Neutral Citation Number: [2023] EWHC 3154 (Admin)

Case No: CO/4855/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester District Registry
1 Bridge Street West, Manchester M60 9DJ

Date: 11 December 2023

Before :

Karen Ridge sitting as a Deputy High Court Judge

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Between :

THE KING **(on the application of TESCO STORES LIMITED)**	**Claimant**
- and -	
STOCKPORT METROPOLITAN BOROUGH COUNCIL	**Defendant**
-and-	
LIDL GREAT BRITAIN LIMITED	**Interested Party**

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- -

Richard Turney (instructed by Bryan Cave Leighton Paisner LLP) for the **Claimant Martin Carter** Counsel for the **Defendant**
Douglas Edwards KC (instructed by Blake Morgan LLP) for the **Interested Party**

Hearing date: 5 September 2023

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APPROVED JUDGMENT

[1] By direction under paragraph 1(3) of Schedule 8 to the Planning and Compulsory Purchase Act 2004

Deputy High Court Judge Karen Ridge:

Introduction

1. The Claimant (Tesco Stores) challenges the decision of Stockport Metropolitan Borough Council, the Defendant, made on 9 November 2022, to grant planning permission to the Interested Party (Lidl) for the erection of a Lidl food store on land at 111 Wellington Road North, Heaton Norris, Stockport SK4 2QH.

2. Permission was granted by Lang J. for the claim to proceed on all grounds in an order dated 28th February 2023. The Defendant and Interested Party both resist the claim in its entirety.

3. On 18 April 2023 a second witness statement of Timothy Smith was filed by the Claimant. The statement contains a more detailed plan of the catchment area overlaid with the land registry title plan to the New Bridge Lane site. On the 12 May 2023 the Interested Party filed a witness statement from Jonathan Harper in response to that statement. An accompanying application was submitted for leave to rely on the witness statement and exhibits. There are no objections to either of the statements and I therefore admitted them into evidence.

Factual Background

4. The Interested Party owns land on the corner of Wellington Road North and Sparthfield Road in Heaton Norris, Stockport. The planning permission relates to the creation of a single-storey retail unit comprising 1,900 square metres gross internal area, with a net sales area of 1,256 square metres. The vehicular access to the site would be from Sparthfield Road, along the northern boundary of the site. The site lies outside any designated town centre and therefore the proposal was for an out of centre retail use.

5. The Defendant is the local planning authority. The development plan for the area includes policies set out in the Stockport Unitary Development Plan Review adopted 31st May 2006 which have been saved[1] and policies set out in the Stockport Local Development Framework Core Strategy Development Plan Document adopted 17th March 2011.

6. Policy CS5 which set out Stockport's hierarchy of service centres and set an impact threshold for all A1 uses exceeding 200 square metres net of floorspace in out of centre locations.

7. Relevant development plan policies are in accordance with the National Planning Policy Framework (NPPF) and the proposals were considered in light of the sequential test. The NPPF says that:

> "87. 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. 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.
>
> 88. 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. Applicants and local planning authorities should 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….
>
> 90. When assessing applications for retail and leisure development outside town centres, which are not in accordance with an up-to-date plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floorspace threshold (if there is no locally set threshold, the default threshold is 2,500m2 of gross floorspace). 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).
>
> 91. Where an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the considerations in paragraph 90, it should be refused."

The Retail Impact Assessments

8. For the purposes of applying the sequential test, a number of sites were considered to be suitable for the proposed retail use, and sequentially preferable. First, Land at Water Street was a site which was proposed for a foodstore by Aldi and was the subject of a planning application. Secondly, there was a vacant unit (Unit 4B) in the Peel Centre which had been identified as being suitable for a similarly sized foodstore.

9. Both the Interested Party's and the Defendant's retail consultants addressed the sequential test in setting out their position on the application. The Claimant, together with other objectors, also made representations on this issue.

10. Rapleys were the retail consultants instructed on behalf of the Interested Party. In its first appraisal Rapleys argued that policy CS5 was out of date because it referred to Use Class A1 set out within the Town and Country Planning (Use Classes) Order 1987 which had been superseded. On this basis, they argued that there were no locally set threshold for impact assessments and the proposal was under the threshold of 2,500square metres set out in the NPPF which triggered the need for an impact assessment. Whilst they argued that no retail impact assessment was necessary, they said that an assessment had been prepared to "provide the Council with comfort that the proposal will not give rise to any significant adverse impacts on designated retail centres".

11. <u>The Advice of the Defendant's Retail Consultants</u>: The Council instructed external consultants (Tetra Tech) to review the retail appraisal and to provide advice. The first Tetra Tech appraisal was dated February 2021 and it concluded that the Rapley's PRS had not demonstrated compliance with the sequential approach to site selection. Further information was required in relation to the level of flexibility of format adopted and further information was needed in relation to other sequentially preferable sites, these included Unit 4B and Water

Street.

12. Rapleys then provided further information via a March 2021 Retail Planning Appraisal. That was considered by Tetra Tech who advised that compliance with the sequential test had not been demonstrated due to a change in circumstances in relation to the Water Street site. Further information was required in relation to the impact tests submitted.

