 9, para 38). For the reasons I have explained, however, even where a proposal is plainly in breach of policy and contrary to the development plan, a failure properly to understand the policy in question may result in a failure to appreciate the full extent or significance of the departure from the development plan which the grant of consent would involve, and may consequently vitiate the planning authority's determination. Whether there has in fact been a misunderstanding of the policy, and whether any such misunderstanding may have led to a flawed decision, has therefore to be considered.

24. I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the appellants' primary contention is that the word "suitable", in the first criterion of Retailing Policy 4 of the structure plan and the corresponding Policy 45 of the local plan, means "suitable for meeting identified deficiencies in retail provision in the area", whereas the respondents proceeded on the basis of the construction placed upon the word by the Director of City Development, namely "suitable for the development proposed by the applicant". I accept, subject to a qualification which I shall shortly explain, that the Director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.

25. First, that interpretation appears to me to be the natural reading of the policies in question. They have been set out in paras 4 and 5 above. Read short, Retailing Policy 4 of the structure plan states that proposals for new or expanded out of centre retail developments will only be acceptable where it can be established that a number of criteria are satisfied, the first of which is that "no suitable site is available" in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word "suitable", in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out of centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

26. Secondly, the interpretation favoured by the appellants appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a "suitable" site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping provision which cannot be met in a sequentially preferable location. If "suitable" meant "suitable for meeting identified deficiencies in retail provision", as the appellants contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

27. Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out in para 6 above. They provide further support for the respondents' interpretation of the policies. Paragraph 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Paragraph 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

28. I said earlier that it was necessary to qualify the statement that the Director and the respondents proceeded, and were correct to proceed, on the basis that "suitable" meant "suitable for the development proposed by the applicant". As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc and Redcar and Cleveland BC* [1998] JPL 23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing

development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

29. It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in *Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165, para 14, 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.

30. In the present case, it is apparent that a flexible approach was adopted. The interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing. Even taking that approach, however, they did not regard the Lochee site vacated by the appellants as being suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate. In accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts: they did not proceed on an erroneous understanding of the policy.

31. Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility. The considerations in favour of the proposed development were very powerful. They were also specific to the particular development proposed: on the information before the respondents, there was no prospect of any other development of the application site, or of any development elsewhere which could deliver equivalent planning and economic benefits. Against that background, the argument that a different decision might have been taken if the respondents had been advised that

the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

Conclusion

32. For these reasons, and those given by Lord Hope, with which I am in entire agreement, I would dismiss the appeal.

LORD HOPE

33. The question that lies at the heart of this case is whether the respondents acted unlawfully in their interpretation of the sequential approach which both the structure plan and the relevant local plan required them to adopt to new retail developments within their area. According to that approach, proposals for new or expanded out of centre developments of this kind are acceptable only where it can be established, among other things, that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres. Is the test as to whether no suitable site is available in these locations, when looked at sequentially, to be addressed by asking whether there is a site in each of them in turn which is suitable for the proposed development? Or does it direct attention to the question whether the proposed development could be altered or reduced so as to fit into a site which is available there as a location for this kind of development?

34. The sequential approach is described in National Planning Policy Guidance Policy 8, *Town Centres and Retailing*, para 5.2 as a fundamental principle of NPPG 8. In *R v Rochdale Metropolitan Borough Council, Ex p Milne*, 31 July 2000, not reported, paras 48-49, Sullivan J said that it was not unusual for development plan polices to pull in different directions and, having regard to what Lord Clyde said about the practical application of the statutory rule in *City of Edinburgh v Secretary of State for Scotland* 1998 SC (HL) 33 at p 44, that he regarded as untenable the proposition that if there was a breach of any one policy in a development plan a proposed development could not be said to be "in accordance with the plan". In para 52 he said that the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.

35. I see no reason to question these propositions, to which Mr Kingston QC for the appellants drew our attention in his reply to Mr Armstrong's submissions for the respondents. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the

respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128, para 23, is the interpretation of the policy which it sets out primarily a matter for the decision maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents' decision to follow the Director's recommendation and approve the proposed development is not that it was *Wednesbury* unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.

36. In *Lidl UK GmbH v The Scottish Ministers* [2006] CSOH 165 the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development out with the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge of centre or out of town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13 Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be "suitable" in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14 he said that the question was whether the alternative town centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it.

37. Mr Kingston submitted that Lord Glennie's approach would rob the sequential approach of all its force, and in the Inner House it was submitted that his decision proceeded on a concession by counsel which ought not to have been made: [2011] CSIH 9, 2011 SC 457, para 31. But I think that Lord Glennie's interpretation of the phrase was sound and that counsel was right to accept that it had the meaning which she was prepared to give to it. The wording of the relevant provision in the local plan in that case differed slightly from that with which we are concerned in this case, as it included the phrase "or can reasonably be made available". But the question to which it directs attention is the same. It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no suitable site is available within or on the edge of the town centre.

38. The context in which the word "suitable" appears supports this interpretation. It is identified by the opening words of the policy, which refer to "proposals for new or expanded out of centre retail developments" and then set out

the only circumstances in which developments outwith the specified locations will be acceptable. The words "the proposal" which appear in the third and fifth of the list of the criteria which must be satisfied serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. It is worth noting too that the phrase "no suitable site is available" appears in Policy 46 of the local plan relating to commercial developments. Here too the context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers in para 28, above, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.

39. For these reasons which I add merely as a footnote I agree with Lord Reed, for all the reasons he gives, that this appeal should be dismissed. I would affirm the Second Division's interlocutor.

