

MRPP

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**APPEAL BY LIDL UK
LTD/ORCHARD STREET
INVESTMENT MANAGEMENT LLP**

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**HOMEbase LTD
UNIT 1 GEORGE RICHARDS WAY
BROADHEATH
ALTRINCHAM**

**STATEMENT OF CASE
OF
TESCO STORES LIMITED
(RULE 6 PARTY)**

10th AUGUST 2021

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1. INTRODUCTION

- 1.1 Tesco Stores Ltd (Tesco) were awarded Rule 6 status on 11th May 2021.
- 1.2 Tesco trade from an edge of centre Extra superstore at Manor Road (WA15 9QT) in Altrincham town centre. The store opened in November 2002. It has a gross area of 9,176m² and a sales area of 5,462m². It provides Tesco's full range of food and grocery items including Afro-Caribbean, Asian, 'Free From', Greek, Kosher, Polish and World food lines as well as a broad non-food range and offers a cafe and pharmacy.
- 1.3 Tesco's position is that the appeal should be dismissed and planning permission refused. It supports the basis for the first reason for refusal in that there is a sequentially preferable site which is available within a reasonable period of time and is suitable to accommodate the proposed foodstore component of the development having regard to the application of appropriate flexibility. As such the proposal fails to satisfy the sequential test as set out in the NPPF, is contrary to saved Policy S11 of the Revised Trafford UDP and Policy W2.12 of the Trafford Core Strategy (which engages the test in the NPPF).
- 1.4 In the context of sequential testing, assessment is focused on the "*main development opportunity within Altrincham Town centre*" i.e., the Altair site as described in Policy W2.3. Implementation is seen as being primarily "*through private sector development of new facilities within the town and other centres*" (see 'Implementation Mechanism' at the Core Strategy's page 153).
- 1.5 Tesco is aware of and relies on the advice provided by the Council's retail planning consultant, Nexus, on sequential assessment matters in their two reports dated September 2019 and May 2020.

- 1.6 Tesco are aware of the second reason for refusal arising from the creation of a new point of egress off George Richards Way. This is seen as having the potential to cause an unacceptable impact on highway safety. The Local Planning Authority (LPA) has unresolved concerns (see the LPA's, Statement of Case (SoC) (4.25)) and is to obtain its own independent survey evidence (LPA's SoC (4.27-4.31)). Tesco has not seen evidence that may have been adduced in respect of these matters and reserves the right to consider such material and express a position, as may be appropriate, on it.
- 1.7 On 8th April 2021 the LPA granted planning permission for an identical proposal (bar the egress onto George Richards Way which would be relocated by circa 20m). Tesco lodged a Claim for Judicial Review of that decision on 19th May 2021. Tesco is currently waiting for an oral (or 'renewal') hearing of its application for permission to bring the Claim.

2. TESCO'S CASE

- 2.1 Tesco adopts the Local Planning Authority's position in respect of the failure of the sequential test. Whilst it is noted that the reason for refusal was negatively worded to reflect that the Council had considered that the appellant had not adequately demonstrated through the provision of information requested at application stage, that the relevant tests were capable of being met, the Council in its Statement of Case (SoC) moves to a position where it considers the case against the appellant is proven. As paragraph 4.3 of its SoC confirms, this is now expressed in terms of the test being "*emphatically failed*".
- 2.2 For convenience, the relevant paragraphs of the Local Planning Authority's case relied upon by Tesco, are set out below. Additional commentary by way of footnotes is provided in support of, or in clarification of, Tesco's case.

4.4 In evidence it will be emphasised that the NPPF encourages local authorities to adopt a 'town centre first' approach when assessing proposals for 'main town centre uses.' This is in order that town centres remain the focus of retail, commercial and leisure activity and to ensure their continued vitality and viability. Proposals for such uses which are not in an existing centre and not in accordance with an up-to-date development plan should be subject to two key tests: 1. the sequential test; and – where the amount of floorspace proposed is over 2,500 square metres gross or a locally set floorspace threshold – 2. the impact test.

4.5 The appeal site is in an out-of-centre location. With reference to the Proposals Map accompanying the development plan, the site forms part of a 'Retail Warehouse Park' allocation. Policy W2 states that further development within Trafford's out-of-centre retail parks

should be limited to the sale of bulky comparison goods (non-food) only.¹

4.6 The ‘out-of-centre’ location of Altrincham Retail Park contrasts with the identification, by Policy W2, of Altrincham as the Borough’s ‘Principal Town Centre’, and of Sale, Stretford and Urmston as ‘Other Town Centres.’ District Centres and Local Centres are also referred to.² Outside of these identified centres, Policy W2 explains that: ‘there will be a presumption against the development of retail...and other town centre-type uses except where it can be demonstrated that they satisfy the tests outlined in current Government Guidance.’³ These are the tests of ‘sequential’ and ‘impact’ as referred to in paragraph 4.4 above.