13. In May 2021 Rapleys produced a Retail Addendum Report and a letter dated 3 June 2012 on behalf of the Interested Party. Tetra Tech, on behalf of the Defendant, agreed that the evidence supported discounting the Unit 4B on the basis that it was not available/available within a reasonable period. They concluded that the Water Street site could be available because it appeared that such a scheme was being progressed on it.

14. The final appraisal from the Defendant's retail advisors came in August 2022. Further information had been submitted by Rapleys in the form of a Retail Impact Update Note of July 2022 and an email dated 8 July 2022. Tetra Tech advised that it was accepted that Unit 4B was not available being the site owner was 'in legals' with another food operator. They further accepted that Water Street was not available because Aldi had reached a legally binding deal in principle with the landowner of that site.

15. In terms of retail impact the Tetra Tech report concluded that:

> "Having carefully reviewed Rapleys assessment and cumulative impact, even in the event the Asda store did close, we consider that, on balance, the proposed Lidl store, when considered alongside the foodstore proposals/commitments at the Peel Centre and Water Street, is unlikely to result in a significant adverse impact on the vitality and viability of Stockport Town Centre. In coming to this conclusion, we have had regard to, inter alia: the wider role of the town centre, its vitality and viability, recent and on-going significant investment, and the likelihood of the Asda store site being redeveloped and not lying vacant for a long period of time."

16. Because Aldi had entered into an agreement to occupy the Water Street site if permission was granted for its discount foodstore, the Defendant's retail consultant advised that Water Street "can no longer be considered to be available/available within a reason[able] period for the proposed development". It was noted that Aldi had stated that "they would relocate from their existing store on New Bridge Lane".

17. The Officer's Report (OR): was produced, with a recommendation for approval. After setting out relevant national and local policy imperatives, the OR went on to set out the objections received on behalf of various retail operators. The objections received from the Claimant were summarised as follows:

> "Objections on behalf of Tesco on Retail Policy Grounds (July 21)
>
> Our client makes representations of objection to the above application. Our clients trade from an edge-of-centre Extra format superstore on Tiviot Way. This first opened for trade in

2004. The positive retailing function of this store has since been consistently recognised by the Council including through its Local Plan. Our clients also trade from an edge-of-centre store at Burnage Lane which opened in 2005. This store provides a main and local food shopping destination for local residents and underpins the vitality and viability of the adjacent local centre. Our client has invested significantly in creating these important facilities and continues to invest today.

Our client's objections to the planning application focus on the following considerations:

1. The misinterpretation of the sequential test particularly with regard to the flexibility to be applied to matters relating to format and scale in the assessment of other opportunities.

2. The proposed trading concept is acknowledged to lead to additional trips and travel, the effects of which have not been assessed but are likely to result in an unsustainable form of development.

The application has failed to interpret the sequential test correctly. The extent of benefit that can arise from delivering development that can enhance the vitality, viability and health of a town centre has a relationship with the extent to which flexibility has been applied to the scale and format of the operator's development. Thus, greater flexibility should be applied where achievement of the test's planning policy objective can be secured. The applicant's 'one size fits all' approach to the application of specific formats is self-serving in the rejection of otherwise suitable sites that could secure positive outcomes for the town centre.

The applicant's proposed trading concept relies on customers using other shops and stores to complete their food shopping activity. Since the majority of trips are assessed as being diverted from full range stores (see Table 6B at Appendix 3 of the May 2021 Addendum Retail Statement) there will likely be marked increases in the overall number of trips, travel and mileage undertaken for shopping. These effects have not been assessed in the application's Transport Assessment. They are likely to lead to an unsustainable form of development.

For these reasons, the application should be refused.

Further Objections on behalf of Tesco on Retail Policy Grounds (October 22)

We have particular concerns as to the content of the Officer's Report in terms of the application of the sequential test.

The sequential test is set out at paragraph 87 of the NPPF which requires 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."

Of particular relevance in the determination of this application is the matter of availability and the intended occupier of two sequentially preferable sites, Unit 4B in the Peel Centre and the Water Street site. The Council's independent retail advisor, Alder King, considered that both of these sites were not available because on the former, "Peel have confirmed to us that they are in legals with another food operator for the unit" and on the latter that "a legally binding agreement has been entered into between Morbaine and Aldi, and therefore, if planning permission is granted, Aldi will occupy the store/site". These statements are then affirmed within the Analysis section of the Officer's Report.

The Judgment in Aldergate Properties Ltd v Mansfield District Council considered whether the identity of a retailer was a consideration in relation to 'availability'. Paragraph 42 of the Judgment confirms that "A town centre site may be owned by a retailer already, to use itself for retailing, who is not going to make it available to another retailer. It is plainly available for retailing, though only to one retailer. That does not mean that another retailer can thus satisfy the sequential test and so go straight to sites outside the town centre. "Available" cannot mean available to a particular retailer but must mean available for the type of retail use for which permission is sought."

The conclusions therefore made by both Alder King and Officers fail to take into account the position set out in the leading Aldergate Judgment. Neither the Peel Centre nor the Water Street site should be considered to be unavailable because there is an intention that they are to be occupied by a particular retailer. Aldergate is quite clear that, in this situation and for the purposes of the sequential test, these units are available - "Available cannot mean available to a particular retailer but must mean available for the type of retail use for which permission is sought."

