Neutral Citation Number: [2024] EWHC 1641 (Admin)

Case No: AC-2022-LDS-000274
CO/4706/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT (SITTING IN LEEDS)

Date: 2 July 2024

Before :

Dan Kolinsky KC

(sitting as a Deputy Judge of the High Court)

- -

BETWEEN:

LIDL GREAT BRITAIN LIMITED

Claimant

- and -
EAST LINDSEY DISTRICT COUNCIL

Defendant

ALDI STORES LIMITED

Interested Party

Douglas Edwards KC, instructed by Blake Morgan LLP for the Claimant

Killian Garvey instructed by Legal Services Lincolnshire for the Defendant

Neil Cameron KC instructed by Freeths LLP for the Interested Party

Hearing date: 15 May 2024

Approved Judgment

This judgment was handed down remotely at 11am on 2 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Judgment: Approved by the court for handing down

Dan Kolinsky KC (sitting as a Deputy High Court Judge):

1. The Claimant (Lidl Great Britain Limited ("Lidl")) seeks to quash the grant of planning permission dated 4 November 2022 by the Defendant to the Interested Party (Aldi Stores Limited ("Aldi")) for development of a new retail foodstore and associated development on land off Spilsby Road, Horncastle.

2. The Claimant and the Interested Party are each supermarket operators trading in a discounter style. Each has applied for planning permission for a supermarket on different parcels of land outside of the town centre but within the settlement of Horncastle.

3. The issue in the case is whether the Defendant approached the question of cumulative retail impact on Horncastle town centre lawfully in granting the Interested Party planning permission. The Claimant's essential complaint is that, in circumstances where there was only sufficient capacity for one new foodstore in an out of centre location (without causing a significant adverse impact on the vitality and viability of Horncastle town centre), the Defendant acted unlawfully in granting planning permission for the Interested Party's proposal without comparing it to the Claimant's proposal.

4. Permission to proceed with the claim was granted by Ms Karen Ridge sitting as a Deputy Judge of the High Court on 15 December 2023 following an oral renewal hearing. The Deputy Judge granted permission on ground 1 (failure to consider the merits of the Claimant's proposal) and part of ground 2 (unfair to determine the Aldi application until the outcome of the comments on the Lidl retail assessment were known and the schemes could be considered together).

5. This judgment is structured as follows:-

    a. Factual Background and Applicable Planning Policy
    b. Legal Principles
    c. Submissions
    d. Discussion

<u>Factual Background and Applicable Planning Policy</u>

(1) <u>The Claimant's and the Interested Party's Planning Applications</u>

6. The Claimant's application was submitted on 22 April 2022. It sought planning permission for the demolition of existing buildings and the erection of a new foodstore with access, parking, landscaping and associated works at Boston Road Horncastle. When submitted, the application proposed a net sales area of 1,411 sq m.

7. On 2 September 2022, the Claimant amended its scheme to reduce the floorspace to 1,251 sq m (of which 1,001 sq m would be convenience good sales and 250 sq m for comparison good sales). Following receipt of the amended scheme, the Defendant undertook a further consultation exercise which commenced on 7 September 2022.

8. The Interested Party's application for planning permission was submitted 7 weeks earlier on 3 March 2022 (and validated on 11 March 2022). It proposed a foodstore with 1,315 sq m of net floorspace (comprising 1,052 sq m of convenience floorspace and 263 sq m of net comparison floorspace). The proposed development includes a petrol filling station.

9. At a meeting between the Claimant's representatives and the Defendant's planning officers on 7 June 2022, the Defendant indicated its intention to consider the Claimant and the Interested Party's applications together. Part of the judicial review claim which failed at the permission stage was that this had created a legitimate expectation. The Deputy Judge held that it was not arguable that the Defendant had made any binding promise.

10. The evidence of Ms Kate Bleloch (Senior Acquisitions Consultant for the Claimant) explains (in para 8 of her witness statement dated 14 December 2022) that the proposed reduction in sales area between the Claimant's submitted application and its amended application was "a bid to win the beauty parade between the Lidl and Aldi applications" to "reduce the impact on Horncastle Town Centre".

(2) Applicable Retail Planning Policy

11. The applicable version of the National Planning Policy Framework (NPPF) was published on 20 July 2021. Its policy in respect of retail development was contained in paragraphs 90 and 91 which provided as follows.

"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".

12. The key development plan policy in respect of retail development is policy SP14 of the East Lindsey Local Plan (2018). It provides so far as material:-

"Strategic Policy 14 (SP14) – Town/Village Centres and Shopping

The town centres in Alford, Horncastle, Louth, Mablethorpe, Skegness and Spilsby, and the primary frontages will be defined on the Settlement Proposals Map.

The Council will support the development of shopping, commercial leisure, office, tourism, cultural services and community services and facilities that contribute to the vitality and viability of town centres in the District by:

1. Expanding or improving the town centre's retail, business, office, tourism, leisure, commercial and cultural facilities.

2. Supporting Class A1 retail uses and over the shop residential accommodation within the primary shopping frontages.

3. Proposals for 'edge of' and 'out of centre' retail schemes will be subject to the sequential test to establish and ensure that there are no suitable, available sites in the Town Centre which should be brought forward first.

4. Requiring proposals for retail, leisure and office development in 'edge of centre', or out of centre locations with a floor space in excess of 1000 sqm net to include an impact assessment which must demonstrate;

• That the proposal will not be detrimental to existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal.

• That the proposal will not harm town centre vitality and viability, including local consumer choice and trade in the town centre and the wider area, up to five years from the time the application is made.

• For major schemes where the full impact will not be realised in five years, the impact should also be assessed up to ten years from the time the application is made.

> • That the design of any proposal connects to the town centre in that it should not turn its back on the town centre; be an integral part of the character of the street scene, incorporating parking so that it does not dominate the street scene".

13. There are three relevant components of the retail policy for the purpose of considering out of centre proposals.

    a. First, there is a requirement to consider the sequential test which focuses on whether the floorspace proposed could be accommodated in a preferable location such as in the town centre. In the present case, it is common ground that the Aldi and the Lidi sites each have to satisfy the sequential test and neither is superior to the other in terms of their location in policy terms.

    b. Second, retail policy focuses on whether there would be an adverse impact on investment in the town centre. This is referred to as the first limb of retail impact. This is not the focus of the debate in the present case.

    c. Third, retail policy examines the impact of the proposal on the vitality and viability of the town centre. This is known as the second limb of retail impact. It is the focus of the discussion of retail policy in this claim.

14. It is common ground that policy SP14 sets a lower threshold for the retail impact assessment than the national default. Both schemes exceed the 1,000 sq m threshold for requiring an impact assessment in policy SP 14.

15. It should be noted that para 91 of the NPPF directs refusal of planning permission where there is likely to be significant adverse impacts on the vitality and viability of the town centre. SP 14 does not use that language but facilitates an assessment of a proposal's impact on the town centre.