4.7 It is the matter of the sequential test to which the Council’s reason for refusal relates. There is one site, known as the Altair site (land bounded by Oakfield Road, Thomas Street and Altrincham Interchange), which is the focus of the Council’s case. Policy W2 refers to it as the main development opportunity within Altrincham town centre, and it is also identified and promoted in the ATCNBP. It has benefitted from an outline planning permission for major mixed-use development since August 2008 (LPA ref. H/OUT/68603). The most recent outline planning permission was granted in August 2014 (LPA ref. 81115/O/2013), and the site is also the subject of two Reserved Matters permissions for Phases 1 and 2 (LPA refs 86755/RES/15 and 90432/RES/17).

¹ See Policy W2.14. Paragraph 19.10 of the Local Plan provides justification and refers to the Trafford Retail and Leisure Study as providing clarity on this matter.

² Policy W2.3 explains the expected content of Altrincham Town Centre’s “main development opportunity. It leads with “Retail...forming circa 15,000m² (together with café, bar and restaurant accommodation).” There is no attempt to limit the opportunity in terms of main retail sectors. Indeed, Policy W2.4 refers to the “focus” across all town centres “on the consolidation and improvement of the convenience and comparison retail offer, with the potential to strengthen and enhance the retail offer where suitable...”

³ See Policy W2.12

4.8 *Current government policy in relation to the sequential test is set out in paragraphs 86 and 87 of the NPPF. Paragraph 86 requires that: ‘Main town centres 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’ (emphasis added). In considering edge and out-of-centre proposals, paragraph 87 continues that ‘...preference should be given to accessible sites that are well-connected to the town centre’. Paragraph 87 continues that: ‘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.’⁴*

4.9 *It will be explained in evidence that the Council has addressed the issue of ‘disaggregation’ in forming conclusions regarding the sequential test (i.e. whether the constituent parts of a proposal should be subdivided for the purpose of considering alternative sequentially preferable sites). In this situation, this would involve separating the proposed Lidl from the reconfigured DIY use. The Council will accept that this matter is not specifically dealt with in the NPPF and it is recognised that there is no default planning policy requirement to disaggregate proposals on every occasion. However, with reference to important case-law and notable planning decisions, whether disaggregation is appropriate is ultimately a matter of planning judgement that can be exercised depending on the circumstances as they apply in each case, the*

⁴ Now paragraphs 87 and 88 of the 20th July 2021 version of the NPPF.

Council will maintain.⁵ Accordingly, it will be concluded that it is appropriate in this instance to consider the appeal proposal on the basis of whether the proposed Lidl foodstore in isolation could be accommodated on a sequentially superior site. Indeed, it is considered that the appellant has still not provided any persuasive evidence to support its position that the downsized Homebase and the new Lidl are commercially and/or functionally dependent, and that the only means of achieving the downsizing of the DIY store would be through the occupation of an additional adjacent unit by a discount foodstore operator.

4.10 The extant planning permission for Altair does not include provision for a foodstore. However, the appellant has confirmed that Lidl has entered into a contract (as of February 2020) with Nikal Developments to take a lease on a Lidl store as part of an amended future proposal. The Council is of the view that this agreement of terms between Lidl and Nikal gives an indication that the site is able, in principle, to accommodate a discount foodstore.⁶ It will be made clear in evidence that this was not the case prior to Lidl's partnering with Nikal.⁷

4.11 Paragraph 86 of the NPPF requires sequential alternative sites to be available or expected to become available within a reasonable period.⁸ It will be confirmed in evidence that the Council does not accept the appellant's position that the Altair site is not available

⁵ There are at least two relevant considerations. 'Disaggregation' might not be seen as appropriate where there is a strong functional relationship between relevant elements, e.g., a superstore building and its petrol filling station, or a roadside restaurant and its drive thru facility. But in the subject circumstances there is no particular relationship or synergy between a DIY store, which will be visited relatively infrequently in connection with the carrying out of building and other projects and the more regular purchasing of food and grocery items from a supermarket.

