

Case No: CO/6256/2015

Neutral Citation Number: [2016] EWHC 1670 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

PLANNING COURT

BIRMINGHAM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2016

Before :

MR JUSTICE OUSELEY

Between :

ALDERGATE PROPERTIES LTD

Claimant

- and -

MANSFIELD DISTRICT COUNCIL

Defendant

- and -

REGAL SHERWOOD OAKS LTD

**Interested
Party**

Daniel Kolinsky QC (instructed by Browne Jacobson LLP) for the Claimant
Tim Sheppard (instructed by Ashfield & Mansfield Legal Services) for the Defendant

Hearing dates: 1 June 2016

Judgment

MR JUSTICE OUSELEY :

1. On 5 October 2015 Mansfield District Council, the Defendant, granted planning permission to Regal Sherwood Oaks Limited, RSOL, the Interested Party, for the development of a food store of 1,925 sq. ms. at Sherwood Oaks Business Park, which it owned. The intended occupier of the food store was Aldi. The Claimant is a property developer, an associated company of which owns a site at Belvedere Street in Mansfield town centre. The site is also known as Stockwell Gate South. It has planning permission for retail, business, restaurant, hotel and other town centre uses. It has to include a minimum of nearly 4,000 sq. m. of retail floor space, without limitation on the goods which can be sold.
2. The Claimant objected to RSOL's planning application on the grounds that it would have a severe effect on the ability of its Belvedere Street site to attract investment, to which policy required a convenience store, such as that proposed, to be directed. Mansfield DC granted planning permission after consideration by its Planning Committee of an Officer's Report which recommended that permission be granted. It was granted subject to conditions, one of which was intended to limit occupation of the store to Aldi.
3. The Claimant challenges the decision on the grounds that the District Council: 1) erred in its approach to the sequential test required by paragraph 24 of the National Planning Policy Framework, NPPF, by ignoring sites in Mansfield town centre because Aldi would not locate there in view of the nearby location of other existing or permitted Aldi stores; 2) imposed a condition personal to Aldi without considering relevant planning policy objections to such a condition; 3) failed to consider whether the proposal accorded with the Development Plan, and policy R6 in particular, also failing to consider the adverse impact which the proposal could have on the viability and vitality of Mansfield Town Centre including future investment there, and 4) failed to consider the Claimant's contentions about the extent of the proposed store's catchment area.

The facts

4. The application, as described in the form, is for a 1,925 sq. m. food store and associated facilities. The application does not state that it is an application for a store for Aldi, though RSOL never made any secret of its intended occupier. Its site on the business park is out of centre, to the south east of Mansfield town centre by about 3 ½ miles, near the A617. Aldi operates another store at Nottingham Road about just under 1 mile south of the town centre; this store is very roughly of similar size to that proposed. It had planning permission for a third store of 1,300 sq. m. at Leeming Lane South, about 1 1/2 miles north of the town centre. RSOL's planning consultant and the District Council planners discussed what retail assessments were required for its consideration of the planning application when submitted. To understand the significance of these discussions, it is necessary to set out certain parts of the NPPF and Development plan policy.
5. Paragraph 23 of the NPPF, under the heading "Ensuring the Vitality of Town Centres" requires planning policies to be positive and to promote competitive town centres. In drawing up Local Plans, local planning authorities should:

- “Recognise town centres as the heart of their communities and pursue policies to support their viability and vitality;...
- Promote competitive town centres that provide customer choice and a diverse retail offer...
- Allocate a range of suitable sites to meet the scale and type of retail, leisure, commercial, office, tourism, cultural, community and residential development needed in town centres. It is important that [these] needs... are met in full.... Our local planning authorities should therefore undertake an assessment of the need to expand town centres to ensure a sufficient supply of suitable sites;
- Allocate appropriate edge of centre sites for main town centre uses that are well connected to the town centre where suitable and viable town centre sites are not available...”

Paragraph 24 is important because it contains the sequential test.

“24. Local planning authorities should apply a sequential test to planning applications for main town centre uses that are not in an existing centre and are not in accordance with an up-to-date Local Plan. They should require applications for main town centre uses to be located in Town Centres, then in edge of centre locations and only in suitable sites are not available should out of centre sites be considered... applicants and local planning authorities should demonstrate flexibility on issues such as format and scale.”