This must be the case bearing in mind the intention of the sequential test is to secure retail (and other main town centre uses) in town centres, then on edge of centre site and only then in out of centre locations. The most sequentially preferable site must be developed first. In order to therefore satisfy this policy requirement, availability should be considered only in relation to whether it is available for the type of retail use sought (as set out in Aldergate). As such both the Peel Centre (due to the change of use permission) and the Water Street site are available and are sequentially preferable to the Lidl application site.

The sequential test has therefore been failed. That conflicts with saved UDP Policy TCG3 and permission should be refused. Indeed, paragraph 91 of the NPPF explains that this should be the case.

In these circumstances, could you confirm the appropriateness of the recommendation in your Report being amended to reflect

this important breach of policy.

However, if officers are unwilling to take such a step, we read the relevant terms of decision making delegated to the Area Committee as not allowing them to grant or resolve to grant permission for applications that are departures from the development plan. The matter would therefore need to be reported to the Planning and Highways Regulation Committee.

18. The OR then goes on to consider the sequential test in the following terms:

"Sequential Approach

The applicants define the catchment area for the proposed discount store as commensurate with a 5 minute drive-time. The reasoning for this approach is agreed and it is considered that the catchment appears broadly reasonable and consistent with catchment areas often adopted for deep discounters in larger town/cities. This catchment includes the following centres: Stockport Town Centre; Reddish Houldsworth Square District Centre; Heaton Chapel Local Centre; Shaw Road/ Heaton Moor Road Local Centre; and Moor Top (Heaton Moor) Local Centre

Having reviewed the submission and findings of the Planning and Retail Statement, it is accepted that there are no sites or units that would be physically capable of accommodating the proposed foodstore (taking into account reasonable flexibility) in Houldsworth District Centre or the other 3 local centres. In relation to the Town Centre, the following sites have been assessed under the sequential approach analysis… Officers agree with this list and are aware of no other sites which require assessment under the sequential test. The position on sequential assessment has been an evolving one over time since the application was submitted. The up to date position as regards to each of the sites above will now be considered below: …

Unit 4B, The Peel Centre

The owners of the retail park, Peel, have obtained planning permission for the change of use of the unit from non-food retail to flexible class E use (LPA ref: DC/081762). At the time of writing, it is understood that Next are in the process of closing down the store with store closure expected later in Summer 2022. The applicant's submission advises that they have been advised by the agent representing the owner, that they are currently in legals with a retail operator to occupy Unit 4b with the "deal" moving forward and set to conclude by the end of August. The applicants note that both parties have instructed solicitors, representing a commitment to moving the deal forward and significant costs will have been incurred by both sides and it is likely that heads of terms for a deal will have been agreed between the two parties in advance of this process. The Council's retail planning advisor has subsequently discussed Unit 4B with Peel to verify the applicant's statement. The site owners have confirmed to us that they are in legals with another food operator

for the unit. Accordingly, it is agreed that the unit is not available/available within a reasonable period for the proposed development.

Land at Water Street Site

A planning application has been submitted by the landowners, Morbaine, for a discount foodstore scheme on this site. Aldi has confirmed in a letter dated 25th November that they have "reached a deal in principle with Morbaine for the occupation of the proposed foodstore and has entered into a legally binding agreement to this effect". Aldi state that they would relocate from their existing store on Newbridge Lane. Given that an agreement at an advanced stage has been entered into between Morbaine and Aldi, and therefore, if planning permission is granted, Aldi will occupy the store/site, it is concluded that the site can no longer be considered to be available/available within a reason period for the proposed development.

Sequential Approach Conclusions

In response to the objections received from Tesco on the 3rd October 2022, the outlined Aldergate Properties Judgment has been reviewed at length and the following comments can be made. As discussed above, it has been concluded following the receipt of appropriate evidence that neither the Water Street site or Unit 4b at the Peel Centre are available for the retail development proposed under this application. This is because these sites have been committed to other retailers and therefore, there is no access to these sites by the applicant or any other parties. It is considered therefore, that this position is not comparable to the situation in paragraph 42 of the Aldergate judgment where a site was available to be taken up, albeit by one retailer. The alternative sites in this application have been taken up and are not 'available'. What is considered to be very important in this case is that the issue here is availability, not use. The Aldergate judgment clearly states that the identity of the applicant is not relevant to the scope of the sequential test and the issue is whether other, sequentially preferable, sites are available for the type of retail use proposed. In this case, as Unit 4B and Water Street have been taken up by other operators, then they are not "available for the type of retail use for which permission is sought." They are not available to Lidl in this case or in fact to anyone else.

Therefore, it is considered that the Council would be entitled to conclude that the sequential test has been passed, that policy TCG3 has not thereby been breached and that the proposals are not departures from the Development Plan. The main issue in the Aldergate case was whether the identity of the applicant is relevant to the scope of the sequential testing. It is concluded that nothing in this application turns on the identity of the applicant and the sequential testing has not been affected by their identity. On the basis of all the above information, officers remain

> satisfied that the applicant has demonstrated that the proposed development is in accordance with the sequential approach retail policy test. Therefore, for these reasons, it can be concluded that the proposals do not constitute a departure from the development plan as the necessary tests have been met."