(3) <u>Retail Impact Assessment</u>

16. In order to assess each application, the Defendant appointed specialist retail consultants (Nexus). Nexus were tasked with reviewing the retail analysis submitted by the Interested Party and the Claimant respectively and undertaking their own evaluation. In September 2022 Nexus produced retail impact assessments which considered the effect of the Lidl scheme as submitted and the Aldi scheme and assessed their cumulative impact.

17. Tables 4.1 and 4.2 of the Nexus' assessment showed the impact of the Aldi store, the Lidl store (as submitted) and the cumulative impacts on the Horncastle town centre. Table 4.1 did so by reference to the assumptions made by Aldi's retail consultants. Table 4.2 did so by reference to the assumptions made by Lidl's retail consultants. In

both tables the Aldi store is projected to have a greater impact on town centre trading than the proposed Lidl store. Paragraph 4.62 of Nexus' assessment noted the "cumulative impact on the Co-op on Conging Street and the Tesco on Watermill Road to be high". Para 4.68 indicated that "when assessed cumulatively, we are concerned that the impact could be at a significant adverse level, and therefore cannot conclude that the [Aldi] proposal (when considered alongside Lidl) accords with the requirements of both strands of the NPPF impact test and the Local Plan in so far as it relates to the impact on town centre vitality and viability". The same conclusion was reiterated in paragraph 5.11 (under the heading of summary and recommendations).

18. On 12 October 2022, the Defendant's case officer for the Claimant's scheme (Miss Lindsey Stuart) requested Nexus to produce an "addendum to the assessment to take account of the reduced sized store and retail area" (para 13 of Lindsey Stuart witness statement dated 9 January 2023).

(4) Determination

19. Both applications were major development. Under article 34 of the Town and Country Planning (Development Management Procedure) (England) Order 2015, local planning authorities are expected to determine such applications within a 13 week period. The period may be extended by agreement (article 34(2)(c)).

20. The consequence of exceeding this timeline without agreement is that the applicant would be able to make an appeal against the non-determination of an application to a planning inspector. An adverse costs award against the local planning authority could be made if a planning inspector decided that the local planning authority had behaved unreasonably in failing to make a timely determination.

21. The evidence before the Court in respect of agreed extensions of time is as follows.

22. In respect of the Interested Party's application, Michelle Walker's (the Defendant's case officer for the Aldi application) indicates that a series of extensions of time were agreed with the Interested Party until 4 November 2022 (see para 4 of her second witness statement dated 24 January 2024). This extension of time was stated to be enable the matter to be considered at the 3 November 2022 planning committee.

23. In respect of the Claimant's application, a series of extensions were agreed. Most materially for present purposes Miss Stuart wrote to Lidl's representatives on 12 October 2022 stating "The current extension of time expires tomorrow. Can you please agree to a further extension of time until 6 December 2022".

24. The Claimant was not made aware that the Interested Party's application was proceeding to be considered at the Planning Committee on 3 November 2022. Ms Bleloch's witness statement indicates that she became aware of that fact on 4

November 2022 (see para 10) after the committee meeting had taken place. Richard Huteson (Partner of Rapleys LLP, planning consultants for the Claimant) confirms in para 4 of his second witness statement dated 17 January 2023 that the Claimant did not become aware of the Interested Party's application being determined separately from its application until 4 November 2022 (after the committee meeting had taken place).

25. The explanation provided in the Defendant's evidence as to why the Claimant's application was not considered on 3 November 2022 is set out in paragraph 16 of Miss Stuart's witness statement dated 9 January 2023. It states: "The reports for the agenda for the Planning Committee held on 3/11/2022 needed to ideally be completed by 12/10/2022 or at the latest by 21/10/2022. As outlined above I did not have the addendum to the Retail Assessment to take account of the amendments to reduce the size of the store which were needed to complete the report therefore the application was not ready to be determined in time for the Planning Committee on 03/11/2022".

(5) The Challenged Decision

26. The Interested Party's application was considered at the planning committee on 3 November 2022. It was granted planning permission. Planning permission was issued on 4 November 2022. Members of the planning committee had the benefit of an officers' report to committee ("OR") recommending approval and an addendum report ("AR"). The key parts of those reports were as follows.

27. Section 7 of OR identified the main planning issues which included retail impact.

28. Para 7.4 identified the proposal as being an out of centre site. Paras 7.5 set out the NPPF's retail policy and para 7.6 referred to SP 14 of the Local Plan. Paras 7.13-7.15 stated:

> 7.13 "As well as this application submitted by Aldi, the Council is also considering a separate planning application for another new supermarket in Horncastle. This application has been submitted by Lidl and is for a site on Boston Road. Their proposed supermarket was originally for 1411 square metres (net) of retail floorspace, but following an amendment it is now for 1251 square metres (net).
>
> 7.14 The company preparing the latest retail report for the Council, Nexus, has also been appointed as a retail consultant to advise the Council on the impacts of both the Aldi and Lidl applications and the cumulative impact of both supermarkets on the vitality and viability of Horncastle.
>
> 7.15 Ideally the Council would consider both applications at the same Planning Committee meeting, however, amendments have been submitted for the Lidl application which will delay its determination".

29. As to the retail issues relating to the Aldi scheme:-

a. Paragraph 7.19 indicated Nexus' view that the proposal conformed to the requirements of the sequential test.

b. Paragraph 7.20 indicated that there was no identified impact on investment in the town centre (the "first strand" of the retail impact assessment).

c. Paras 7.31-7.32 contained an analysis of the "second strand" of the retail impact assessment namely the impact on the vitality and viability of the town centre. A focus of that analysis was the impact of the proposal on town centre stores (Co-op and Tesco). That analysis was drawn together in paras 7.31 and 7.32 in the following terms:

7.31 "Nexus advise that whilst they have a concern about the potential impact on the Conging Street Co-op the key test of retail impact is whether the proposal would have a significant impact on the centre as a whole, would it lead to the closure of an existing facility and what would the wider implications of that be for the town centre? One of the key functions of both the Tesco and Conging Street Co-op is that they are associated with linked trips to the other shops in the town centre. Nexus consider that there would be a reduction in such linked trips as a result of the proposed development, however, Nexus do not believe that this would be to the extent of causing a significant adverse impact. This is partially due to the fact that those shopping at Aldi would still need to visit other shops in the town for example the post office, pharmacy, DIY, opticians etc. and so linked trips would still occur and this would help to ensure that the impact does not fall beyond the threshold of being significantly adverse. (NB. Appeal decisions confirm that linked trips can take place by car)

7.24 Nexus conclude that whilst the identified impact from the introduction of an Aldi store on the existing 'in centre' Conging Street Co-op would be high the impacts would not be significant adverse. The same conclusion is reached in respect of the Tesco store which although being in an 'edge of centre' location is still an important facility in helping to support footfall and expenditure into the town centre. In addition Nexus do not consider the impacts on these stores would lead to significant adverse impacts on the vitality and viability of the town centre nor do they consider the impacts on other operators within the town centre would be at a level that would have a significant adverse impact on the overall vitality and viability of the centre. Nexus go on to advise that in accordance with national retail planning policy the positive benefits of the proposal in terms of increasing consumer choice within the town should also be taken into account when weighing up the overarching merits of the proposal".