6. Paragraph 26 deals with impact:

“26. When assessing applications for retail, leisure and office development outside of town centres, which are not in accordance with an up-to-date Local Plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floor space threshold (if there is no locally set threshold, the default threshold is 2,500 sq m.).”

7. The assessment should cover impact on existing, committed and planned public and private investment in centres in the catchment area of the proposal and an assessment of the impact it would have on town centre vitality and viability. Paragraph 27 of the NPPF is important; it states that where an application fails to satisfy the sequential test

or is likely to have a significant adverse impact on one or more of the factors referred to, it should be refused.

8. As I have said, this proposal is for an out of centre site. There is no locally set threshold for impact assessment, so the NPPF default threshold was above the proposed size of store. It was not a site allocated for retail uses in any plan, old or up-to-date. The Development Plan includes the Mansfield District Local Plan 1998 saved policies. The emerging Local Plan was not given significant weight. Policy R6 is a policy saved from the 1988 Local Plan.

9. R6 states:

“Planning permission will be granted for retail developments... outside existing centres... unless it can be clearly demonstrated that they would meet all of the following criteria..-

“1. There are not other suitable locations available in the first instance within a defined centre or in the second instance at the edge of a defined centre;

2. The development would not directly, or when considered with other developments, seriously affect the vitality and viability of any nearby centre;

3. The development will not prejudice any future investment in existing centres or the implementation of Local Plan policies...”. (The other criteria are immaterial.)

10. It is convenient to note here policy R7 which relates to the relationship between the retail development and the character of the surrounding area, M16 which relates to movement and BE1 which relates to design, which featured in the Report along with Policy R6 as policies with which the proposal complied.

11. Following the discussion with RSOL’s planning consultant, the District Council’s Senior Development Control Officer sent her an email explaining what was required in carrying out of the sequential test and impact assessment in this case. It was crucial for the way in which the decision- making process developed. This email said:

“Although the proposed retail store is intended to serve a five minute drive time catchment area which encompasses the Oak Tree District Centre, it would essentially function as an out-of-centre supermarket due to its location away from the district centre, and its position alongside the A617. Retail is a main town centre use and therefore should be located in-centre, and only be permitted in edge and out-of-centre locations where there are no in-centre sites available.

In relation to Aldi’s current application at Leeming Lane South, it was agreed during pre-application discussions that the sequential assessment exercise would not need to include sites south of the Mansfield ring road/ A6191, as that area was

covered by the catchment area of the existing Aldi store on Nottingham Road. It was also considered unrealistic that Aldi would operate a second store in such close proximity to the Nottingham Road store, and it would therefore be unreasonable to require a search for sites that would not make commercial sense for the operator.

It is considered that we would need to take the same, realistic, approach to their proposal, therefore it is accepted that the catchment area (shown in the plan that is attached to the letter dated 12/2/15) is suitable. The letter also refers to the two local centres that are located within the catchment area. It is considered that any potential sites in or on the edge of these centres should be covered by the sequential assessment, in order that it is robust. (At this stage it has not been considered which sites may warrant investigation- but we would be happy to do this should a formal pre-application request be made).

Finally, in relation to the impact test- whilst this not a formal requirement due to the size threshold, however the current Aldi application is supported by a proportionate assessment in order to help highlight that there would be no adverse impacts.”

12. The upshot of this approach, because of the second paragraph set out above, was that Mansfield town centre sites were excluded from consideration in the sequential test. This was not because the 5 minute drive time catchment area on the map extended into the town centre only a short way and not as far as the Claimant’s site. It was because Aldi would not develop a store in Mansfield town centre where it would compete with Aldi’s other nearby stores. In May 2015 RSOL’s planning consultant submitted the Planning and Retail Statement as required. This first described Aldi’s retail model and trading characteristics which it said set Aldi apart from mainstream supermarket operators in the UK. Aldi was a “limited line deep discounter retailer...”. Its trading philosophy was said to be materially different because its aim was to offer “high quality exclusive own label groceries at heavily discounted prices”. All this and more resulted, it was said, in a “type of food retailing which is unique in its operational style and approach.” The deliberately restricted range of goods meant that Aldi customers “will often link their shopping trip with a trip to other shopping destinations.” Aldi sold a small amount of non-food products measured by the floor space they took up, and so Aldi did not compete with comparison retailers. Nonetheless it wanted no restriction on the range of goods to be sold.
13. The Statement then described the sequential test which it had undertaken and why. It included the email, set out above. It said that Aldi had been flexible, looking at sites up to 25 percent below the minimum size for a store of 1,925 sq. ms. It described this as considerable flexibility “given that the proposals as submitted are consistent with Aldi’s standard store format and business model”. The areas of search were described, but it is not the areas which were examined which are contentious, nor the conclusions in relation to the sites within them which were considered.
14. The contentious part is the indisputable fact that the area of search and sites examined did not cover Mansfield town centre sites including the Claimant’s site. This was