APPENDIX 4: R (on the application of Zurich Assurance Ltd T/A Threadneedle Property Investment v North Lincolnshire Council (2012) EWHC 3708 (Admin)

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Ltd (t/a Threadneedle Property Investments), R (on the application of) v North Lincolnshire Council & Anor [20
3708 (Admin) (20 December 2012)
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Case N

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN LEEDS

Leeds
1 Oxford Row

B e f o r e :

MR JUSTICE HICKINBOTTOM

Between:

THE QUEEN on the application of
ZURICH ASSURANCE LIMITED trading as
THREADNEEDLE PROPERTY INVESTMENTS **Clair**

- and -

NORTH LINCOLNSHIRE COUNCIL **Defe**

- and -

North Lincolnshire Council) for the Defendant
Christopher Katkowski QC and Graeme Keen (instructed by Gordons LL
for the Interested Party
Hearing date: 17 December 2012

HTML VERSION OF JUDGMENT

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Mr Justice Hickinbottom:

Introduction

1. The Claimant ("Zurich") is the owner of the Foundry Shopping Centre, which lies wit primary shopping area in the centre of Scunthorpe, the largest town in North Lincolns shopping centre comprises 19,000 sq m of retail floorspace in 45 units.

2. The Interested Party ("Simons") has an option to purchase the Trent Valley Garden Ce Doncaster Road, Gunness ("the Site"), which is about 2.5 kilometres from Scunthorpe

3. On 26 March 2012, the Defendant ("the Council"), which is the relevant local plannin granted planning permission to Simons to demolish the garden centre and its associate and construct a retail park with four retail units and associated access roads, car parki area and landscaping.

4. In this claim, issued on 8 May 2012, Zurich challenges that decision, with the permiss Honour Judge Gosnell sitting as a judge of this court granted on 23 July 2012.

5. At the substantive hearing, Zurich was represented by Paul Tucker QC and Anthony C Council by Vincent Fraser QC and Alan Evans, and Simons by Christopher Katkowsk Graeme Keen.

Factual Background

6. The Site has been a garden centre since the mid-1980s: on 17 January 1985, planning was granted for a change of use of the land, and to erect appropriate buildings. That p subject to a condition (Condition 2) that limited the goods that could be sold to a pres which, in general, excluded food and clothes. However:

    i) full planning permission was granted on 3 April 1986 to retain a restaurant, lo and patio area;

    ii) outline planning permission was granted on 9 August 1990 to erect buildings create a non-food retail warehouse park (although that was never implemented, of course long since lapsed); and

park on the Site, initially proposing six retail outlets, but later reduced to four namely (4,645 sq m) and three smaller units. Accompanying the application was a screening o 22 July 2011 under Regulation 4 of the Town and Country Planning (Environmental I Assessment) (England and Wales) Regulations 1999 (SI 1999 No 293), to the effect th environmental impact assessment was unnecessary. The application was validated by on 31 August 2011.

8. Two letters of objection were lodged by planning consultants representing Zurich (Inc Limited, "Indigo"). However, on 14 December 2011, the application was considered b Council's Planning Committee, which resolved in favour of granting it subject to the c a satisfactory Section 106 planning obligation. The application was referred to the Se State, who indicated that the matter would not be called-in for decision by him.

9. On 23 December 2011, a letter before claim was sent to the Council by an informal gr businesses and residents opposed to the project, known as "Keep Scunthorpe Alive" (challenging the decision to grant permission; and further letters of objection were sen As a result, the Council's case officer (Mr David Wordsworth) prepared a further repo committee which, rather than merely updating the earlier report to deal with the objec was a comprehensive report covering all of the ground again including the contents of objections to which I have referred ("the Main Report") with an addendum of its own two late, further letters of objection from Indigo and KSA ("the Addendum Report"). unnecessary for me to consider the earlier report further.

10. On 7 March 2012, on the basis of the Main Report and the Addendum Report, the Co Planning Committee reconsidered the application, and again resolved to grant permiss referral and a satisfactory Section 106 obligation, in the following terms:

> "**Resolved** - (a) That the committee is mindful to grant permission for the development; (b) that the application be referred to the Secretary of State in acc with statutory procedures to enable him to consider whether or not to intervene in the event of the Secretary of State deciding not to intervene, the Head of Development Management be authorised to grant permission subject to the con of a formal agreement under Section 106 of the Town and Country Planning Ac providing for off-site highway improvements, Scunthorpe town centre protectio protected species translocation and maintenance and a contribution towards imp the existing footpaths in the vicinity of the site, and to the conditions contained report, and (c) [sic] that if the obligation is not completed by 7 June 2012, the H Development Management be authorised to refuse the application on the groun adverse impact upon the vitality and viability of Scunthorpe town centre, adver impact upon highway safety and levels of congestion within the locality, advers impact upon protected species and their habitat, and non-compliance with Polic of PPS 4, policies T2 and T6 of the North Lincolnshire Local Plan, and policies C25 and CS17 of the North Lincolnshire Core Strategy."
>
> (The voting being equal on the above matter, … the chairman used his second a casting vote in favour of the motion)."

That resolution very much followed the wording of the officer's formal recommendati

("Marks & Spencer"). Marks & Spencer had had a 949 sq m shop in High Street, Scu
1931 to early 2011 when it closed, commercial non-viability being given as the reaso

13. It is that grant of planning permission on 26 March 2012 that Zurich now challenges.

Legal Principles

14. This case hinges largely upon criticisms of the officer's Main and Addendum Reports
Council's Planning Committee, seen in the light of national and local planning policy.
legal principles relating to such reports and policy were agreed by the parties, and are
uncontroversial.

15. Each local planning authority delegates its planning functions to a planning committe
on the basis of information provided by case officers in the form of a report. Such a re
also includes a recommendation as to how the application should be dealt with. With
reports:

> i) In the absence of contrary evidence, it is a reasonable inference that members
> planning committee follow the reasoning of the report, particularly where a
> recommendation is adopted.
>
> ii) When challenged, such reports are not to be subjected to the same exegesis t
> might be appropriate for the interpretation of a statute: what is required is a fair
> of the report as a whole. Consequently:
>
> > "[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).
>
> iii) In construing reports, it has to be borne in mind that they are addressed to a
> "knowledgeable readership", including council members "who, by virtue of tha
> membership, may be expected to have a substantial local and background know
> (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sulliva
> he then was). That background knowledge includes "a working knowledge of t
> statutory test" for determination of a planning application (Oxton Farms, per Pi

16. The principles relevant to the proper approach to national and local planning policy a
uncontroversial:

> i) The interpretation of policy is a matter of law, not of planning judgment (Tes
> Stores Ltd v Dundee City Council [2012] UKSC 13).

a matter entirely for the planning committee (Tesco Stores Ltd v Secretary of S the Environment [1995] 1 WLR 759 at page 780 per Lord Hoffman).