30. This analysis shows Nexus acknowledging disadvantages of the Aldi scheme impacting on town centre stores. However, it advised that there would not be significant adverse impacts on the town centre as a whole.

31. Paras 7.33-7.38 addressed retail cumulative impact.

    a. Paragraph 7.33 records that Nexus advised the Council that it "must consider the cumulative impacts on Horncastle and its catchment area of both stores coming forward".

    b. The analysis of cumulative effects is set out based on Aldi's consultants figures (7.35) and Nexus' analysis (drawing on Lidl and Aldi's analysis and undertaking their own assessment (7.36)). The conclusion is summarised in para 7.37 as follows:

    "Nexus conclude that cumulatively if both Aldi and Lidl were to come forward then there would be a significant adverse impact on Horncastle town centre which would be contrary to SP14 in the Local Plan, Policy 12 in the Horncastle NHP and the NPPF"

32. Paragraph 7.38 referred to the Lidl amendment (to reduce its proposed floorspace) and stated:

    "Since the report was produced by Nexus, Lidl have amended their scheme to reduce the amount of net floorspace. Whilst it is not expected that the reduction proposed would lead to a change in the cumulative impact Nexus are in the process of revising their report in terms of cumulative impact and Members will be updated at the Planning Committee meeting".

33. The report drew together the retail conclusions as follows.

    7.41 "It is clear that the introduction of an Aldi supermarket into Horncastle would add choice and competition into this catchment area and it would help to claw back a large amount of trade that is currently leaking out of the area. However, it is also clear from the evidence that the introduction of this supermarket would also take trade away from the existing shops in the area, particularly the Conging Street Co-op and the Tesco supermarket which are anchor stores for the town centre. Whilst this loss of trade is a concern and could be harmful to the vitality and viability of the town centre the Council's retail consultant, Nexus, is satisfied that this would not amount to a significant adverse impact, which is the test for acceptability in impact terms. It is also the case that some linked trips between the Aldi store and the town centre could occur. Overall it is considered that the impact test would be passed in this case when considering the introduction of an Aldi supermarket on its own". (emphasis added)

34. This analysis (consistent with the earlier parts of the report) was to the effect that the Aldi store could be harmful to the vitality and viability of the town centre but would not by itself amount to a significant adverse impact.

35. Para 7.42 states:

> "Whilst the Lidl application is not before Members today it is important that consideration is given to the cumulative impact of introducing two discount retailers into the town. From all the evidence provided to date it is clear that the introduction of two supermarkets would have a significantly harmful impact on both the Conging Street Co-op and the Tesco store. In this situation the Council's retail consultant has concerns about the future viability of the Conging Street Co-op, due to its identified current trading performance and considers that should this operator close its store which acts as a key anchor within the town centre then this could result in a significant adverse impact on the centre as a whole which would be unacceptable and contrary to SP14 in the local Plan, Policy 12 in the Horncastle NHP and the NPPF. Members will be updated on this cumulative position at the meeting".

36. The overall conclusions section of OR stated (at para 8.1):

> "The proposed Aldi supermarket would be provided on a site that whilst in an out of centre location would be sequentially acceptable and provide good connectivity with the town centre. The development of two supermarkets in Horncastle would cumulatively likely have a significant adverse impact on the vitality and viablity of the town centre, however, the introduction of the Aldi supermarket on its own would not have the same level of impact. Whilst the Aldi supermarket would have a harmful impact on existing businesses, particularly the 'in centre' Conging Street Co-op and the 'edge of centre' Tesco, it would not result in significant harm to them or the vitality and viability of the town centre. In addition the new store would provide choice and competition and would help to claw back trade leakage from the relevant catchment area. As such its introduction overall is considered to be acceptable and policy compliant".

37. The AR dealt with comments received since the publication of the OR and provided some further guidance to members.

38. As to comments received:-

    a. As is clear from the chronology (see para 24 above), Lidl was not aware of the matter going to committee. However, Tesco (through its consultants) commented on the approach to cumulative impact in the following terms:

    > "Tesco has a store on the edge of Horncastle town centre which provides an effective anchor to the centre. They note that the Council's retail consultant

Nexus has concluded that Aldi or Lidl alone would not cause significant adverse harm justifying refusal. However, Nexus has concluded that the potential cumulative impact could result in significant adverse impact on the overall vitality and viability of Horncastle town centre. As a result of this Tesco considers it would be wholly inappropriate for the Council to determine either application separately from the other as that would prevent decision makers being able to have proper and fair regard to the important cumulative impacts that have been advised upon by Nexus".

b. The report records Aldi's consultants response to this point which was:

"No reason why LPA cannot determine Aldi application if aware of Lidl application and clear advice from Nexus. Cumulative impact is material consideration, however, matter for LPA as decision maker to allocate weight is given to this issue. Lidl proposal is not a commitment and no clear planning objection to Aldi application. Lidl proposal still undergoing consultation and outcome of this not determined at this stage – applications are at different stages".

39. The further planning analysis on retail issues was contained in para 9 of AR in the following terms:

a) "There is a considerable level of relevant Planning Case Law in relation to the issues at hand in this case, the approaches established by those have been considered by Officers; have informed the committee report, and this supplemental paper. This is to ensure that as far as practicably possible, Members have all relevant information before them, in order to make an appropriate determination of the case at hand.

b) When considering planning applications for new retail stores that are not located in a town centre the Local Planning Authority must be satisfied that the proposal passes a Sequential Test and also shows, through an Impact Assessment as set out in SP14 in the East Lindsey Local Plan and in the NPPF, that the proposed development would not have a significant adverse impact on the vitality and viability of the town centre/s. The Council has employed a retail consultant, Nexus, to advise on this.

c) The site proposed for the Aldi store is highly accessible and is well connected to the town centre. It is the view of both Nexus and your officers that there are no known sequentially preferable sites to that proposed by Aldi for the siting of a new discount supermarket in Horncastle. Thus satisfying the Sequential Test.

d) Nexus has advised the Council that:-

1. They agree that there are no other sites which are 'in centre', 'edge of centre' or better connected to a centre, that could support the proposed development;

2. The proposed Aldi store would not impact on existing, committed and planned public or private investment in a centre/centres within the catchment area of the proposal;

3. When considered by itself the proposed Aldi supermarket would not have a significant adverse impact on the vitality and viability of the town centre. Your officers agree with these conclusions.