19. The OR therefore confirmed that the judgment of Ouseley J. in *Aldergate Properties Limtied and Mansfield DC [2016] EWHC 1670 (Admin)* had been considered at length but the situation in the current proposal was not comparable and it has been concluded that the Water Street site and Unit 4B were not available. The report went on to consider retail impact in terms of trade diversion from town centre uses to the proposed discount store. It was concluded that the proposal was unlikely to result in a significant adverse impact on the vitality and viability of the Stockport Town Centre or any other defined centre. The proposal was considered acceptable in terms of all other planning issues, subject to the imposition of conditions. The report went on to recommend that planning permission be granted.

20. At the planning committee meeting on 17 October 2022 committee members resolved to grant permission and the planning permission was duly granted on 9 November 2022.

THE LAW

21. In the main, the relevant law in relation to this case is uncontroversial. The power to grant planning permission is created by Section 70 of the Town & Country Planning Act 1990. Section 38 (6) of the Planning & Compulsory Purchase Act 2004 requires that decisions about planning permission should be taken in accordance with the development plan unless material considerations indicate otherwise. The National Planning Policy Framework is an obvious material consideration in this respect, representing, as it does, national government policy. It is now well settled that the meaning of planning policy is a matter of law (see *Tesco Stores Ltd v Dundee City Council [2012] UKSC 13*).

22. Alleged errors in officer reports on planning applications are assessed having regard to whether members were materially misled on material matters. In *R (Mansell) v Tonbridge BC [2019] P.T.S.R. 1452* Lindblom LJ summarised the principles as follows:

> "41. The Planning Court—and this court too—must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court: see para 50 of my judgment in the East Staffordshire case. The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but—at local level—to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and—on appeal—to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do

not normally require intricate discussion of their meaning."

23. Lindblom LJ. went on to stress:

> "One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also—however well or badly a policy is expressed—that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect—in every case—good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt."

24. And..

> "Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R (Loader) v Rother District Council [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, R (Watermead Parish Council) v Aylesbury Vale District Council [2018] PTSR 43 . There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, R (Williams) v Powys County Council [2018] 1 WLR 439 . But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

25. It is well-established that the interpretation of policy is a question of law. As Lord Reed JSC said in *Tesco Stores Ltd v Dundee City Council [2012] PTSR 983:*

> "18. 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 … policy statements should be interpreted objectively in accordance with

> the language used, read as always in its proper context."

26. Thus, a failure to correctly interpret a policy will render a decision open to challenge, per Lord Keith of Kinkel in *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447.*

27. When applying the sequential test, national policy requires the applicant to demonstrate flexibility in the application of the test. The judgment of Ouseley J. in *Aldergate Properties Ltd v Mansfield DC [2016] EWHC 1670 (Admin)* has featured prominently in this case in arguments between Mr Turney for the Claimant and Mr Carter and Mr Edwards for the Defendant and Interested Party.

28. The Aldergate case was concerned with the application of the sequential test and in particular, the requirements of suitability and availability in relation to sequentially preferrable sites. The claim related to the interpretation of 'suitability' in the application of the test. This was because, the claimant in Aldergate was aggrieved, in part, by the council's decision to grant planning permission to a competitor (Aldi) for an out of centre retail proposal on the grounds that the sequential test has been passed.

29. In Aldergate the Council had determined that the sequential test was met on the basis that town centre sites had been excluded from consideration (or deemed unsuitable) because Aldi would not locate there in view of the nearby location of other existing or permitted Aldi stores. It was relevant to note that the Council had in fact also imposed a condition personal to Aldi to reflect the basis on which it decided the test was met. The verbal report to committee had confirmed that "the permission shall enure for the benefit of Aldi and no other retailer on the basis that the recommendation is based on the application and taking into account the specific commercial considerations of the potential operator".

30. Mr Justice Ouseley referred to the Supreme Court decision in the Tesco Stores and Dundee case. That case also had revolved around interpretation of the word 'suitable' in the sequential test. In Aldergate, Mr Justice Ouseley said:

> "Before turning to the submissions, I need to set out parts of the decision of the Supreme Court in Tesco Store Limited v Dundee City Council [2012] UKSC 13, [2012] 2 P&CR 9, because the District Council's understanding of it was critical to its approach. Tesco challenged the grant of planning permission for a supermarket on a large industrial estate out of centre. The City Council had had to consider whether such a store met criteria in the Development Plan, the first of which was that "no suitable site is available in the first instance within and thereafter on the edge of city, town or district centres". The City Council had interpreted "suitable" as meaning "suitable for the development proposed by the applicant". Tesco contended that it meant "suitable for meeting the identified deficiencies in retail provision in the area". The question of what "suitable" meant was a question for the Court, although its application was a matter of planning judgment. In addition to the Development Plan itself, the Plan incorporated Scottish Planning Policy Guidance, which was replaced in generally similar terms by other Scottish planning policy statements. Although the policy

> documents at issue in that case have some similarities in wording and certainly in purpose to that in the NPPF, the Court was not considering English planning policy documents."