because to the north and south, in quite close proximity as described, there was an existing and a permitted Aldi store already. A further one in the town centre would not fit Aldi's commercial model, competing with its own trade in those stores.

15. The Statement also explained that no impact assessment had been carried out, because none was required for a proposal below 2,500 sq.ms. according to NPPF [26] and no locally set threshold required one for a 1,925 sq.m. proposal.
16. Shortly before the Officer's Report was prepared, the Claimant submitted the short objection to which I have already referred in paragraph 2.
17. The Officer's Report itself was informed by a document entitled "Planning Policy Observations", an internal policy analysis which was very largely adopted in the Officer's Report itself. One part however was not taken forward, which said, after dealing with a short term quantitative need - now reduced by the Leeming Lane South permission for an Aldi store:

"It is not considered that this store would have an impact on the committed floor space at Stockwell Gate South due to its distance and the presence of the existing Aldi store at Nottingham Road"

"This store" is the store proposed at Sherwood Oaks Business Park.

18. The Officer's Report was made public before the Committee considered the application on 23 September 2015. Its publication led to the Claimant making further objections on 22 and 23 September. These were reported orally in summary form to the Committee, along with the objection of another body supporting town centre regeneration. The Claimant's representations of 22 September objected to the use of a 5 minute drive time catchment area for the selection of areas for sequential testing, (and an inaccurate one to boot, said the Claimant); it objected to the way in which town centre sites had been ignored, and to the lack of examination of the impact of the proposal on the vitality and viability of Mansfield town centre and upon investment proposed there. The principle of "town centre first" had been side stepped. A little more detail was added as to why those were sound objections. Its 23 September objection referred to two Inspector-SSCLG decisions which the Claimant said supported its approach, emphasising that Mansfield town centre should not be ignored in the sequential test. It added "we can see no support for the contention that Aldi's commercial reluctance to compete with its own out of centre store can legitimately lead to excluding sites in Mansfield Town Centre from the sequential test required by the... NPPF. It simply cannot be correct of officers to advise the Council (and the Applicant for that matter) that Mansfield Town Centre can be ignored when considering the Sequential test."

The Officer's Report and the decision

19. The Officer's Report described the proposal accurately in its heading but added, in the body of the text to the accurate language used in the heading, that the proposal was for an Aldi food store. The Report conveyed, barely needing to summarise them, the points from the Claimant's first letter of objection. The relevant Mansfield District Local Plan 1998 Saved Policies were set out in summary form. This summary referred

to the sequential test in Policy R6 criterion 1, but made no reference to criteria 2 or 3. It referred to the three other saved policies which I have already noted. It then said “as the policies are in accordance with the NPPF they should be afforded considerable weight.” It referred to a study of 2011 and an addendum of 2014 both commissioned by the District Council, which formed part of the evidence base for the emerging Local Plan and were material considerations for this planning decision.