⁶ The appellant has not provided the Contract (or an appropriately redacted version). But Lidl's Head of UK Property's letter (15th January 2021 at Appendix 16 of the Appellant's SoC, see at point 2) confirms that "Lidl exchanged contracts with Nikal, the developer controlling the Altair site, in respect of their development on 07 February 2020". It also confirms that "Lidl would act as an anchor tenant for the scheme."

⁷ This is not part of Tesco's case including because it has not been provided with the "evidence" referred to.

⁸ Now paragraph 87.

now and will not become available in a reasonable timeframe. The appellant states that the Altair site is complex and that any revised development would take at least three to four years before it was ready for occupation.

4.12 It will be acknowledged that the Altair site cannot immediately accommodate the proposed use and that the Altair development has been beset by delays. It will also be accepted that the last national planning policy guidance which defined what a 'reasonable period' may be for the purposes of the sequential test has been superseded. Nonetheless, when applying reasonable judgement and when drawing on noteworthy and relevant national planning decisions, the Council will maintain that the three to four year period suggested by the appellant for the operation of a foodstore at Altair is reflective of a reasonable period in this case.⁹ The appellant's proposed programme for the delivery of Altair accounts for basic requirement necessary to bring forward development, it is considered. To rule out sites simply on the basis that they need to go through the planning process runs the risk of available sequential alternative being limited to those that are already under construction or currently available, it will be maintained.

4.13 Accordingly, it will be confirmed in evidence that the Council's position is that the Altair site is available within a reasonable period, as envisaged by the NPPF, to accommodate the foodstore proposed.

4.14 The appellant has confirmed that planning permission will be sought for an amended Altair scheme which will incorporate a

⁹ Indeed, Lidl themselves see this as a reasonable period of time in respect of a more complex, town centre scheme where they are committed to being an anchor tenant (see point 3 of Lidl's letter of 15th January 2021). 'Flexibility' does not only apply to 'format and scale' (the examples given at NPPF 88) but other considerations required to give effect to achieving the Government's 'town centre first' principle.

'metropolitan format' discount foodstore as an integral element of the overall development. Metropolitan model foodstores are typically progressed where there is insufficient land to provide a traditional store with surface car parking.

4.15 The appellant's position is that the Altair site cannot be deemed suitable for the type of development proposed at the appeal site, even when applying flexibility on issues such as format and scale, as required by the NPPF. Its stance is that the two Lidl foodstores, at Altair and at Altrincham Retail Park, would be fundamentally different. However, the Council will maintain that the evidence does not support this position.

4.16 Indeed, in evidence it will be acknowledged that some new information has recently been supplied (as part of the appeal submission) as a means of supposedly demonstrating a material difference between the two proposals. Included within this is a reference to the sales area at the Altair foodstore being 15% smaller (although the exact floorspace is still not disclosed), to Altair accommodating 40 metres less vertical shelving, and to Altair relying on 70% self-served checkouts.¹⁰ However, it will be demonstrated that this extra information, despite its continued lack of precision, only serves to confirm Council concerns that the two stores would be of a broadly comparable size and scale, and would function in a broadly similar manner. The Council's viewpoint is further corroborated, it will be demonstrated, by the characteristics

¹⁰ See at point 4 of Lidl's letter of 15th January 2021. Reference is made in this letter to "The differences between the two stores are akin to the differences between Tesco's Metro format and Superstore format." The Metro branding was introduced in 1994 when such stores continued to serve town and district centre, e.g., 'High Street' locations in the context of the growth of superstore formats which, unlike most existing town centre stores, had associated surface car parking under the store's control. However, Tesco rebranded all of its Metro format stores in May 2021 with the majority downsizing to become Express convenience stores (i.e., with a sales area of less than 279m² (3,000ft²)) but with some operating and branded as Superstores. Thus, Lidl's suggested comparison cannot be made and the nature of the change itself confirms the existence of two very much more district trading models than Lidl's current use of its Metropolitan format. That, as confirmed by Lidl, has only around a 15% smaller trading area.

of the two Altrincham locations and of the population that would be served in each case.¹¹ The provision of a car park as part of the Lidl Altair (even if shared with other uses and not surface-level) suggests that it would still cater for some car-borne custom, akin to the appeal scheme, and this will be referenced.

4.17 It remains the case, however, that detailed specifications of the Altair foodstore, of its size and design, have not been provided, despite a contract having been signed and despite the expected three to four year timetable. The contract itself has still not been disclosed, and nor any important detail within it.