31. In Aldergate the claimant had submitted that the Council was wrong to ignore town centre sites on the basis that the applicant was not prepared to compete with its own stores. Counsel for the district council had contended that the Council had been right to focus on the commercial requirements of the proposed operator. It was this dispute which was to be resolved and it was resolved as follows:

> "35. I have no doubt but that Mr Kolinsky's [counsel for the claimant] essential argument is correct, for a variety of reasons. In my judgment, "suitable" and "available" generally mean "suitable" and "available" for the broad type of development which is proposed in the application by approximate size, type, and range of goods. This incorporates the requirement for flexibility in [24] NPPF, and excludes, generally, the identity and personal or corporate attitudes of an individual retailer. The area and sites covered by the sequential test search should not vary from applicant to applicant according to their identity, but from application to application based on their content. Nothing in Tesco v Dundee City Council, properly understood, holds that the application of the sequential test depends on the individual corporate personality of the applicant or intended operator
>
> 36. I shall approach this first by construing the NPPF, without considering Tesco v Dundee City Council because the language of the Scottish policies is to some extent different, and it did not consider the language of the English policies relevant to this case. First, although the language of "suitable" and "available" features in both the plan-making policy in [23] NPPF and in the development control policy in [24] NPPF, it is inevitable that their focus will be different at the two stages. But there is a sensible relationship between them; they are not to be read simply in isolation from each other. The plan-making policies plainly do focus on allocating sites to meet retail needs, as a town centre use; but policies and site allocations have to be sound and their effectiveness depends on their commercial realism. That approach properly involves planning for development to go to commercially realistic allocated sites where a particular type of development is seen as publicly beneficial, and discouragement, to the point of refusal, for such development elsewhere. The development control policy in [24] NPPF deals with applications for town centres uses out of centre where there is no up to date Development Plan embodying the policies of [23] NPPF. But the development control policy aims to achieve as much of what an up to date plan would achieve as possible. It is not intended that the absence of an up to date plan creates a rather different world in which retailers could enjoy a much greater degree of temporary freedom based on their individual commercial interests.

> 37. Second, and related, NPPF [24] positively "requires" retail investment in the first place to locate in town centres rather than elsewhere. Its thrust is rather more emphatic than policies which advise developers and retailers to have regard to the circumstances of town centres, as in Tesco v Dundee [28]. It is the purpose of the planning system to control development, that is to permit, prevent, encourage, inhibit or limit and condition it, so that the individual private or commercial interest and the broader public interest meet in reconciliation however uneasily. NPPF [24] cannot therefore be interpreted as requiring "suitability" and "availability" simply to be judged from the retailer's or developer's perspective, with a degree of flexibility from the retailer, and responsiveness from the authority.
>
> 38. Third, and of critical importance here, still less can it be interpreted as envisaging that the requirement or preferences of an individual retailer's trading style, commercial attitudes, site preferences, competitive preferences whether against itself or greater competition should dictate what sites are "suitable" or "available" subject only to a degree of flexibility. NPPF [23] and [24] are simply not couched in terms of an individual retailer's corporate requirements or limitations. That would be the antithesis of planning for land uses and here, its default policies. It would take very clear language for such an odd result to be achieved.
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> 39. Any alternative approach would reduce the sequential test to one of the individual operator's preference, with the suitability of centres, sites and their availability varying from applicant to applicant each proposing the same broad type or even identical form of development. This case illustrates just why on the proper interpretation of NPPF [24], the identity of the applicant or proposed occupier is generally irrelevant. Even if the applicant had been Aldi, or if the application had been for a store to be occupied by Aldi, with an occupancy condition envisaged from the outset, the town centre would have been wrongly excluded from the search area on the basis of Aldi's particular corporate, commercial position or style. Any other approach would make nonsense of the sequential test to the advantage of an operator well-represented in the area, or one reluctant to compete with certain other retailers, however sensible that reluctance might be commercially. The applicant may not be a retailer; it may or may not have an operator identified, or one may be signed up or interested but the identity of which it is not yet willing to disclose. It would have to go through the full sequential test, and then obtain its retailer; but were the application made with retailer in tow, the test would be different. And were a retailer later signed up, it could require a different sequential test for the same application or a repeated application for the same development at the same site. That is not the intention of NPPF [24] or any sensible application of the sequential test.".

32. Ouseley J. went on to say:

> "42. Fourth, there is a further reason why the identity of the applicant, as opposed to the sort of development it proposes, is not generally relevant to the sequential test. The sequential test in the NPPF is not just one of suitability; it covers availability:
>
> "only if suitable sites are not available, should out of centre sites be considered." A town centre site may be owned by a retailer already, to use itself for retailing, who is not going to make it available to another retailer. It is plainly available for retailing, though only to one retailer. That does not mean that another retailer can thus satisfy the sequential test and so go straight to sites outside the town centre. "Available" cannot mean available to a particular retailer but must mean available for the type of retail use for which permission is sought"

33. I shall return to this judgment in my analysis.

34. Finally, in relation to ground 3, section 100D Local Government Act 1972 provides:

> "100D.– Inspection of background papers.
>
> (1) Subject, in the case of section 100C(1) , to subsection (2) below [a time limit], if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public–
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
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> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council. …
>
> (3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy. …
>
> (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which— (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and (b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

35. In *R (Joicey) v Northumberland CC [2014] EWHC 3657 (Admin)* and in *R (Hale Bank PC) v Halton BC [2019] EWHC 2677 (Admin)*, decisions to grant planning permission were quashed because of a failure by the local planning authority to publish background papers in accordance with s 100D. In Hale Bank, the challenge related to the failure to make available for inspection a report from an

advisor to the local planning authority on compliance with a sequential test. Lieven J held:

> "58. The clear statutory intention behind s.100D(5) of the LGA 1972 is to ensure that documents upon which the OR is based are open to be viewed by members of the public. It is in my view absolutely obvious that the OR is partly based on Ms Atkinson's advice, indeed I fail to see how it could not have been. Ms Atkinson's role was precisely to advise the Council on the issue of compliance with the Plan, and Mr Henry simply relied on that advice when writing the report. The fact that the advice was in part opinion does not remove it from the scope of s.100D(5) , indeed quite the contrary, advice will often be the very thing upon which the OR is based. … 60. Further, proper compliance with s.100D is an important part of maintaining a transparent planning system, in which third parties can be properly informed as to why particular recommendations are being made. The failure to produce the advice from the Council's advisor was an obvious breach of this requirement."

36. In *R (Save Warsash and the Western Wards) v Fareham Borough Council [2021] EWHC 1435 (Admin*), a decision to grant planning permission was quashed for a failure to make background papers available. Jay J, relying on Joicey, noted that "this court sets a very high standard in determining… that statutory breaches would have made no difference" [37].

37. More recently, in *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC and others [2023] EWHC 1995 (Admin)* Holgate J. confirmed that there are two aspects to be considered: firstly, whether there has been substantial compliance with the legislation and secondly, whether the claimant has suffered substantial prejudice from any non-compliance. He emphasised that these tests are fact sensitive and went on to say:

> "Plainly, it is unnecessary for a request to see a document to have been made for a breach of s.100D(1)(b) to have occurred. On the other hand, when it comes to material prejudice, a person who was aware of a reference in a committee report to a background paper but who has never shown or had any interest in inspecting the document is unlikely to get very far in a claim for judicial review"

Ground 1: The Application of the Sequential Test

38. On behalf of the Claimant, Mr Turney contends that the OR materially misdirected members on the meaning of 'available' for the purposes of application of the sequential test. The misdirection, it is alleged, led to the finding that Unit 4B and the Water Street sites were not available and the flawed conclusion that the sequential test had been met. This contention relies on paragraph 42 in the Aldgate judgment.

39. Firstly, I accept Mr Carter's proposition that the question as to whether sequentially preferable sites were available within the meaning of paragraph 87 fell to be determined at the date of the committee meeting. That has to be right in the context of a changing background factual situation in relation to the sites

under consideration.

40. In the Aldergate case the Council had determined a 5-minute drive catchment area in relation to the impact assessment. Part of the catchment fell within the Mansfield town centre but this town centre was excluded from the sequential test because the Council accepted that Aldi would not develop a store in the town centre so as to compete with existing town centre Aldi stores. Consequently all Mansfield town centre sites were excluded from consideration in the sequential test. This decision was based on the 'suitability' of town centre sites rather than their availability.

41. The Aldergate judgment turned on whether the question of suitability (and availability) should be assessed having regard to the commercial identity and imperatives of an individual applicant. The conclusion was that the identity of applicants was not generally relevant. Paragraph 42 in my view is restating the prior findings that the suitability of a site cannot be assessed having regard to one particular applicant and similarly, the availability of a site cannot be assessed having regard to one particular retailer. For these reasons I further accept that Mr Carter is correct when he says that the observations in paragraph 42 are not part of the ratio decidendi of the decision

42. Mr Edwards further emphasises the importance of context in the interpretation of planning policy as recognised by Ouseley J. when he explained that:

> "The true focus of interpretative debate is still the wording of the policy in context, and here of the English policies. Policy interpretations arising from litigation may be context and argument specific, and not intended as substitutes for the text at issue for all cases and contexts. The good sense of the planning consequences of any given interpretation may be a guide to its correctness."

43. To go back to the words in the policy… "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". The words in brackets are a key aid to construction in my view. The words 'or expected to become available within a reasonable period', when given their natural and ordinary meaning, point to some possibility of any unidentified applicant having the opportunity to secure occupation of a site in a reasonable timeframe.

44. If a site is already committed to an occupier, then the commercial reality is that it is not available to any other unidentified operator and, dependant on the facts of the case, there may be no opportunity of it becoming available within a reasonable period.

45. In this case the Council was at pains to disregard the identity of the applicant. The OR is very careful to observe the principles set out in the Aldergate judgment. Consideration was given to the two other sites and the evidence produced. Unit 4B was owned by Peel and they were in legal negotiations with a retail operator with a deal set to conclude by August. After obtaining evidence, the Council concluded that the site was not available or expected to become available within a reasonable period of time. That is a rational conclusion.

46. In relation to land at Water Street, a planning application had been submitted by the landowners for a foodstore on the site and a deal in principle had been reached with discount foodstore operator Aldi. Again, the OR considers the evidence and comes to a planning judgment that the site can no longer be considered to be available or available within a reasonable period. The conclusion that these two sites were not available is not premised on the fact that the sites were each in the control of another retailer but because they were not commercially available to any operator (other then the contracting party). The Council had assessed that both sites were essentially off the market.

47. For all of the above reasons I conclude that this ground does not succeed. There was no misinterpretation of retail policy in the OR and no misapplication of that policy in terms of the sequential test.