20. The 2011 study had recommended that Stockwell Gate South include provision for a convenience/food store to meet the current qualitative shortfall in the town centre. The 2014 addendum said that by 2021 there would be a modest quantitative need for convenience floor space if the committed space were built; the need would arise earlier if no site were developed on Stockwell Gate South or on one other site (not in Mansfield town centre). The addendum recommended that any additional provision should be concentrated in Mansfield town centre in the first instance “as there is currently no supermarket provision in the town centre following the closure of the Tesco at Stockwell Gate...”. A supermarket in the town centre would enhance its attractiveness as a retail destination and encourage linked trips.
21. The Officer's Report commented that there was a quantitative need up to 2017 for 1,500 sq. m. of convenience floor space but the Aldi permitted at Leeming Lane South would absorb much of that capacity, while also meeting a qualitative need in the north of the District. But that would still leave a lack of convenience floor space in the town centre, as a qualitative rather than quantitative need.
22. The Report continued, saying that as the application site was out of centre, a sequential assessment had to be carried out. The Report referred to the agreement that the exercise did not need to include sites covered by the catchment areas of the existing store on Nottingham Road or the recently permitted store at Leeming Lane South, to the south and north respectively of Mansfield town centre, because it was “unrealistic that Aldi would operate a store in close proximity to these existing and committed stores, and it would therefore be unreasonable to require a search for sites that would not make commercial sense for the operator”.
23. The Report noted the centres and sites considered, and the reasons why they were not suitable. In order to be suitable for Aldi, sites needed to be at least 0.6 ha in size. The applicant was thought to have been fairly flexible in terms of more central sites, and in format and scale by looking for sites “which are slightly smaller than the application site”. Aldi’s reasoning for not being more flexible was based on *Tesco Stores Limited v Dundee City Council*, (dealt with below), set out in the Planning and Retail Statement with particular reference to paragraph 38 of the judgment, which focussed suitability on the developer’s proposals, not on some alternative scheme which might be suggested by the authority. The question, said the Report, was whether an alternative site was suitable for the development proposed, not whether the proposed development could be altered to fit an alternative site. The sequential test was thus passed and the principle of retail development acceptable. There was no separate discussion of impact.
24. The conclusion reads as follows:

“It is considered that the sequential assessment carried out by the applicant meets the requirements of paragraph 24 of the

NPPF and the conclusion that none of the sequentially preferable sites would meet the requirements of this proposal is accepted. Although the proposal is below the size threshold for requiring an impact assessment, the applicant has submitted a proportional impact assessment and this has demonstrated that the proposed store would not have a significant adverse impact upon the vitality and viability of nearby District/Local Centres. As such the principle of retail development at the site is accepted. It is considered that the sitting, scale, appearance and layout of the proposed development would not be harmful to the visual appearance of the surrounding area. Car parking and access arrangements are considered to be acceptable. The proposal is considered to accord with Saved Policies R6, R7, BE1 and M16 [29/09/20017] of the adopted Mansfield District Local Plan. It is therefore considered that there are no adverse impacts of granting planning permission what would significantly demonstrably outweigh the benefits of this development when assessed against the Framework.”

25. The reference to “a proportional impact assessment” is something of a mystery. There was no separate document from the applicant beyond the Planning and Retail Statement. The Planning and Retail Statement is silent about impact, whether on town centre or on any nearby district or local centres. It deals with a sequential test for those other centres but that is all. Indeed, the Report specifically explains why no impact assessment is being done at all. It repeats a comment in the pre-discussion email about a proportional impact assessment being undertaken, which appears to be without foundation. The recommended conditions included condition 3 which limited the floor area for the sale of comparison goods to 20 percent. giving the reason that this was to safeguard the vitality and viability of town centre. At that stage there was no proposed condition seeking to limit occupation to Aldi.
26. The Officer’s speaking note for the meeting, which was read out, said that the application proposed “a 1,925 square metres Aldi food store...” The note summarised the more elaborate grounds of objection received from the Claimant. It explained the sequential test as agreed at the pre-application stage, notably that the search area would not cover the catchment area of Aldi’s existing and committed stores. The Officer specifically addressed objections to the methodology used in defining the area for the sequential test which excluded Mansfield town centre sites, but said that case law and appeal decisions clearly accepted the approach taken: the site must be suitable for the commercial requirements of the operator.
27. The size of the store was less than the threshold set out in the NPPF and so no impact assessment was considered necessary.
28. It added, what was not in the written report, that there should be a personal condition tying occupation to Aldi by requiring that “the permission shall enure for the benefit of Aldi and no other retailer on the basis that the recommendation is based on the application and taking into account the specific commercial considerations of the potential operator”. The agent had confirmed that Aldi was tied into a contract to take this site and that if this condition were imposed, it was likely to withdraw from the proposal.

29. The applicant's planning consultants made representations about the proposed condition shortly before the meeting. The terms of that objection are instructive in relation to the principal issue argued on behalf of the Claimant. It said:

"I've had a think about this, and a personal permission seems onerous; are you suggesting that if the site were occupied by any other discount food retailer that you would be refusing planning permission?"

I can confirm that the store will be occupied by Aldi. However, we do not consider that a personal permission in this regard would satisfy the tests set out at paragraph 203 and 206 of the NPPF. We do not consider it to be reasonable or necessary for a condition to be attached stating that the store can only be occupied by Aldi. This would imply that the LPA consider that the proposal would be unacceptable if the store were to be occupied by an alternative food retailer which would clearly not be the case."