   Your officers agree with these conclusions.

e) Lidl has submitted an application for a discount foodstore on the Boston Road Service Station site. The Aldi application was submitted first and is now ready for determination, whereas the Lidl application was submitted later and has been delayed due to revisions to the application which has necessitated the need for re-consultation.

f) The cumulative impact of having both an Aldi and a Lidl supermarket in Horncastle has been assessed by the Council and Nexus has concluded that if both stores were to come forward there could be a significant adverse impact on the vitality and viability of Horncastle town centre which would not comply with the SP14 and the NPPF in terms of the impact test. Your officers agree with this conclusion.

g) Cumulative impact is a material consideration to be taken into account in the determination of this planning application for Aldi because the impacts of introducing both this supermarket along with the supermarket for Lidl could result in a significant adverse impact on the vitality and viability of Horncastle town centre. This impact has been considered in the context of the planning application, with reference in both the main report and this addendum. Case law has established that the weight to be attributed to any material consideration is a matter of planning judgement for the decision maker.

h) In this case your officers consider that little weight should be given to the issue of cumulative impact because the significant adverse impact would only arise if both the Aldi and Lidl supermarkets were developed – there would be no such significant adverse impact from the Aldi application alone. Furthermore there is only the Aldi application before members today for consideration. The Lidl application is not a commitment and has not yet been, nor is ready to be, considered by the Council. If cumulative impact arises as a more weighty issue in the future then the harm would .. need to be considered at that point in time. Such circumstances may be when the Lidl application or any other application for an out of centre scheme is formally considered.

i) It is the consideration of your officers that the proposed Aldi supermarket is not likely to have a significant adverse impact on the vitality and viability of Horncastle town centre and it has been suitably demonstrated that the proposal would not harm the vitality and viability of the town centre. It is your officers opinion, therefore, that the Aldi proposal would satisfy the retail impact assessment requirements of SP14 in the Local Plan and the NPPF and so retail impact would not be a reason to refuse planning permission for this Aldi application.

j) As there are no clear planning objections to the Aldi application it is not necessary to consider whether there are other more appropriate sites that do not contain such drawbacks.

k) Objectors have argued that the Aldi application should be delayed so that both the Aldi and Lidl applications can be considered together. There is a wealth of case law that looks at the issue of alternative schemes and whether or not such schemes need to be taken together. It has been held an alternative proposal is normally irrelevant except in exceptional circumstances, such as two rival sites for the same local need or clear planning objections to the development. Your officers have however considered the cumulative impact and conclude that it is fair and reasonable to take and determine these applications sequentially. The Aldi application was submitted first and is now ready for determination, whereas the Lidl application was submitted later and has been delayed due to revisions to the application which has necessitated the need for re-consultation. The site of the Lidl application is not an existing commitment, or an allocation in the Local or Neighbourhood Plan and as such raises similar considerations to the Aldi application. The outcome of the Lidl application is, therefore, uncertain at this stage and therefore, it is open to the Council to consider the Aldi application on its own, provided the issue of cumulative impact is considered, which it has been. Given the aforementioned comments and the advanced stage of the Aldi application, your officers consider that it would not be reasonable to withhold determination of the Aldi application on the basis of the Lidl scheme.

l) In conclusion, your officers remain of the opinion that the Aldi application is able to be determined and should be favourably recommended. The relevant retail matters have been carefully considered, in particular the cumulative impact. Cumulative impact is a relevant material consideration, however, it is your officers opinion that in this case it is an issue of only limited weight that would not be likely to give particular application (known as the planning balance) is a matter for the decision taker. It is your officers opinion, that when taken as a whole, there are other matters arising from the scheme as set out in the main report which could be applied within the overall planning balance, which would outweigh the lesser issue of cumulative impact".

40. Planning permission was issued on 4 November 2022.

41. The Claimant's application for planning permission has yet to be determined. By agreement, it is being held in abeyance pending the outcome of this judicial review claim.

Legal Principles

42. The determination of an application for planning permission must be made having regard to the provisions of the development plan (so far as material) and to any other

material considerations (s.70(2) Town and Country Planning Act 1990). The determination should be in accordance with the development plan unless material considerations indicate otherwise (s.38(6) Planning and Compulsory Purchase Act 2004).

43. In considering an officer's report to members of a planning committee, the approach is well settled and summarised by Lindblom LJ. in Mansell v Tonbridge and Malling BC [2017] EWHC Civ 1314 at para.42. The test is in substance whether the report is materially misleading. The report should not be made subject by the Court to "hypercritical scrutiny" (see St Modwen Developments Limited v SSCLG [2017] EWCA Civ 1643 at para 7, per Lindblom LJ). The report should be read fairly and as a whole.

44. There are many cases on the materiality of alternatives in planning decision making. The general approach to alternative sites is summarised by Holgate J in R (Stonehenge World Heritage Site Limited) v Secretary of State for Transport [2021] EWHC 2161 (Admin) at paras 269-271 (which draws in particular on the analysis of Simon Brown J (as he then was) in Trusthouse Forte v Secretary of State for the Environment (1987) 53 P&CR 293 at 299-300 and the discussion of approach contained in the Court of Appeal's decision in R (Mount Cook Land Limited) v Westminster City Council [2017] PTSR 116 at para 30). This line of cases emphasises that it will ordinarily be a matter of planning judgment for the decision maker to assess the relevance of the alternatives (see Langley Park School for Girls v Bromley [2009] EWCA Civ 734 at paras 52-3).

45. Sullivan J (as he then was), astutely observed in R (Chelmsford Car and Commercial Ltd) v Chelmsford [2006] 2 P&CR 12 at para 8: "it is necessary to approach the authorities with a degree of caution since they are all fact sensitive".

46. In developing his submissions, Mr Edwards KC for the Claimant invited the Court to differentiate between general cases concerning the relevance of alternatives and "rivals" cases. For cases to fall within this latter "category", Mr Edwards KC identified the following essential features (a) rival proposals (b) for one planning permission (c) which were before the decision making authority.

47. By contrast, Mr Cameron KC submitted that there was no special category of "rivals" cases. He further contended that the present case was not analogous to the cases relied upon by Mr Edwards KC. I will address this debate once I have identified the key authorities.

48. In GLC v Secretary of State for the Environment (1986) 52 P&CR 158, the Court of Appeal upheld the dismissal of a challenge to planning permissions for residential and commercial development in the Docklands area of London. The challenge that the Secretary of State had failed to consider alternative sites failed. Oliver LJ. (with whom Mustill LJ. and Sir Roualeyn Cumming-Bruce agreed), made the following observations on the approach to alternative sites (at p.172):

> "I think it may be said, as Mr. Barnes has submitted, that comparability is appropriate generally to cases having the following characteristics: First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development, or at least only a very limited number of permissions".

49. Oliver LJ.'s observations have been considered in subsequent cases.

50. It is important to note that Oliver LJ's observations were preceded by a caveat: "It is plain that there are, as the learned judge accepted, cases where a comparable site must be a material consideration; an obvious example is an airport. It is I think difficult to define where the dividing line is drawn." He was not "seeking to lay down a test for every case, because definition is I think always dangerous in these circumstances".