The Relevant National and Local Guidance

17. At the relevant time, national planning policy was contained in Planning Policy State Planning for Sustainable Economic Growth ("PPS4"), supplemented by Planning for Practice Guidance on Need, Impact and Sequential Approach ("the PPS4 Practice Gu published by the Secretary of State for Communities and Local Government. (For the completeness, it should be said that PPS4 was replaced on 27 March 2012, i.e. the da relevant planning decision in this case. However, the National Planning Policy Frame replaced PPS4, has no relevance to this claim.)

18. PPS4 identifies the Government's overreaching objective for a prosperous economy a economic growth" (paragraph 9). To help achieve that, the Government's more particu for planning include building prosperous communities by improving the economic pe towns, delivering more sustainable patterns of development, and promoting the vitalit of towns and other centres as important places for communities (including the focusin economic growth and development of main town centre uses in existing centres) (para

19. One policy to that end is the requirement for sequential assessment for planning appli main town centre uses that are not in an existing centre and not in accordance with an development plan (Policy EC14.3). Such sequential assessments must be performed i with Policy EC15, which provides:

> "15.1 In considering sequential assessments required under Policy EC14.3, loca planning authorities should:
>
> a. ensure that sites are assessed for their availability, suitability and viability.
>
> b. ensure that all in-centre options have been thoroughly assessed before less ce sites are considered.
>
> c. ensure that where it has been demonstrated that there are no town centre sites accommodate a proposed development, preference is given to edge of centre lo which are well connected to the centre by means of easy pedestrian access.
>
> d. ensure that in considering sites in or on the edge of existing centres, develope operators have demonstrated flexibility in terms of:
>
> > i. scale: reducing floorspace of their development;
> >
> > ii. format: more innovative site layouts and store configurations such as multi-storey developments with smaller footprints;
> >
> > iii. car parking provisions; reduced or reconfigured car parking areas; and
> >
> > iv. the scope for disaggregating specific parts of a retail or leisure

business model from a sequentially preferable site, for example where a retailer be limited to selling a significantly reduced range of products. However, evidence which claims that a class of goods proposed to be sold cannot be sold from the centre should not be accepted."

20. Policy EC16.1 requires planning applications for main town centre uses that are not in not in accordance with an up-to-date development plan to be assessed against a number impacts on centres, including "the impact of the proposal on town centre vitality and v (Policy 16.1.b). Policy EC10.2 requires such applications also to be assessed against a other considerations, including the impact on economic and physical regeneration (Po EC10.2.d) and the impact on local employment (Policy EC 10.2.e).

21. Policy EC17 is of particular importance in this claim. It provides as follows:

> "EC17.1 Planning applications for main town centre uses that are not in an exis centre and not in accordance with an up to date development plan should be ref planning permission where:
>
> a. the applicant has not demonstrated compliance with the requirements of the sequential approach (policy EC15); or
>
> b. there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of impacts set out in policies EC10.2 and 16.1 (the assessment), taking account of the likely cumulative effect of recent permission developments under construction and completed developments.
>
> EC17.2 Where no significant adverse impacts have been identified under polici EC10.2 and 16.1, planning applications should be determined by taking accoun
>
> a. the positive and negative impacts of the proposal in terms of policies EC10.2 16.1 and any other material considerations; and
>
> b. the likely cumulative effect of recent permissions, developments under const and completed developments.
>
> EC17.3 Judgments about the extent and significance of any impacts should be i by the development plan (where this is up to date). Recent local assessments of health of town centres which take account of the vitality and viability indicators Annex D of this policy statement and any other published local information (su town centre or retail strategy), will also be relevant."

22. The effect of Policy EC17, and the requirements it places on a local authority applyin – and again uncontentious as between the parties to this claim.

> i) Where a planning application is for development of main town centre uses no centre and not in accordance with an up-to-date development plan, then it is for applicant to demonstrate compliance with the requirements of the sequential ap (confirmed in paragraph 5.6 of the PPS4 Practice Guidance).

committee performing a balancing exercise, taking account of the positive and
impacts of the proposal in terms of those two policies and any other material
considerations. That balancing exercise takes place within the four corners of th
policy: the policy requires it to be performed.

iv) If it has not been demonstrated, or if it has been demonstrated but there is cl
evidence that the proposal is likely to lead to significant adverse impacts set ou
Policies EC10.2 and 16.1, then the policy is that the application should be refus
However, that national policy (of refusing an application in these circumstance
capable of being displaced if the planning committee considers that it is outwei
other material considerations. That too requires the committee to perform a bal
exercise, but this exercise is performed outside the four corners of the policy: it
required because of the *nature* of the policy, not because of its *terms*. However,
negative factor that must be taken into account in this exercise is of course the
it is the national policy to refuse an application in these circumstances.

23. That is the relevant national policy. Turning to local policy, the development plan for
Lincolnshire comprises three elements:

i) The Yorkshire and Humber Plan (Regional Spatial Strategy to 2026): The Lo
Act 2011 enables the revocation of regional policies, but that has not been fully
implemented yet. Policy YH4 identifies Scunthorpe as a sub-regional town whi
should be the prime focus for facilities (including retail shopping) in the region

ii) Those parts of the North Lincolnshire Local Plan that were saved by a direct
the Secretary of State dated 17 September 2007: Policy S8 (Out-of-centre Retai
Leisure Development) reflects the national sequential approach, by only permit
of-centre retail development where (amongst other things):

- a clear need for the development can be demonstrated;
- a developer can demonstrate that there are no sites for the proposed use within or at the edge of the town centre that are suitable, viable for the proposed use and likely to be available within a reasonable time period; and
- the proposal will have no adverse impact on the vitality and viability of existing district centres and the rural economy;

iii) The Council's Core Strategy, adopted in June 2011 as part of the North
Lincolnshire's local development framework, which sets out the spatial plannin
framework to 2026.