The objection also said that the restrictions on floor space, and the design, should offer sufficient comfort. The store had been specifically designed to Aldi's requirements. The District Council was of the view that, because of the weight given to Aldi's business requirements and in particular in relation to the way the sequential test was carried out, the permission should be solely for their benefit. So a condition was to be imposed stating that the development "shall ensure [sic] for the benefit of Aldi stores and no other retail operator" for the reason suggested in the Report.

Tesco Stores Limited v Dundee City Council

30. Before turning to the submissions, I need to set out parts of the decision of the Supreme Court in *Tesco Store Limited v Dundee City Council* [2012] UKSC 13, [2012] 2 P&CR 9, because the District Council's understanding of it was critical to its approach. Tesco challenged the grant of planning permission for a supermarket on a large industrial estate out of centre. The City Council had had to consider whether such a store met criteria in the Development Plan, the first of which was that "no suitable site is available in the first instance within and thereafter on the edge of city, town or district centres". The City Council had interpreted "suitable" as meaning "suitable for the development proposed by the applicant". Tesco contended that it meant "suitable for meeting the identified deficiencies in retail provision in the area". The question of what "suitable" meant was a question for the Court, although its application was a matter of planning judgment. In addition to the Development Plan itself, the Plan incorporated Scottish Planning Policy Guidance, which was replaced in generally similar terms by other Scottish planning policy statements. Although the policy documents at issue in that case have some similarities in wording and certainly in purpose to that in the NPPF, the Court was not considering English planning policy documents.
31. Lord Reed, with whom the other Justices agreed, said at paragraph 24 that he accepted, subject to a qualification, that the City Council's approach was correct that "suitable" meant "suitable for the development proposed by the applicant" rather than "suitable for meeting identified deficiencies in retail provision in the area". He

concluded that that was the natural reading of the policies. It seems to me that his reasoning in paragraphs 25 to 27 is related very much to the control of development at the application stage. Hence the focus of “suitability” on that which was applied for. He then referred to the qualification and paragraph 28 is important:

“28. I said earlier that it was necessary to qualify the statement that the Director and the respondents proceeded, and were correct to proceed, on the basis that “suitable” meant “suitable for the development proposed by the applicant”. As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers’ and retailers’ taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Exp William Morrison Supermarket plc and Redcar and Cleveland BC* [1998] JPL23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

29. It follows from the foregoing that it would be an oversimplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed

sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in *Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165, para 14, whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.”

32. Lord Hope joined in rejecting Tesco’s submissions and in particular the contention that the City Council’s approach would rob the sequential approach of all its force. He said [at 37]

“It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no site is suitable within or on the edge of the town centre.”

33. The whole purpose of the exercise is directed to what the developer was proposing not to some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. He concluded in paragraph 38 that the context of the phrase indicated:

“38... Here too the context indicates that the issue of suitability is directed to the developer’s proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer’s assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed refers in para 28, above, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.”

Ground 1: the application of the sequential test

34. Mr Kolinsky QC for the Claimants submitted that the District Council had misunderstood *Tesco v Dundee*; he did not contend that that decision was inapplicable to English planning policy. Mansfield town centre could not be ignored because a proposed operator was not prepared to compete with its own stores. This would frustrate [24] of the NPPF. It failed to apply the requirement for flexibility with which Lord Reed qualified the meaning of “suitable” as “suitable for the development proposed by the applicant.” Mr Sheppard for the District Council submitted that the Council had correctly understood and applied *Tesco v Dundee*, and especially [28] and [38]. It had focused on the commercial requirements of the proposed operator; and there was no point in asking it to look at sites which were not commercially suitable for the development proposed, so far from suitable that no adjustment or flexibility could make them suitable. The Planning and Retail Statement showed, as the Officer’s Report had accepted, that the applicant had shown some flexibility over the size of sites it had looked at.