51. Oliver LJ's observations were considered further by the Court of Appeal in Secretary of State v Edwards (1994) 69 P&CR 607 (CA). The facts concerned candidate sites for a motorway service area. Each potential sites necessarily involved development in the open countryside. The local planning authority had refused planning permission for 7 schemes. Mr Edwards promoting one scheme appealed the refusal in his case and asked for the appeal to proceed by public inquiry. Roadside Development Limited (RDL) appealed the refusal in respect of their sites and these appeals proceeded by the

written representations procedure. A request by Mr Edwards to have the appeals heard together failed. The Secretary of State granted planning permission to RDL. Mr Edwards' challenged this on the basis of a failure to undertake a comparative assessment of the alternatives before granting consent. The challenge succeeded at first instance (before Nigel Macleod QC sitting as a Deputy Judge of the High Court). The Secretary of State's appeal to the Court of Appeal was dismissed.

52. At first instance, one of the points made by the Deputy Judge (see (1993) 66 P&CR 393 at 408) was: "If [the Secretary of State] failed to take account of the material matter because of an earlier administrative decision….[the Secretary of State] cannot hide behind the administrative decision to justify the omission". That part of the reasoning was not challenged in the appeal.

53. The appeal focussed on whether alternative sites were a material consideration. Roch LJ (with Sir Stephen Browne and Russell LJ agreed) drew on Oliver LJ's suggested approach (at 613). The Court of Appeal undertook the exercise of applying those indicative criteria and held that the case fitted the description of a case where alternatives were relevant. At 615-6, Roch LJ noted that there could be no dispute as to the third and fourth criteria – the existence of an alternative site for the same project which might have a lesser adverse effect on the countryside, and a situation in which [there] could only be one permission, or alternatively a limited number of permissions for such development".

54. At 616, Roch LJ stressed: "Crucial in this case, in my judgment, was the fact that there were not merely alternative sites, but those sites had been the subject of planning applications and were, in the case of three other applicants, the subject of appeals to the Secretary of State. Those other sites were material planning considerations in the circumstances of this case, account of which would have created a real possibility that the Inspectors' decisions in the RDL appeal would have been different".

55. In Chelmsford, Sullivan J (as he then was) quashed the grant of planning permission for affordable housing outside the settlement boundary. In the circumstances of the case, where there were two rival sites for the same local need, the Council had erred

by not undertaking a proper comparison of their advantages and disadvantages. The Council had undertaken a partial comparison of the sites but had failed to take account of the Claimant's site contention that it was better located in terms of its relationship with the defined settlement boundary and with existing settlement pattern.

56. As mentioned, above, Sullivan J noted at para 8 the need for caution as the authorities on alternatives are all "fact sensitive". Sullivan J noted Roch LJ's observations in Edwards and observed that it may be relevant to distinguish between cases where an application had been made for a rival scheme which had to be determined and a case where an alternative had been suggested by an objector (para 9 and para 11).

57. In *Chelmsford* , Sullivan J. at paras.13-14 held as follows:

"13. In the present case the proven need was very local: affordable housing for a particular village, East Hanningfield. It was common ground that there was a need for only 12 affordable dwellings in the village. Two sites had been put forward as capable of meeting that need on opposite sides of Old Church Road. Both of the sites were the subject of planning applications and both of the applications were to be considered at the same meeting.

14. Common sense would suggest that in these particular circumstances a comparison between the merits of the two sites would inevitably be a material consideration. Indeed, it would appear from the planning officers' reports in respect of the two applications, that the officers did think that at least some degree of comparison between the two applications was relevant in terms of criterion (ii) in Policy HO3. …" .

58. Having reviewed the circumstances of the case, Sullivan J concluded (at para 23): "it was inconsistent and unrealistic to contend that there were no "competing sites" issue. Both sites were competing, on opposite sides of the same road for the same very limited, and highly localised need".

59. Sullivan J therefore held that the failure to undertake balanced assessment of their merits was unlawful.

60. In Derbyshire Dales DC v Secretary of State for Communities and Local Government [2010] I P&CR 19 Carnwath LJ (as he then was) sitting in the High Court upheld a planning Inspector's decision that it was unnecessary to consider alternative sites when granting planning permission for the erection of four wind turbines. Carnwath

LJ's judgment (at paras 14-22) contained an analysis of "long-running debate among planning lawyers" as to the relevance of alternative sites (dating back to Rhodes v Minister of Health and Local Government [1963] 1 WLR 208). Carnwath LJ highlighted the distinction (by reference to the judgment of Simon Brown J (as he then was) in Trusthouse Forte between cases in which it is permissible and cases in which it is necessary to refer to alternative sites.

61. Carnwath LJ explained at para 19 that Edwards was the only example of the cases which were cited to him which indicated that it was necessary to refer to alternative sites. He observed at para 19: "The facts illustrate the special circumstances which are necessary to support such an argument". Having set them out, he observed at para 22:

> "Given that there was an acknowledged need for only two sites, that several competing sites were before the Secretary of State, but that there were clear planning objections to them all, it seems odd that the Secretary of State declined to adopt the obvious means of enabling the selection to be made on a comparative basis. It was arguably "irrational" or "Wednesbury unreasonable" for him not to do so. However, that was not how the case seems to have been presented or decided. Instead it was put as a failure to have regard to "material considerations", contrary to s.78. It is noteworthy that the Court regarded it as "crucial" that alternative sites had not only been identified, but were before the Secretary of State on appeal".

62. Carnwath LJ then set out some wider reflections on the legal approach to whether a consideration is a mandatory material consideration (drawing on the judgment of Cooke J in the New Zealand Court of Appeal's decision Creednz Inc NZ v Governor General [1981] 1 NZLR 172 at 182).

63. In the Supreme Court case in R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] UKSC 3 at paras 29-32, Lord Carnwath drew on his judgment in Derbyshire Dales and the judgment of Cooke J in Creednz. Having done so, he formulate the point at issue in the Samuel Smith case as:

> "whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", **or alternatively whether on the facts of the case, they were "so obviously material" as to require direct consideration".** (emphasis added)

64. There is a direct link between the caselaw on alternatives and the recent formulation by the Supreme Court on the approach to mandatory material considerations. Edwards and Chelmsford are cases which were decided before the basis for mandatory material considerations had been so articulated. However, I consider that they are consistent with the subsequent recognition that the specific facts of a case may make it obviously material to consider alternatives. In both cases, there were two or more putative developers competing for one planning permission (or in the case of Edwards two planning permissions) where the rival applications were before the decision making body. In Carnwath LJ's consideration of Edwards (in Derbyshire Dales), he thought the defect in the decision making process could have been similarly expressed in terms of Wednesbury unreasonableness.