24. Mr Tucker particularly relied upon the Core Strategy. It stresses (paragraphs 10.7 and

"The improvement of Scunthorpe town centre is priority for both the Sustainab

"To fulfil its sub-regional role, identified in the [Regional Spatial Strategy], Scu town centre will be main location for all new retail, leisure, cultural and office development…. New development should make a positive contribution to impr the town centre's viability and vitality, support the creation of a comfortable, sa attractive and accessible shopping environment, and improve the overall mix of uses in the centre and its connectivity to adjoining areas."

26. Directly reflecting PPS4 and the sequential approach required by that national policy, 10.25 provides:

"New retail development is an important part of the continued growth in North Lincolnshire. In particular it will have an important role to play in helping to re Scunthorpe town centre. In choosing the location of new retail development, it be done in line with the sequential test as set out in PPS4, which is as follows:

- Existing centres, where the development is appropriate in relation to the r function of the centre, then
- Edge of centre locations, which are well-connected to the existing centre where the development is appropriate to the role and function of the centr then
- Out of centre sites that are well serviced by a choice of means of transpor

Application of the Policies to this Application

27. In respect of Simons' August 2011 application, the planning committee had the benefi from two consultants in retail development, HOW Planning LLP ("HOW", instructed and England & Lyle (instructed by the Council itself).

28. HOW and England & Lyle agreed that the proposed development would not have any adverse impact on Scunthorpe town centre, the predicted diversion of trade being no r 5.5% (see Main Report, at page 59).

29. On the other hand, there was evidence that the development would bring significant e benefits to the area, with estimates of a claw back of retail trade of £20m, and the crea approximately 300 part-time and full time jobs (Main Report, page 49). The evidence Council's Head of Economic Development and Area Renaissance included the follow Report, page 62):

"Whilst we recognise that there may be some negative impact on the town centr development, the employment growth, increased local disposable income and stemming the leakage of retail spend outside of North Lincolnshire will result i positive impact on Scunthorpe and North Lincolnshire.

It is recognised that female unemployment is currently rising faster than male unemployment in North Lincolnshire. The additional new jobs created, due to t part-time nature, will provide needed employment opportunities particularly for

within or on the edge of Scunthorpe. However, England & Lyle examined the potentia
proposed Marks & Spencer store to be split into (i) a non-food (clothes and household
which might be accommodated in a 3,884 sq m unit in Cole Street in the town centre,
occupied by T J Hughes, and (ii) a food-only store which might be accommodated in
High Street formerly occupied by Marks & Spencer. The advisers considered that, if t
unit was to be discounted, then "there needs to be a clearer justification as to why it is
for use by Marks & Spencer" (paragraph 8.8 of November 2011 Report). Furthermore
proposed Marks & Spencer retail operation could be accommodated thus, "the sequen
assessment does not adequately assess whether the floorspace of the other retail units
located on separate sequentially preferable sites to comply with Policy EC15" (paragr

31. HOW responded that Marks & Spencer did not have a business model of stores limite
and household goods, and they considered that they needed a store offering a full rang
goods to make it commercially viable.

32. England & Lyle were still cautious. In their response to HOW's further comments, the

> "There may be advantages in creating a critical mass of retail development on t
> application site but these advantages should be treated as positive benefits of th
> scheme, not part of the sequential approach. Policy EC17 justifies refusal of pla
> permission where an applicant has not demonstrated compliance with the requi
> of the sequential approach. In this instance we suggest that it is better for the C
> make its own judgement about whether sequentially preferable sites are availab
> suitable and viable for retail development – including the former T J Hughes un
> Street car park, land surrounding Church Square, Winterton Road, Glebe Pit an
> Road. We would simply comment that, regarding the former T J Hughes unit, th
> argument seems to be that it would not be viable for Marks & Spencer to opera
> store selling clothing and homewares, and have a separate Simply Food store. E
> qualitative need that has been claimed is for an improved retail offer in clothes
> shopping. It may be viable for Marks & Spencer to operate a store selling cloth
> food in the T J Hughes unit, which is significantly larger than the former [Mark
> Spencer] store in the High Street. The Council needs to be satisfied that the bus
> model proposed by Marks & Spencer is the most appropriate one for Scunthorp
> that it justifies an out-of-centre location."

33. In fact, by that stage, of the possible alternatives mentioned, the T J Hughes unit was
available site in the town centre, the issue consequently focusing on whether that site
and viable.

34. It was the view of Marks & Spencer, shared by the applicant Simons, that splitting the
operation between the T J Hughes unit and other premises was not commercially viab
Report of the officer accepted that justification for not splitting the Marks & Spencer
it did not accept that the smaller units could not be disaggregated, in the following ter

> "The applicants have stated that the closure of [Marks & Spencers'] in-centre op
> in 2010 on viability grounds, which was a more typical clothing and food offer,
> demonstrates that this is a challenging catchment for the retailer from a comme
> perspective. This position has led [Marks & Spencer] to establish that 'to create

homeware goods. This additional justification provided by the applicants does e how the viability of the [Marks & Spencer] business model is an important consideration, and justifies why neither the T J Hughes site or the Southgate un suitable given that the clothing and food offer at the [Marks & Spencer] town c site failed to be viable." (page 55).

"In summary, the applicants have adequately justified the sequential approach t assessing sites within and on the edge of Scunthorpe town centre for their avail suitability and viability. On the issue of disaggregation, whilst the applicants ha provided a justification why the [Marks & Spencer] (unit 1) cannot be disaggre they have not demonstrated flexibility in terms of disaggregating the smaller un the proposal (units 2, 3 and 4) onto separate, sequentially preferable sites. For t reason it is felt that the sequential test has not been passed and therefore fails to with all the requirements of policy EC15 of PPS4." (page 57)

35. It is common ground between the parties that Simons, as the applicant, failed to demo compliance with the requirements of the sequential approach in Policy EC15, for the in that report, i.e. that it had failed to demonstrate the flexibility required by Policy E that it had not demonstrated that the three smaller units could not be disaggregated int sequentially preferable sites.