35. I have no doubt but that Mr Kolinsky's essential argument is correct, for a variety of reasons. In my judgment, "suitable" and "available" generally mean "suitable" and "available" for the broad type of development which is proposed in the application by approximate size, type, and range of goods. This incorporates the requirement for flexibility in [24] NPPF, and excludes, generally, the identity and personal or corporate attitudes of an individual retailer. The area and sites covered by the sequential test search should not vary from applicant to applicant according to their identity, but from application to application based on their content. Nothing in *Tesco v Dundee City Council*, properly understood, holds that the application of the sequential test depends on the individual corporate personality of the applicant or intended operator.
36. I shall approach this first by construing the NPPF, without considering *Tesco v Dundee City Council* because the language of the Scottish policies is to some extent different, and it did not consider the language of the English policies relevant to this case. First, although the language of "suitable" and "available" features in both the plan-making policy in [23] NPPF and in the development control policy in [24] NPPF, it is inevitable that their focus will be different at the two stages. But there is a sensible relationship between them; they are not to be read simply in isolation from each other. The plan-making policies plainly do focus on allocating sites to meet retail needs, as a town centre use; but policies and site allocations have to be sound and their effectiveness depends on their commercial realism. That approach properly involves planning for development to go to commercially realistic allocated sites where a particular type of development is seen as publicly beneficial, and discouragement, to the point of refusal, for such development elsewhere. The development control policy in [24] NPPF deals with applications for town centres uses out of centre where there is no up to date Development Plan embodying the policies of [23] NPPF. But the development control policy aims to achieve as much of what an up to date plan would achieve as possible. It is not intended that the absence of an up to date plan creates a rather different world in which retailers could enjoy a much greater degree of temporary freedom based on their individual commercial interests.
37. Second, and related, NPPF [24] positively "requires" retail investment in the first place to locate in town centres rather than elsewhere. Its thrust is rather more emphatic than policies which advise developers and retailers to have regard to the circumstances of town centres, as in *Tesco v Dundee* [28]. It is the purpose of the planning system to control development, that is to permit, prevent, encourage, inhibit or limit and condition it, so that the individual private or commercial interest and the broader public interest meet in reconciliation however uneasily. NPPF [24] cannot therefore be interpreted as requiring "suitability" and "availability" simply to be judged from the retailer's or developer's perspective, with a degree of flexibility from the retailer, and responsiveness from the authority.
38. Third, and of critical importance here, still less can it be interpreted as envisaging that the requirement or preferences of an individual retailer's trading style, commercial attitudes, site preferences, competitive preferences whether against itself or greater competition should dictate what sites are "suitable" or "available" subject only to a degree of flexibility. NPPF [23] and [24] are simply not couched in terms of an individual retailer's corporate requirements or limitations. That would be the

antithesis of planning for land uses and here, its default policies. It would take very clear language for such an odd result to be achieved.

39. Any alternative approach would reduce the sequential test to one of the individual operator's preference, with the suitability of centres, sites and their availability varying from applicant to applicant each proposing the same broad type or even identical form of development. This case illustrates just why on the proper interpretation of NPPF [24], the identity of the applicant or proposed occupier is generally irrelevant. Even if the applicant had been Aldi, or if the application had been for a store to be occupied by Aldi, with an occupancy condition envisaged from the outset, the town centre would have been wrongly excluded from the search area on the basis of Aldi's particular corporate, commercial position or style. Any other approach would make nonsense of the sequential test to the advantage of an operator well-represented in the area, or one reluctant to compete with certain other retailers, however sensible that reluctance might be commercially. The applicant may not be a retailer; it may or may not have an operator identified, or one may be signed up or interested but the identity of which it is not yet willing to disclose. It would have to go through the full sequential test, and then obtain its retailer; but were the application made with retailer in tow, the test would be different. And were a retailer later signed up, it could require a different sequential test for the same application or a repeated application for the same development at the same site. That is not the intention of NPPF [24] or any sensible application of the sequential test.
40. In this instance, Mr Sheppard accepted, on instructions, that had the proposed operator been a retailer other than Aldi, say Lidl, or unknown or, as happens, not revealed, the sequential test would have had to cover Mansfield town centre. The forthright comment by RSOL's planning consultant on the proposed personal condition, set out above, is directly in point. Any other operator might well have failed the sequential test, and would have been refused permission. But Aldi uniquely, because of its existing out of centre representation, would have been better placed to obtain a further permission out of centre than any other operator. If Aldi and another operator had been looking to develop a store in the Mansfield area, Aldi would have been able to pass the sequential test ignoring the perhaps more difficult to develop town centre site; the rival, say Lidl, would have had no choice but to take it into account. On Mansfield DC's analysis, Aldi would have got permission for the RSOL site, leaving Lidl to contemplate a town centre site now facing greater competition. If Lidl had been the operator chosen by RSOL, it would have had to consider the town centre sites. That is not how the NPPF can have been meant to work.
41. This is not solved by the imposition at the end of the process of a condition restricting occupation to a particular retailer. That may be necessary for consistency of approach but it would reinforce the error of approach; instructively though it was opposed here by Aldi which had benefited from an approach unique to Aldi. The town centre remains where development is required; the out of centre development may inhibit or prevent a store coming forward in the town centre, and draw away town centre trade, trips, expenditure and vitality.
42. Fourth, there is a further reason why the identity of the applicant, as opposed to the sort of development it proposes, is not generally relevant to the sequential test. The sequential test in the NPPF is not just one of suitability; it covers availability: "only if suitable sites are not available, should out of centre sites be considered." A town