65. Samuel Smith was cited by the Supreme Court with approval in R (Friends of the Earth Limited) v Secretary of State for Transport [2020] UKSC 52 at para 118. In Friends of the Earth, the Supreme Court referred to the "third category" (by reference to the judgment of Cooke J) as being cases where notwithstanding the silence of the statute "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] ….would not be in accordance with the intention of the Act". In respect of this third category of material consideration, the Supreme Court gave the following guidance (at paras 119-121).

> "119 As the Court of Appeal correctly held in Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government [2018] PTSR 2063, paras 20–26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar Wednesbury irrationality test (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410–411, per Lord Diplock).
>
> 120 It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the Wednesbury irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in Corner House Research at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

> 121 Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in Hurst (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 (Lord Hoffmann)".

66. The threads of this discourse as to the nature of mandatory material considerations are helpfully drawn together by Thornton J in R (Peak District Council and South Yorkshire Branch of the Campaign to Protect Rural England v Secretary of State for Transport [2023] EWHC 2917 (Admin) (in the context of a discussion of alternatives to the A57 Links Road scheme). At para 36, Thornton J explained:

> "The widely applied analytical approach to the question of whether a particular consideration may be classed as a 'mandatory material consideration', such that a decision maker will act unlawfully in not taking it into account is explained in R (Friends of the Earth) v Secretary of State for Transport) [(2021] PTSR 190 at §116-121. The question is whether the consideration in question was expressly or impliedly identified in legislation (or policy), as a consideration required to be taken into account by the decision maker "as a matter of legal obligation", or alternatively whether, on the facts of the case, it was "so obviously material" to the decision on the particular project as to require direct consideration. A consideration that is so 'obviously material' such that a failure to take it into account would be irrational would not accord with the intention of the legislation (or planning policy)".

67. Rationality is often appropriately characterised as setting a particularly high hurdle for Claimants in planning cases. The classic encapsulation of this is contained in the observations of Sullivan J (as he then was) in Newsmith Stainless Ltd v SSETR [2021] EWHC Admin at paras 6-8. That standard of review is apt for cases which involve matters of impression or attempts to review the exercise of broad planning judgments where the essence of the decision is exercise of a judgment on which a broad range of views are possible none of which can be categorised as unreasonable. That said, the approach to rationality is sensitive to its context and the nature of the decision under challenge. Sedley LJ observed in R v Parliamentary Commissioner for Admin, ex parte Balchin [1998] 1 PLR 1 at para 27 irrationality means "a decision which does not add up, in which, in other words, there is an error of reasoning which

robs the decision of logic". In the present case, there is a debate about how rationality should be approached. I return to this below.

Submissions

68. Mr Edwards KC on behalf the Claimant contended that the present case (like Chelmsford) concerned two competing proposals for what in practice was one planning permission for new convenience retail floorspace in Horncastle. Both proposals were for a discount foodstore. Both were proposed on sites which were located out of the town centre for the purposes of planning policies concerning retail development. As such, and given their scale, their impact on the vitality and viability of the town centre at Horncastle was material, for the purposes of planning policy.

69. Therefore, he submitted the comparative merits of each became an obviously material consideration in the determination of both. He argued that AR para 9(k) accepts that alternative schemes need to be considered together where there are "two rival sites for the same local need". Here, despite the Defendant's officers concluding the schemes were rivals (as they plainly were), the Defendant failed, when determining the Interested Party's application for planning permission, to consider the merits of Claimant's proposal on a comparative basis or at all. The Defendant's officers gave the Planning Committee no advice on this in either or the OR, AR or otherwise. This failure "without explanation – to 'join the dots' and compare the merits" was irrational (given that the schemes were correctly characterised as rivals for a single planning permission).

70. Mr Edwards submits that the Defendant in granting planning permission for the IP's proposal (a) the Defendant failed to have regard to an obviously material consideration, namely Claimant's rival proposal and/or (b) having recognised (see AR at para.9(k)) that C's rival proposal was relevant, acted irrationally in failing to have regard to it on any substantive basis.

71. Mr Edwards accepted the Claimant's second ground of challenge which concerned procedural fairness was essentially parasitic on his first ground. The scope of ground

2 as pleaded had been much reduced by the Deputy Judge at the permission stage. The point now at issue is: if the Defendant was legally obliged to have regard to Claimant's rival proposal when determining the Interested Party's application, was it procedurally unfair for Defendant to have determined the Interested Party's application as it did.

72. On behalf of the Defendant, Mr Garvey contended that there was no obligation to take account of alternatives in the present case.

73. He stressed that the Defendant had decided to grant planning permission for the Aldi scheme because it did not cause planning harm.

74. He specifically relied on paragraph 9(i) of AR which he submitted contained a finding that there would not be retail harm to the town centre from the Aldi proposal. As such, he contended that this was not a case where alternatives were relevant because the premise for any discussion of alternatives was that there might a better alternative which reduced the harmful impact of the proposed development. Mr Garvey submitted that this premise did not arise here due to the finding that the Aldi scheme did not cause harm.

75. Mr Garvey emphasised that the decision taken by the Defendant was that cumulative impacts were material but they were given little weight for the reasons explained in the AR 9 (h) and (k). He contended that paragraph 9(h) explained that the Lidl application was not "ready to be considered by the Council" and as such, he submitted, the Defendant was not able to undertake any comparison. He argued it was a matter for the Council as to how much weight they placed on cumulative impacts. He submitted that there was no basis for reviewing the Council's decision to place limited weight on alternatives on grounds of irrationality.

76. Mr Garvey submitted that the Court should apply the Newsmith approach to its consideration of alleged irrationality.

77. Both Mr Garvey and Mr Cameron KC on behalf of Aldi submitted that there was no special category of cases concerning rivals. They each argued that the present case did not share characteristic features with Edwards and Chelmsford on which the Claimant

relied. They argued that in Chelmsford the consideration of alternatives arose under the specific requirements of the planning policy at issue in that case.

78. Moreover, Mr Cameron KC submitted that the part of retail policy which was concerned with alternatives was the sequential test. There was an unchallenged finding here that there were no sequentially better sites than the Aldi scheme available. This was accordingly not an appropriate case for the general law to impose any requirement to consider alternatives (which were relevant under the policy at a different stage of the analysis).

Discussion

79. In resolving these competing arguments, the starting point is to identify with care (and in accordance with the well-established principles) the planning analysis in OR and AR which formed the basis of the Defendant's decision.

80. Officers drew on and accepted the retail analysis undertaken by Nexus, the Defendant's retail consultants. This is apparent from OR at paras 7.31-2 (setting out adverse impact from the Aldi store on certain town centre shops but judging that this did not amount to a significant adverse impact). The same analysis is set out in paras 7.41 and 8.1 of OR.

81. In the OR, the analysis of Nexus (adopted by officers) was that the Aldi store would have some adverse impacts on the town centre but there would not be significant adverse impact on the town centre.