The Grounds of Challenge

36. Zurich, through Mr Tucker, relied upon six grounds of challenge.

37. I can deal with two grounds very shortly, because Mr Tucker properly conceded that, they are bound to fail by dint of authority binding on me. They were Grounds 5 and 6 Statement of Facts and Grounds, namely:

i) Ground 5: The Highways Contribution Planning Obligation: The Section 106 agreement included an obligation to pay the sum of £300,000 for capacity road improvements. It was submitted that the committee erred because they were no advised that they could only take this proposed obligation into account if it was justified by Regulation 122(2) of Community Infrastructure Levy Regulations 2 2010 No 949). However, Mr Tucker accepted that, on the current state of the la particular Derwent Holdings v Trafford Metropolitan Borough Council [2011] Civ 832, even if he were to persuade me that that was so, that would not be a ba upon which the planning permission challenged could be quashed.

ii) Ground 6: Legal Error in the Screening Opinion: It was submitted that the sc opinion dated 22 July 2011 (referred to in paragraph 7 above) was unlawful, as upon future documentation which did not exist at the time of the opinion. Howe was not suggested that there was any evidence that, if the opinion had been prep accordance with the correct procedure, the resulting decision in relation to the p permission would have been any different. Consequently, Mr Tucker conceded the challenge advanced was based upon a procedural not substantive defect, fol R (Berky) v Newport City Council [2012] EWCA Civ 378, that basis of challen would be bound to fail in this court.

40. As I have indicated (paragraph 22(ii) above), the question as to whether an applicant demonstrated compliance with the requirements of the sequential approach is capable two answers, "yes" or "no". If it has not demonstrated compliance, then there is a pres raised by Policy EC17 that the application will be refused. In this case it is common g Simons failed to demonstrate compliance with the requirements of the sequential appr manner I have described (paragraphs 34-5 above).

41. However, Mr Tucker submitted that the planning committee were led into error by the Main Report which, at page 62, said:

> "PPS4 is clear in its advice that local planning authorities must consider both th sequential approach and impacts upon retail centres when determining out-of-c retail development proposals. The applicants have followed the sequential appr and assessed whether sites are suitable, viable or available but have not display flexibility by looking at the issue of disaggregation, particularly with regard to t smaller units (units 2, 3 and 4). Consequently policy EC15 of PPS4 is not fully complied with."

42. That reference to the policy not being "fully" complied with is repeated in the Adden page 1, which says in response to the further letters of objection:

> "In response, it should be noted that it is accepted that the retail proposal at [the does not fully comply with the sequential approach…"

That report goes on to say, at page 3, that:

> "In this case, it is felt that the economic benefits of the development are materia considerations which outweigh the development plan and any non-compliance sequential test under the provisions of PPS4".

43. Mr Tucker submitted that those passages displayed a fundamental misunderstanding a misapplication of Policy EC17 – because the policy does not admit of partially meetin sequential test. The committee, instead of being told in unequivocal terms that where (any) failure to meet the sequential test the national policy directed refusal of the appl led to believe that the partial breach of the test should merely be weighed against the material considerations, notably the economic benefits of the development. That was with regard to the proper approach to Policy EC17, as a result of which the planning p should be quashed.

44. Forcefully as that submission was made, I do not find it compelling. The passages reli be seen in their full context: I am not persuaded that the Main and Addendum Reports viewed fairly as a whole, do betray any misunderstanding or misapplication of Policy

45. The Main Report shows the following.

> i) Mr Tucker accepted – as he had to do – that the relevant PPS4 national polici comprehensively and accurately set out on pages 21 and following of the Main On page 24, Policy EC17.1 is accurately set out, thus:

That is repeated on page 51.

ii) Policy EC15 is set out in full on page 54; and that test is immediately applie circumstances of this case on pages 55-7. The conclusion of the report on that i out in the passage quoted above (paragraph 34) was that "the sequential test has been passed…". That conclusion is clear and unequivocal.

iii) However, that is not the end of the planning committee's exercise; because, found that the applicant had not satisfied the sequential test (thereby giving rise national policy presumption of refusal), the committee still had to decide wheth are any other material considerations which displace that presumption. The repo proceeds, properly, to consider the other material considerations, both positive a negative: the impact of the development on Scunthorpe town centre and other r centres within the catchment area (pages 57-9), highway issues (pages 59-61), residential amenity (pages 61-2), economic considerations (page 62) and ecolog 62).

iv) There is then a section headed "Balance of Considerations", which includes quoted passage upon which Mr Tucker relies. That needs to be placed in its par context: it forms part of the following passage:

> "Under the provisions of Section 70(2) of the Town & Country Planning Act 1990 local planning authorities are required, when determining applications, to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Government guidance and the contents of Planning Policy Statements are material considerations but local planning authorities need not follow Government guidance if other material considerations outweigh this.
>
> PPS4 is clear in its advice that local planning authorities must consider both the sequential approach and impacts upon retail centres when determining out-of-centre retail development proposals. The applicants have followed the sequential approach and assessed whether sites are suitable, viable or available but have not displayed flexibility by looking at the issue of disaggregation, particularly with regard to the smaller units (units 2, 3 and 4). Consequently policy EC15 of PPS4 is not fully complied with.
>
> *Under policy EC17.1a of PPS4 planning applications that fail to demonstrate compliance with the sequential approach (policy EC15) should be refused*." (emphasis added).

v) The report then proceeds to consider the other material considerations to whi has already referred, of which it considers that the economic benefits of the development should be attributed particular weight in a period of serious econo

The other particular factor which is identified is "the fall back position of the existing use of the site, which enables 4,500 sq m gross of retailing from the site". I return to this factor below (paragraphs 65 and following below: see especially paragraph 68).

vi) There is then consideration of how the adverse impact on the town centre, a significant, might be diminished by a Section 106 obligation (again referred to paragraphs 79 and following below: see especially paragraph 84).

vii) The final conclusion (and the report's recommendation) was:

> "It is considered that the positive benefits outweigh the negative and what negative impacts have been identified have been mitigated to an acceptable degree. Consequently the recommendation is one of approval subject to the conditions and the completion of a Section 106 agreement".