4.18 In any event, it will be confirmed in evidence that investigations on the matter of the suitability of the Altair site have been taken as far as they need to – the Council now considers - in order to form a sound and reasonable view (and with it recognised that this is an adjusted position relative to the reason for refusal due to the provision of further information). The Council does not accept that the Altair site cannot accommodate a foodstore of a comparable scale and nature to the appeal proposal and with a similar range and type of goods. The pursuit of a metropolitan model at Altair is in fact indicative of operators being able to be flexible in order to secure representation on more challenging sites, it will be put forward. On the contrary, it will be concluded that the Lidl proposals for Altair are consistent with the NPPF requirement at paragraph 87 for operators to demonstrate flexibility on issues such as format

¹¹ It is unreasonable to assert (see the penultimate paragraph letter of 15th January 2021 – Appendix 16 of the Appellant's SoC) that the catchment area for the sequential test should be somehow adapted to exclude an area that Lidl might see as serving the Altair opportunity. The sequential test operates by considering opportunities for the general "type of retail use" and starts with the town centre (see in particular the Aldergate judgment at paragraph 42). It should not seek to serve specific subsets of a 'customer base' in order to circumvent the operation of the test. The Aldergate judgment has relevance in this regard (see for example at its paragraphs 37 to 43).

*and scale. On this basis, the Council will conclude that Altair is also a suitable site.*¹²

4.19 In concluding on the sequential test, the Council will advance its position that there is a more centrally located site and that is available and also now suitable to accommodate the foodstore element of the appeal proposal. Whilst the appellant may assert that Lidl is contractually obliged and committed to bringing forward both the Altair and retail park schemes, the sequential test requires that the sequentially preferable site comes forward in advance of the less central site, it will be stated.

4.20 The NPPF, at paragraph 90, advises that where a proposal fails to satisfy the sequential test then it should be refused.¹³ This is a scenario that applies here, it will be explained, and the development is also contrary to Policy W2¹⁴ and Policy S11 on that basis.

2.3 Tesco accept that there will be some minor benefits arising from the development. These include investment in the local economy and a degree of improved consumer choice and competition in the grocery market. However, the amount of employment that would be generated by the proposal is limited and in the context of retail development the net change in local employment will largely be a reflection of the change in trading performance of other local retailers that have been negatively impacted.

2.4 Appendix 12 to the Appellant's SoC is a letter from Homebase's Estates Manager (29th June 2020). This refers to the planning application having been under consideration for almost a year, during which "*the retail landscape has continued to deteriorate*", refers to 'a Compulsory Voluntary Agreement' entered into in 2018 that dealt with the closure of 42 stores, and "*the*

¹² Now paragraph 88.

¹³ Now paragraph 91

¹⁴ Specifically, W2.12 and there is a specific breach of W2.14

underperformance of the business". It suggests that *"a smaller, more modern store is fundamental to our future success in Altrincham..."*. However, the author provides no specific evidence of the current or potential future performance of the respective stores, or the nature of the deal that may be available to Homebase from their Landlord. However, it is noted that even before the preparation of this letter, Homebase had announced, in a press statement dated 27th February 2020, that it had *"returned to profit"* with a *"strong plan in place to accelerate progress in 2020"*, that *"nearly all 164 stores are now profitable"* and the *"Proposed competition of the CVA 18 months ahead of plan due to strong financial performance."*

- 2.5 Tesco's case is that the extent of harm arising from the policy conflict with the sequential test is significant and that the benefits asserted by the appellant are at most, limited. As such the benefits are not capable of outweighing the identified harm and would not justify a decision other than in accordance with the development plan, as guided by the NPPF.

3. CONDITIONS

- 3.1 Notwithstanding the case advanced by Tesco, should planning permission nevertheless be granted a condition should be imposed or planning obligation secured requiring the cessation of the permitted use of the proposed foodstore unit if the Altair site does not provide for occupation by a discount food retailer within four years (see evidence advanced by the appellant and relied upon by the LPA). In the circumstances, such a condition or obligation is necessary and reasonable to prevent the circumvention of the sequential test.
- 3.2 Such a condition or obligation is analogous with the situation that retailers may be required to comply with when opening a new out of centre store, i.e., to retain an existing town centre operation for a given period.

4. DOCUMENTS

- 4.1 Aldergate Properties Ltd v Mansfield District Council and another [2016] EWHC 1670 (Admin).
- 4.2 Proposed Lidl, Appraisal of Retail and Town Centre Issues, Nexus, September 2019.
- 4.3 Proposed Lidl, Appraisal of Retail and Town Centre Issues – Supplementary Report, Nexus, May 2020.
- 4.4 Homebase Press Statement – “Homebase returns to profit ahead of plan” – 22nd February 2020.