82. This analysis was not altered or qualified in AR. Mr Garvey and Mr Cameron KC argued that para 9(i) of AR indicated that there would not be any retail planning harm. On a fair reading of the reports, I do not consider that it is correct to read into that sub-paragraph a conclusion which is discordant with the remainder of the retail analysis in OR and AR. Mr Garvey and Mr Cameron KC argued that the finding of no conflict with policy SP 14 necessarily conveyed a conclusion that there would be no adverse impact on the town centre. However, I do not agree that this reflects a fair reading of the retail analysis in OR and AR. Read in context, the whole thrust of the retail analysis in OR was that there would be a disadvantageous impact from the Aldi

store on its own on the town centre but this in itself would not amount to a significant adverse impact. This is clear from the parts of the OR that I have referred to above. Moreover, it is precisely the point also made in AR para 9(d). The conclusion of Nexus (which officers adopted) was that there would not be a significant adverse impact on the town centre. I reject the proposition that AR para 9(i) displaces the consistent way in which the relationship of the Aldi scheme with the town centre was analysed in OR and AR read fairly as a whole. Paragraph 9(i) should be read in harmony with the rest of the analysis.

83. Reading the analysis as a whole, it is plain that the Aldi store did have some adverse impacts on the town centre but it would not have a significantly adverse impact on the town centre if developed on its own. It was on this basis that the conclusion was reached that there would be no conflict with retail policy.

84. I therefore disagree with the proposition advanced by Mr Garvey and Mr Cameron KC that this a case where there would be no disadvantageous retail impact. That is not what the retail analysis showed or how it was analysed in OR and AR read as a whole. The focus of Nexus' analysis was that there would be some adverse impact which it found fell short of "significantly adverse" to the town centre.

85. Moreover, cumulative impact was considered to be a material issue. As far as cumulative impact is concerned, the evidential position was clear. There would be a significant adverse impact if the Aldi Store and the Lidl store both came forward. This is clearly set out in paras 7.33-7.38 of OR and paragraph 9(f) and 9(g) of AR.

86. The advice of Nexus was that the Defendant should consider cumulative retail impact.

87. The reason given in AR for giving little weight to "cumulative impact" was that "only the Aldi store is before members" and "cumulative impact" may be considered a more weighty consideration in the future when the Lidl application is considered.

88. The implication of this is that the Aldi scheme would be considered on a different (and more favourable) basis than the Lidl scheme. In the former case, little weight would be given to cumulative impacts. In the latter case cumulative impacts would inevitably be a more significant material planning issue. The practical effect of this

would be to treat as determinative the fact that the Aldi scheme was the first to be considered. This is the inescapable consequence of the factual context (as analysed by the Defendant itself) namely (a) both stores (if developed together) would have a significant adverse impact on the town centre (b) they were accordingly rivals competing for the finite retail capacity available to trade in an out of centre location in a way which would not cause a significant adverse impact on the vitality and viability of the town centre.

89. Mr Garvey's submits that attributing little weight to cumulative impact in determining the Aldi scheme which was reasonably open to the Defendant. He relies on paragraph 9(h) of AR as explaining why this approach was taken. He submits that the Defendant was not in a position to compare the two schemes and so could not undertake the comparison.

90. In my judgment Mr Garvey's submission reads more into paragraph 9(h) of AR than the evidence before the Court supports. AR paragraph 9(h) indicates that the Lidl scheme is not "ready to be considered by the Council". The evidence before the Court as to why that was so is contained in paragraph 16 of Miss Stuart's witness statement which states that Nexus addendum (taking account of the reduced Lidl scheme) was not yet available. This updated retail impact information would have revealed the extent to which the Lidl store would have a lower impact on a solus basis (i.e. one store basis) than the Aldi store (in a context where the figures available already showed that the Lidl store would have less impact). It would also have confirmed whether the overall judgments on cumulative impact altered (in the context of OR 7.38 indicating that "it is not expected that the reduction proposed would lead to a change in the cumulative impact").

91. The evidence before the Court does not indicate that there was any other missing information in respect of the Lidl scheme. The consultation on the amendments had been undertaken in September 2022. On the evidence before the Court, it is not suggested that the Defendant lacked information to enable it to be compared with the Aldi scheme save for the additional retail impact information already discussed which is the missing document referred to in paragraph 16 of Ms Stuart's witness statement.

92. Moreover, to the extent that the Defendant was not ready to make the comparison, I consider that there is some force in the analogy which Mr Edwards KC makes with the Edwards case. In Edwards at first instance the Deputy Judge rejected administrative convenience as a justification for failing to grapple with the comparative merits of the scheme. The fact that the Defendant was not ready to make the comparison is not a good reason to fail to undertake the comparison if it is a mandatory material consideration. Similarly, the fact that the administrative period for determining the Interested Party's application was due to expire does not render what is otherwise a mandatory material consideration irrelevant.

93. The critical question therefore is whether this is a case where a comparison between the two schemes needed to be made.

94. I do not consider that this question can be resolved by determining the somewhat abstract legal debate about how alternative cases should be classified and whether there is a special category of rival cases.

95. As Sullivan J (as he then was) observed, these kinds of cases are fact sensitive. The need to undertake a comparison will only be a mandatory material consideration if it is "so obviously material". It will be so where it would be irrational not to assess it.

96. In the circumstances of the present case, I consider that we are in such territory. This is because of the uncontentious factual basis of the present case The critical points are:-

    a. The cumulative impact evidence is clear. Two out of centre supermarkets would risk a significant adverse impact on Horncastle town centre.

    b. There are two applications before the Council each seeking to address the available capacity without causing a significant adverse impact on Horncastle town centre.

    c. On any realistic view of the retail evidence (as analysed by the Defendant based on Nexus' analysis) this a situation where two stores are competing for

one planning permission. This is because the retail evidence is that more than one store will cause significant harm to Horncastle town centre.

97. These uncontested facts make the comparison between the rival candidates obviously material in my judgment.

98. The facts of this case do fall broadly within the parameters sketched out by Oliver LJ in GLC.

    a. As to the first criterion, there is an advantage in extending the retail offer in the Horncastle area.

    b. As to the second criterion, the Aldi store would even by itself create some disadvantage in that it would draw trade away from the town centre. It is also an important part of the context that there would be a clear disadvantage from permitting two stores. There is finite capacity for accommodating out of centre stores without causing significant harm to Horncastle town centre.

    c. There are rival proposals to fill the available capacity (i.e. Lidl and Aldi) (so the third indicative criteria is met).

    d. Fourth, the retail evidence shows clearly that in reality there is likely to only be capacity for one of the 2 proposed stores.