46. It may be that a Parliamentary or other legal draftsman might have drafted some of th differently – but, in my judgment, it is clear what is going on here. The applicant havi persuade the officer that the sequential test is passed, the officer performs the exercise must perform to see whether the presumption of refusal mandated by PPS4 is outweig material considerations (see paragraph 22(iv) above). With respect to Mr Tucker's sub evident that, as part of that exercise, the national policy directing refusal in these circu clearly taken into account, expressly, in the italicised passage set out in paragraph 45(agree with Mr Katkowski's submission: *at this stage*, when the positive and negative being balanced to determine whether the presumption is displaced, the extent and con the breach of the sequential provisions may be relevant. That is so because, as well as those provisions raising a presumption of refusal, the extent of the breach may be rele question whether the presumption so raised is overcome in the circumstances of the p The scope of the breach in this case comprised the failure on Simons' part to demonst three smaller units could not be disaggregated into separate, sequentially preferable si paragraph 35 above).

47. The officer considered that the presumption of refusal was displaced in this case by, a primarily, the economic benefits that this development would bring to the area (briefly paragraph 29 above). That was a conclusion based on planning judgment to which the entitled to come, and which the planning committee were entitled to follow.

48. I do not consider that the Addendum Report takes matters any further. The references report, to the proposal not "fully" complying with the sequential approach and the eco benefits of the scheme outweighing "the non-compliance with this part of PPS4" appe no more than a references back to the wording of the main report, rather than a new d Tucker relied upon the words "with this part of PPS4" which, he submitted, showed th had improperly suggested that there could be partial compliance with the sequential a as I have described, the officer had, by this stage, moved on. He had previously unequ indicated that the national policy sequential approach had been breached, and was now whether other material considerations outweighed the policy directive to refuse the ap

50. The final conclusion of the Addendum Report, much in the terms of the conclusion to Main Report, is set out in the penultimate paragraph. Taken as a whole, the Addendu in substance, that the fresh representations do not change the picture: the officer make conclusion on the same grounds as he does in the Main Report.

51. In my judgment, the committee was not tempted into any forbidden line of thinking, that there had been a partial compliance with the sequential approach. I appreciate tha that which was urged by Judge LJ in Oxton Farm (see paragraph 15(ii) above), I have Mr Tucker's submissions on Ground 1, which were based upon a somewhat detailed t analysis, in kind. In this case, the officer's reports are robust enough to bear that analy event, in relation to this ground, Mr Tucker has failed by some distance to persuade m overall effect of the report was significantly to mislead the planning committee about matters. In my judgment, the approach of the officer, followed by the committee, was lawful.

52. For those reasons, I do not find that the first ground is made good.

Ground 2: Misapplication of the Sequential Test

53. In applying the sequential test, an applicant must demonstrate that it has applied an ap degree of flexibility including, by virtue of Policy 15.1.d.iv, the disaggregation of spe the proposal into separate, sequentially preferable sites. The PPS4 Practice Guidance paragraph 6.33):

> "While there is no policy requirement to demonstrate need, an operator claimin is unable to be flexible about its chosen 'business model' would be expected to demonstrate why a smaller store or stores could not meet a similar need."

As indicated in this passage, the burden of demonstrating this falls on the applicant.

54. In this case, submitted Mr Tucker, Marks & Spencer merely asserted that to disaggreg proposed operation into a non-food store (which could be accommodated in the T J H and a food-only store (which could be accommodated separately elsewhere, for exam Marks & Spencer High Street unit) was not viable. There was no evidence upon whic committee could have been satisfied, as they purported to be, that the applicant had de flexibility in accordance with the terms of Policy 15.1.d.iv.

55. Mr Fraser submitted that this ground adds nothing of substance to Ground 1; because that ground, it is uncontentious that Simons failed to demonstrate the flexibility requi EC15.1.d.iv, in that it had not demonstrated that the three smaller units could not be d into separate, sequentially preferable sites. There is therefore a breach of the sequenti any event. It would add nothing of substance if there were a second breach of that sam requirement, in relation to the disaggregation of the proposed Marks & Spencer opera

56. There is obvious force in that submission with regard to the policy-internal question there is a breach of the sequential approach, which triggers the policy directive to refu application; because that is a binary question. However, whether there is a further bre relevant to the balancing exercise required thereafter, in which the question of whethe

(at page 55) makes clear that the only available Scunthorpe town centre opportunity f
Spencer was the T J Hughes unit. In terms of the whole of its proposed operation at th
unit was discounted by Marks & Spencer on account of its size, its total floorspace be
m as opposed to the 4,645 sq m proposed in the development at the Site. The T J Hug
only possibly be appropriate by "disaggregation", i.e. splitting the non-food part of th
store from the food part and house them in separate premises. However, in sequential
Policy EC15.1.a requires planning authorities to ensure that sites are assessed for, not
availability, but also viability and suitability. Marks & Spencer considered such a prop
premises neither suitable for their commercial requirements or business model, nor co
viable. Its position was that this was a commercially challenging catchment for retaile
evidenced by their commercial failure in early 2011 at the (admittedly small) High St
and to create a commercially viable store a full range of goods needed to be provided
roof with a critical mass of retailing.

59. It was that evidence of non-viability that the officer accepted as an explanation as to v
Spencer did not consider a split site in the town centre was feasible. Further, at the pla
committee meeting on 7 March 2012, a representative from Marks & Spencer gave ev

> "… the company's position remained unchanged. It would only develop sites th
> considered commercially viable and there were no such sites in Scunthorpe tow
> centre".

60. In my judgment, it is simply incorrect to say that there was no evidence before the off
committee that (i) the T J Hughes unit was too small to create an economically viable
Spencer food and non-food store, or (ii) it was no economically viable to split the ope
two parts, one of which might be housed in the T J Hughes unit. The evidence was tha
Spencer had considered the T J Hughes unit, and in their opinion they could not use th
indeed, any unit in Scunthorpe town centre) for an economically viable operation. For
they had no interest in any available site other than the Site, as the representative at th
made clear. That was evidence that the committee could properly take into account. It
to expect a commercial operator to reveal its precise commercially sensitive and valua
calculations as to why it considers possible alternatives to the development proposal n
commercially viable; and it is unnecessary for them to do so to enable a planning auth
to a view on viability.