Ground 2: Alleged failure to have regard to a material consideration in applying the sequential test

48. The Claimants contend that the OR materially misdirected members in respect of the sequential test by failing to consider the possibility of the proposal being accommodated at the Aldi Site in New Bridge Lane. The Claimants say that this site is in an edge of centre location and is therefore sequentially preferable. The OR records that Aldi had committed to relocating to the Water Street site if it obtained planning permission for that site. Even if the conclusion that the Water Street site was not available was a lawful one, Mr Turney submits that it must follow that the New Bridge Lane site was available for Lidl because Aldi would not occupy both sites.

49. On behalf of Lidl, planning consultants, Rapleys, had prepared a Planning and Retail Statement (PRS) dated September 2020. As part of its consideration of the sequential test, the RPS identifies a catchment area based on the nature of the retail use proposed. It was explained that Lidl discount stores serve a relatively compact catchment area as they provide a neighbourhood shopping facility. Consequently a 0-5 minute drive time was identified for the catchment area and a catchment plan provided for reference. During pre-application discussions the Council had requested a 10-minute drive time catchment also be considered as a comparator. Both catchments were included in the RPS along with population data.

50. The rationale for adopting a catchment area based on a 5-minute drive time was explained. This was decided on the basis that it was unreasonable to expect the proposed store to attract some 145,000 residents[2] given the location of similar competing facilities, and some larger facilities, within the catchment area. The assessment as to an appropriate catchment area is a matter of planning judgment. In this case the Council accepted the rationale put forward by Rapleys, and further accepted that a catchment based on a 5-minute drive time was the most appropriate for the sequential test. The OR explained that the suggested catchment area was broadly consistent with the catchment areas often adopted for deep discounters in larger towns and that it had been agreed by the Council's own retail consultants. The conclusion on catchment area is completely rational and supported by reasoning.

51. The New Bridge Lane site was not included in the sequential test considerations because it was determined that it lay outside the agreed catchment area. In their

Reply the Claimants suggest that the contention that the site was not a material consideration because it fell outside Lidl's preferred catchment is an ex post facto attempt to justify ignoring an obvious material consideration. I do not accept that characterisation of the evidence and pleadings as they have emerged in this case for the reasons which follow.

52. Firstly, the determination of an appropriate catchment area was properly decided as a matter of planning judgment. The catchment area is delineated on the catchment plan at appendix 4 of the Rapley's report. The application of the boundaries of that catchment area to the area surrounding the proposed site is seen in the appendix 5 plan entitled catchment plan with competing retail facilities. It depicts the New Bridge Lane site as a blue dot which sits on the redline boundary of the 5-minute drive time. As a result of this the New Bridge Lane site was considered to be outside the catchment area and was not considered as part of the test.

53. The plan produced by Mr Smith on behalf of the Claimant is helpful. It depicts part of the site within the catchment area but the Newbridge Lane vehicular access is outside the catchment area. Mr Turney makes the point that there should be flexibility when considering sequential sites. In this case, irrespective of whether the Newbridge Lane site was reconfigured, it is likely that the vehicular access would remain from Newbridge Lane itself which lies outside the centre.

54. The evidence which has been produced in the form of the statement of Mr Harper contains an explanation as to the basis on which the catchment area was applied. I do not consider this to be ex post facto justification. The evidence has arisen because the Claimants criticise the exclusion of the New Bridge Lane site from the catchment area. No doubt if this criticism had been made prior to the matter going to committee, the OR would have dealt with the reasons for the exclusion. The evidence merely illustrates the reasons why it was excluded and the exercise of planning judgment which took place. I am satisfied that the exercise of that judgment was reasonable.

55. Mr Turney contends that it is illogical for the Defendant and Lidl to consider the existing Aldi at Newbridge Lane to be within the 5-minute catchment of the site when assessing retail impact but to treat it as outside the same catchment when applying the sequential test.

56. The Rapley's RPS at paragraph 7.58 explains that because of the distribution of existing convenience stores and the local road network, it was anticipated that a large proportion of the proposed store's turnover would be drawn from a number of stores which included the existing Aldi at Newbridge Lane. The report goes on to say "as these facilities are either dominant stores in the borough; are located within relatively close proximity to the site; or offer a similar range of goods". It is evident that they were included for a number of reasons. Paragraph 7.70 states "the nearest comparable discount retailers are the Aldi on Newbridge Lane (edge of centre store)…."

[2] The population within a 10-minute drive time.

57. Figure 3.1 of the Tetra Tech appraisal of February 2021 summarises the benchmark turnovers and trade draw from table 6 from the Rapleys' RPS. The Tetra Tech table categorises Newbridge Lane as being within the catchment area (albeit outside the town centre). Rapleys' table 6 had placed the Newbridge Lane site in the table under the heading 'Edge/Out of Centre Locations'. It is of note that the Tetra Tech consultant, who had advised throughout, did not suggest that the Newbridge Lane site should be included in the sequential assessment exercise.

58. The Defendant's planning consultant[3], in his final appraisal at paragraph 3.27 referred to the two Aldi stores (which presumably included Newbridge Lane) as being within the catchment area. Mr Turney's point is that it is irrational to include the site as an out of centre site for the for the purposes of the impact test but to exclude the site for the purposes of the sequential test.