99. There was a debate before me as to whether the second indicative criteria was met. Mr Cameron KC and Mr Garvey contended it was not because there was a finding of no retail harm. I disagree. As I have already indicated, I consider that the proper reading of OR and AR (and the supporting retail analysis) is that there would be adverse effects from the Aldi store on the town centre (but in itself this would not be a significant adverse impact on the town centre). In my view, this is sufficient to come within the broad concept of "disadvantage" which is indicated by Oliver LJ. There does not have to be a finding of conflict with a development plan policy. Retail impact which draws trade away from town centre stores is a disadvantage in the sense postulated by Oliver LJ.

100. I disagree with the analysis advanced on behalf of the Defendant and the Interested Party that the Chelmsford case is explained as a case where the issue of alternatives arises under the policy at issue in that case. As I read Sullivan J's analysis in Chelmsford he saw the case as one in which there were obviously two candidates for one opportunity where there would be no justification for granting both and so it was necessary to undertake a fair comparison between their advantages and disadvantages. Sullivan J's reasoning is wider than the Defendant and the Interested Party's contention that the issue of alternatives arises only from the specific wording of the policy. In my view, it arose from the essential characteristics of there being alternative proposals to meet a specific local need (see in particular para 14 of Chelmsford).

101. In the present case, we are in a broadly similar situation. There cannot be two out of centre stores without causing a significant adverse impact on the vitality and viability of the town centre. The analogy with the local need in the Chelmsford case is the (evidentially established) finite retail capacity for a single out of centre store without causing significant adverse impacts on the vitality and viability of Horncastle town centre. Given that evidential position, it was necessary to grapple with the competing merits of the candidates to fill the available capacity and do so in a coherent and principled way. The fact that one store by itself would not cause harm addresses only part of the relevant planning context in a case where there is a rival store which proposes to fill a finite amount of capacity and both cannot be granted.

102. I agree with Mr Edwards KC's submission that adopting a "first past the post" approach does not satisfy the need for a coherent way of determining which of the rivals should be preferred. I consider that this is a case like Chelmsford where a fair comparison and coherent comparison of the rival sites was needed (and was not undertaken).

103. Therefore, I consider that we are in the territory of a mandatory material consideration (as characterised by Lord Carnwath in Samuel Smith) because on the facts of the case, the need for a comparison was "so obviously material" as to " require direct consideration".

104. I reach the same conclusion approaching the issue from the perspective of rationality. I consider that there was a logical flaw in the Defendant's decision to leave out an assessment of the competing merits of these rivals schemes. The Defendant's approach offers no principled or coherent approach for choosing between the two schemes. Its effect is to apply a different approach to the assessment of Aldi's proposal than would inevitably apply to the consideration of Lidl's scheme. In my judgment, this was irrational (in the sense explained in R v Parliamentary Commissioner for Admin exp Balchin) namely it was a decision which "does not add up". By failing to address the relative merits of the two candidates to meet the finite retail capacity, there was a gap in the Defendant's reasoning which deprives its decision of logic. As Mr Edwards KC submits, the Defendant's decision making process identified the cumulative impact position, acknowledged that the Lidl and Aldi were rivals to meet the finite capacity and then did not undertake any comparison between them. This logical flaw is within the legal concept of rationality (as explained by Sedley J in Balchin). The Court has a legitimate role in examining the logic of the Defendant's reasoning (as reflected in the officers' report). The rationality issue is different from the classic Newsmith situation where the Court adopts a high level of deference to reviewing (for example) an aesthetic judgment or the way in which the planning authority weighs competing public interest considerations.

105. As I have already indicated, I have rejected Mr Garvey's submission that the Defendant made a considered decision that a comparison could not be undertaken. The evidence before the Court indicates that the Defendant did not consider the Lidl application because it was waiting for the addendum to the retail impact assessment. This would have provided a further refinement of information which it already had (namely that the Aldi store alone has more impact than the Lidl store and both together would have a significant adverse impact on the vitality and viability of the town centre). I do not consider therefore that the Defendant put forward a logical explanation for failing to compare the 2 rival candidates to meet the finite retail capacity that the retail evidence before it had identified.

106. My decision is not based on accepting Mr Edwards' proposition that there is a special category of cases which applies to rivals. I consider that this contention underplays the importance of the particular facts of the case. To make generalisations about categories of cases risks oversimplification. It fails to heed the warnings that there is no "one size fits all" approach (per Sullivan LJ in R (Langley Park School) v Bromley LBC [2010] 1 P&CR 10 at para 52) and that categorisation can be "dangerous" (per Oliver LJ in GLC).

107. My decision is grounded in the particular circumstances of this case. Here, the critical facts are that the evidence identifies the reality that there are two proposals before the authority to address the finite available capacity for a single out of centre supermarket without having an adverse impact on Horncastle town centre. This essential position is established and uncontentious (as analysed by the Defendant based on the cumulative retail impact assessment its consultants undertook). Both proposals are before the Defendant (as stressed in Edwards at 616 and noted by Carnwath LJ in Derbyshire Dales at para 22). There is also no suggestion that either applicant has behaved in a tactical or contrived way. In this specific context, I consider that it was not lawful to omit a comparative assessment.

108. Mr Cameron KC submitted that the question of alternatives was part of the sequential assessment stage of retail policy. That is correct but it does not alter the analysis above. In a case where there is only one application for retail development the policy context focuses on the sequential test as the place in which alternatives are evaluated. But that is not this case. The specific evidential circumstances of this case is one in which there are two proposals before the authority aiming to address what on the evidence has been found to be finite retail capacity (without causing significant adverse impact on the town centre). Those are the uncontentious facts which mean that in the specific circumstances of this case a comparison was necessary (and was not undertaken). Moreover, as I have found, the reason for declining to undertake it reveals a logical gap in the Defendant's decision making.

109. In my judgement therefore ground 1 succeeds.

110. The second ground of challenge concerns fairness.

111. It was accepted by all parties that this was parasitic on ground 1. I agree. Ground 2 was not the subject of discrete submissions. I therefore make limited observations about it. Ground 1 has succeeded on the basis that it was unlawful to grant planning permission for the Aldi scheme in the specific circumstances of this case without comparing it to the rival Lidl proposal. It would plainly be easier to undertake such an assessment if the applications were considered together at the same meeting. However, I would not go so far as to say that they must necessarily be so considered together. The key point is the need to undertake a comparison where the evidence is so clear that they are alternate propositions for addressing the finite retail capacity to trade in an out of centre format without causing significant harm to the vitality and viability of Horncastle town centre.

112. The Court expresses no view (and makes no assumption) on the comparative merits of the two schemes. The fact that the Lidl scheme is smaller and draws less away from the town centre may or may not be an advantage. That depends on a holistic retail impact assessment which is a matter for the local planning authority. There are other differences between the proposals which will need to be weighed in the planning balance. These are matters of planning judgment for the Defendant. The essential complaint which has succeeded in this claim is that the Defendant failed to undertake such an exercise.

Conclusion

113. I have concluded that ground 1 of this claim succeeds and the grant of planning permission to the Interested Party dated 4 November 2022 should be quashed.

114. I thank Counsel for their helpful submissions in writing and orally.