61. It is also important to mark that developers, and planning authorities, work in the real
& Spencer had assessed the only available town centre alternative to the Site, and had
that a development that was smaller than that proposed, or one with a more restricted
goods, was neither commercially viable nor suitable for their commercial requirement
basis of that assessment, emphasised by their representative who spoke at the plannin
hearing, the officer and committee knew that, if this planning permission was refused
& Spencer would not locate into Scunthorpe town centre. As Lord Reed said in Tesco
[29]:

> "Provided the applicant has [given consideration to the scope for accommodati
> development in a different form and to have thoroughly assessed sequentially
> preferable locations]… the question remains… whether an alternative site is su

are generated by the developer's assessment of the market that he seeks to serve they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers…, they will be rejected. But criteria are designed for use in the real world in which developers wish to opera some artificial world in which they have no interest doing so."

62. Working in the real world, the committee were entitled (and, indeed, bound) to take in evidence that any arrangement in which Marks & Spencer used the T J Hughes unit (t available unit in Scunthorpe town centre) would not be commercially viable, and that that lack of viability, Marks & Spencer would not locate to Scunthorpe town centre in this application for the Site was refused. On the basis of that evidence, in the committ applicant had demonstrated flexibility in terms of the sequential approach so far as the disaggregation of the Marks & Spencer operation was concerned. They were entitled that conclusion on that evidence.

63. For those reasons, I am quite satisfied that there was evidence upon which the commi satisfied (as, in the event, they were) that Simons had demonstrated flexibility in acco the terms of Policy 15.1.d.iv so far as the disaggregation of the Marks & Spencer ope concerned.

64. This ground therefore fails.

Ground 3: Fall Back as an Immaterial Consideration

65. Mr Tucker submitted that, because such a comparison may be a material considerati committee should compare the development for which planning permission is sought hand, with what the applicants could do with the land and premises on the basis of the position as it stands without that planning permission ("the fall back position"). Howe comparison is only proper if there is a realistic possibility of the fall back position hap Those propositions, which I accept, derive from Snowden v Secretary of State for the [1980] JPL 749.

66. In this case, the fall back position used stems from Section 4 of the England & Lyle R November 2011. The report, after referring to the fact that the garden centre "trades fr Class A1 retail floorspace…" (paragraph 4.1) and reciting the Secretary of State's dec 1990 (quoted at paragraph 6(iii) above), says:

> "Our interpretation of the planning status of the existing garden centre is that th established open A1 retail use of the existing building which has a floorspace o sq m gross. The planning consent is subject to conditions on the range of goods allowed to be sold. The consent represents a fall back position that is relevant t current application. A retail development with a total floorspace of up to 4,500 gross could be developed on the site. This could apply to either the Marks & Sp store or the other retail units."

67. That is reflected in the officer's Main Report, at page 50:

> "… The planning status of the existing garden centre is that there is an establish

68. That is the fall back position that appears to be taken into account as a material consid page 63 of the Main Report:

> "Other material considerations to be attributed weight include: the economic be that the scheme would have during this serious economic downturn; additionall *fall back position of the existing use of the site , which enables 4,500 square me gross of retailing from the site*…" (emphasis added).

69. Mr Tucker submitted that the way in which the fall back position was taken into acco law, in two respects.

70. First, he submitted that the officer and committee were wrong to take into account the position, of any form of open Class A1 retailing use, in the absence of a lawful develo certificate issued under Section 191 of the Town and Country Planning Act 1990. Tha enables an application to be made to the relevant local planning authority for a certifi lawfulness of existing use or development, to ascertain "whether any existing use of b land is lawful" (section 191(1)(a)). Mr Tucker submitted that, without such a certifica comparison cannot in law amount to a material consideration.

71. I do not accept that proposition. Before the committee, there was significant evidence had had open Class A1 use of the Site for many years: there was, for example, the evi Secretary of State's decision letter of 9 August 1990 (see paragraph 6(iii) above) and t the Council's own planning advisers that there was established open A1 retail use of t 4,500 sq m building on the Site (see paragraph 66 above). It was open to the committe account that evidence, and give it the weight that they considered appropriate.

72. The second error was, contended Mr Tucker, that the committee were not advised tha only take the fall back position into account if it were a realistic possibility that the fa scenario would happen.

73. Mr Fraser and Mr Katkowski submitted that the "fall back position" here was not a tru position at all, because the comparator used was not something that might happen to u in the future but rather the use to which it is currently being put as a garden centre ent not accept that submission. It is clear from the passages I have quoted above (paragra both the officer's Main Report ("… a retail development with a total floorspace of up square metres gross *could be developed* on the site" (emphasis added)), and the plann report from which it was derived ("A retail development with a total floorspace of up gross *could be developed* on the site" (again, emphasis added)), that the comparator w the garden centre continuing to sell a wide range of goods, but the Site being prospect "developed" with a total retail floorspace of up to 4,500 sq m gross (i.e. with a develo similar size and planning use to the current garden centre). Unlike the adviser's report report does not suggest that that prospective development would be restricted to a Ma store, or three smaller retail units, as proposed in the development of the Site with wh permission is concerned. But it is clear from the language used, that the Main Report the prospect of the land being developed with such a retail development, even if this a were not granted.

74. Curiously, the Addendum Report is in slightly different terms from page 63 of the Ma

position does not have to be probable or even have a high chance of occurring; it has more than a merely theoretical prospect. Where the possibility of the fall back positio "very slight indeed", or merely "an outside chance", that is sufficient to make the posi consideration (see Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Co and Local Government [2009] EWCA Civ 333 at [20]-[21] per Sullivan LJ). Weight i matter for the planning committee.

76. In this case, the report did not address the gamut of possibilities for use of the Site if t were not granted. However, in addition to the possibility that the garden centre would use the Site for 4,500 sq m of open Class A1 retail use, it was obviously a possibility would use the existing use to redevelop the Site for a building of similar size with a si some retailer. The officer's Main Report suggested no more than that. It did not sugge that Marks & Spencer would use the existing buildings or limited redevelopment of th

77. In any event, although Mr Tucker submitted that the planning decision was a close thi used his casting vote (see paragraph 10 above) – it is clear from the Addendum Repor material considerations which in practice outweighed the negative material considerat (including the development plan and non-compliance with the sequential approach) w understandably, the economic benefits that the scheme would bring (see paragraph 3 o Addendum Report, which states that in terms).