59. The exercises to be undertaken in relation to the sequential test and a retail impact assessment are entirely different. In the sequential test the question is whether a site is either inside or on the edge of a town centre OR whether it is out of centre. In simple terms: is a site in centre or out of centre. The test is a binary one leading to a yes or no answer. In the application of the retail impact assessment, planning judgments are made as to how shoppers are likely to adjust their shopping habits on the advent of a new store. More nuanced judgments are made having regard to a variety of factors and how the catchment would operate.

60. I have concluded that the definition of the catchment area was appropriate. The application of the catchment area definition to the stores shown on the plan at appendix 5 was a matter of planning judgment. Notwithstanding the apparent inconsistency in categorisation of the Newbridge Lane site, I accept that on the evidence at the date of committee meeting, it was entirely reasonable of the Council to conclude that the Newbridge Lane site was out of centre for the purposes of the sequential assessment. The committee members had the benefit of advice from Rapleys, and from Tetra Tech, as well its own officers, none of whom advised that Newbridge Lane should be considered in the sequential test. I therefore do not consider that Newbridge Lane was a site that the Defendant was legally obliged to have regard to in the application of the sequential test when the evidence is looked at in totality. For all of these reasons ground 2 does not succeed.

Ground 3: Breach of s100D Local Government Act 1972

61. The third ground contends that the Defendant acted in breach of s100D by failing to make available for inspection the expert advice it received on retail planning matters from its own consultant. On the 1 July 2021 the Claimant's planning agents wrote to the Defendant requesting the retail advice from Tetra Tech and Alder King. The Defendant refused to disclose the documents prior to the committee meeting. Those reports are clearly background papers within the meaning of s100D(5).

[3] Now at Alder King, having moved from Rapleys.

62. The Council did not comply with the statutory requirement to list background documents relied on in the OR and refused to make those documents available for inspection. The Defendant does not argue that there was substantial compliance with the duty but seeks to argue that the Claimant has not been materially prejudiced by the failure.

63. In the Worcestershire case Holgate J. made it clear that the legal effect of a breach will depend upon the circumstances of the case and that cases are likely to fall within a spectrum including failing to comply with statutory requirements timeously, failure to identify the existence of a background paper or refusal to make a background paper available at all.

64. The OR runs to some 69 pages and the Claimants' objections are extensively quoted. In the planning policy (retail) section the OR makes clear reference to the Rapleys' retail impact assessments having been assessed by an independent professional. The OR summarises the key conclusions of the February 2021 appraisal quite fully, explaining why the evidence submitted by Rapleys had not demonstrated that the sequential test had been satisfied. The May 2021 was summarised with an explanation that the Interested Party had still not demonstrated the sequential test had been passed and goes on to explain the requirements for updating information about the availability of the Water Street site.

65. The OR then summarises the third appraisal of June 2021 when it was explained that the Defendant's consultant had accepted that Water Street had been shown to be unavailable and detailed the evidence relied upon. The fourth and final appraisal was summarised and that sets out the conclusion that the sequential test had been satisfied because Water Street and Unit 4B were accepted to be unavailable.

66. It is important to note that the appraisals by the Defendant's consultants were critiques and analyses of the retail impact assessments submitted by the Interested Party. Those original supporting assessments and additional evidence were available to all third parties interested in the planning application. The Defendant's reports from Tetra Tech and Alder King were commentaries on the adequacy of those assessments. The OR clearly explains the basis on which the sequential test was eventually satisfied. The Interested Party's evidence underpinning the final conclusions of the Defendant's consultants is set out in the Conclusions section of the OR[4].

67. It is clear therefore that the Claimant had access to a full suite of assessments produced for the Interested Party and the OR summary of the advice of the Defendant's own retail advisor. The objections submitted on behalf of the Claimant contain a full exposition of its contentions in relation to the appropriate application of the sequential test. The Claimant's second objection letter makes specific reference to the question of availability of sequentially preferable sites, identified by the Claimant as Unit 4B and Water Street.

68. The breach of the duty by the Defendant has not in my view caused material prejudice or serious disadvantage to the Claimant in this case. Prior to the date of the committee decision, the Claimant had a full grasp of the basis on which the Defendant had accepted that the sequential test had been passed. This is clearly different to the situation in the Hale Bank case where Lieven J. had found that it was the fact that the advice in relation to the sequential test was 'so sparse'

which was important.

69. On the particular facts of this case, I do not accept that, if the reports had been available, the Claimant would have made any representations which would have been materially different to those already made. The Claimant contends that it would have made additional representations on the flexibility to be shown in approaching the sequential test had the reports been available. However, the Claimant did make representations on the flexibility to be adopted in its objection. Having now seen the missing reports, the Claimant has not put forward any suggestions as to new points which would have arisen as a direct result of information in the undisclosed material. Each of the first two grounds of claim in this case relate to matters which were evident on the face of the OR and on the Interested Party's supporting documents.

70. In relation to the application of section 31(3C) to (3E) of the Senior Courts Act 1981, even if the statutory duty had been complied with, I am satisfied, for the above reasons, that it would have been highly likely that the outcome in terms of the grant of planning permission would not have been substantially different. Even if I apply the high threshold in Warsash, I am satisfied that in this case, that the breach of the statutory duty has made no difference.

71. The claim on ground 3 also fails.

[4] Page 116 Main Bundle