78. In all the circumstances, I am not persuaded that, in relation to this ground, the officer significantly misled the committee about material matters.

79. Consequently, this ground fails.

Ground 4: The Proposed Restriction on Letting

80. Mr Tucker submitted that the Section 106 obligation with regard to protection of the t by imposing the restriction on tenants of town centre retail premises taking lettings in development that it did impose – did not reflect the degree of protection required by th on the planning committee.

81. That resolution (set out at paragraph 10 above), on this point, was brief. The committe grant permission, authorising the Head of Development Planning to grant permission completion of a Section 106 agreement

> "**…** for off-site highway improvements, *Scunthorpe town centre protection*, pro species translocation and maintenance and a contribution towards improving th existing footpaths in the vicinity of the site, and to the conditions contained in t report…" (emphasis added).

82. If the obligation was not completed within three months, the Head of Development M was authorised to:

> "… refuse the planning application on *the grounds of the adverse impact upon t vitality and viability of Scunthorpe town centre*, adverse impact upon highway s and levels of congestion within the locality, adverse impact upon protected spec

grant of permission; but I do not find any great force in that submission. The Section obligations were of course an important part of the planning consent; but the obligatio and various, and I do not consider that the resolution suggests that the proposed agree concerning protection of the town centre was any more balance-tipping than, say, the pay the Council a sum within 14 days in respect of vole translocation (which appears 4.2.5 of the Section 106 agreement). The draconian sanction of non-compliance after was, in the usual way, to ensure swift compliance and prompt commencement of the d

84. Mr Tucker relied upon the history of how this provision arose. As I have indicated, bo England & Lyle were agreed that the proposed development would not have a signific impact on Scunthorpe town centre (see paragraph 28 above). However, England & Ly the Council was nevertheless to consider conditions that would protect the town centr adverse impact that the development might entail. They raised the possibility of the si being restricted by a bulky goods condition or, if the committee considered that unnec conditions "on the maximum size of units, the prevention of subdivision and on the ar convenience goods floorspace allowed in the scheme" (see Addendum Report, page 3

85. However, the officer's Main Report addressed the issue in a different way (page 63):

> "England & Lyle considered if a bulky goods condition would be a way of prot Scunthorpe's town centre, however the applicants have stated that such a condit would make the development unviable. The developer proposes to enter into an agreement under section 106… which, amongst other things, will give greater c to [the Council] that Scunthorpe's town centre would not have its vitality or via reduced by the proposed development to a degree that would cause harm. A list 30 town centre retailers has been compiled and are referred to as regulated tena the Section 106 agreement. The developer has agreed that only one regulated te will be able to occupy any of the smaller units (2, 3 or 4) for the first five years development opening and that retailer must retain a town centre presence for th five years of the development opening. Whilst it is accepted that there will be s impact upon the town centre, the legal agreement carries significant weight in minimising the less than significant impact that is predicted."

86. The officer's recommendation was therefore that the Council enter into a Section 106 with the owner/developer that prohibited the occupiers of town centre shops from lett development units – which would, of course, be very substantial comfort in respect of and viability of the town centre – subject to just one exception, namely that one of tho centre unit owners could also occupy a development unit, provided that that retailer al a town centre presence for the first five years. All of that was to be done through the S agreement between owners/developers and the Council.

87. In the event, that agreement contained the following covenant by the owner/developer 4.1):

> "… not to let a Unit to a Regulated Tenant during the Regulated Period SAVE T the case of one Unit only there shall be permitted one first letting to a Regulated where such tenant shall prior to the date of his Occupation covenant with the O and/or Developer (as the case may be) that it will Maintain Representation in th

88. Mr Tucker's submission was succinct. The resolution of the committee was made on t
only one town trader would be allowed to let one of the smaller units in the developm
38 required Marks & Spencer, who were not in the town centre, to let the large unit: s
12 above), on the basis that that tenant would also be required to maintain its presenc
centre for five years; but the Section 106 agreement did not give the Council the abili
that restriction. The Council could only require there to be a covenant between the ow
and the relevant tenant. It could not enforce that covenant against the tenant - only the
owner/developer could do so. The planning consent was therefore granted without the
protection required by the committee having been obtained.

89. However, again I am unpersuaded by this ground, which amounts to an argument that
who entered into paragraph 4.1 of the Section 106 agreement did so without due auth
resolution itself merely required the completion of a Section 106 agreement "for… So
town centre protection": it did not specify how that was to be achieved. In the event, i
with the recommendation of the officer's report, the Section 106 agreement forbade 3
relevant retailers from letting any unit in the development: that, of course, was the hea
protection given to the town centre. However, Mr Tucker complains that the restrictio
retailer is not as tight as it might have been.

90. For my own part, I am not convinced that the covenant between the owner/developer
would not be enforceable by the Council, for whose obvious benefit the covenant is m
although I did not hear full argument on that point, and express no concluded view no
my rejection of this ground on that basis.

91. But, leaving that aside:

> i) The planning committee knew that the restriction was to be included in a Sec
> agreement between the owner/developer and the Council, and so were aware th
> relevant tenant would not be a direct party to that agreement.
>
> ii) The fact that the restriction is not as legally watertight or certain of enforcem
> might have been does not make the planning permission unlawful. The real pro
> for the town centre lay in the unchallenged restriction that prevented all but one
> town centre retailers letting a unit in the development at all, and ensured that th
> of the four units in the development (including the larger unit, required by Cond
> to be let to Marks & Spencer) would be let to retailers who had no presence in t
> centre at all. There is no evidence that the committee intended there to be a gua
> legally watertight and enforceable right in the Council to ensure that any tenant
> advantage of that exception would maintain a particular presence in the town ce
> Indeed, no such guarantee could possibly have been given. Further, in none of t
> reports was there any consideration of the extent of presence that might be requ
> be maintained in the town. That suggests that the resolution left the precise form
> proposed restriction to the officer dealing with the Section 106 obligation. The
> Mr Tucker believes that he could have drafted a better provision on behalf of th
> Council – and I have no reason to doubt him – does not, as a matter of law, inva
> the grant of planning permission.

92. For those reasons, Mr Tucker has not persuaded me that, by imposing a restriction on

dismiss the claim.

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