centre site may be owned by a retailer already, to use itself for retailing, who is not going to make it available to another retailer. It is plainly available for retailing, though only to one retailer. That does not mean that another retailer can thus satisfy the sequential test and so go straight to sites outside the town centre. "Available" cannot mean available to a particular retailer but must mean available for the type of retail use for which permission is sought.

43. I have referred to the general irrelevance of the identity of the applicant or proposed occupier to the application of the sequential test in [24] NPPF. I do so because there are instances where identity may matter, notably where the town needs representation by different retailers, or where town centre sites are being hoarded by developers/retailers who refuse to develop them, but also refuse to sell them. Extension applications are also a good example of a type of development which gives rise to problems for the sequential test, without meriting the answer that there is no need for one because the extension can only take place on the one site. There may be other good reasons too, why a court interpretation of a policy should not be expressed in terms which are too rigid. I add that I am not concerned here with the question of how an assessment of impact should be carried out where the identity of the proposed retailer is known, and that retailer may trade at a higher density per sq. m. than some others in the same broad convenience line.
44. I delayed the handing down of this judgment so that I could consider the judgment of the Court of Appeal in *Warners Retails (Moreton) Ltd v Cotswold District Council and others* [2016] EWCA Civ 606, handed down on 24 June 2016 and on which I told the parties I was prepared to receive brief submissions. The first instance decision and the fact of the appeal had been referred to before me. This case also related to the sequential test in [24] NPPF and *Tesco v Dundee*, though it also considered the Planning Practice Guidance of December 2009, relevant to that case but no longer in force by the time of the decision challenged in this case. It also turns on the particular Council report and the situation in Moreton-in-Marsh to which it was directed.
45. Nothing in it causes me to alter the judgment I had reached; and in particular nothing in paragraph 45 on *Tesco v Dundee*. I note the comment by Lindblom LJ in [31], in interpreting the 2009 PPG point that sites "should not be rejected on the strength of " 'the self-imposed requirements or preferences of a single operator....'. Otherwise, the sequential approach would likely become a merely self-fulfilling activity, divorced from the public interest." He added that the PPG also made it clear that the developer's own intentions generally had some bearing on the application of the sequential test. Mr Kolinsky in his short response submitted that that was of some assistance. Of course, the PPG to which the comments relate is not relevant to this case. But the comments of Lindblom LJ are plainly correct as observations anyway, even without a PPG to underlie them. Mr Sheppard suggested that the dicta to the effect that the bounds set on an applicant's preference and intentions as to format and scale for the purpose of NPPF [24] depended on the facts and circumstances of a particular case, was broadly supportive of the Defendant's submissions in relation to the question of what constituted a 'suitable' site in the instant case;[30]. That may be so, but is of no assistance to him here. The town centre was not rejected because of some issue over format and scale, but over its location in relation to Aldi stores.
46. I now turn to whether what I have said requires modification in the light of *Tesco v Dundee City Council*. I do not consider that the approaches are inconsistent at all,

though the differences in the language of the policies but not in broad intent, require the English policies to be considered separately, and could lead to a different result. First, even on the narrowest view of what Lord Reed said, suitability is to be determined by reference to the development proposed by the applicant. The applicant proposed a 1925 sq.m. food store. It was not a food store for occupation by Aldi; Aldi was not the applicant. The sequential site search ought to have included sites where such a store could go. The town centre was not excluded because of the inevitably precisely drawn line to represent the inherently imprecise and debateable five-minute off-peak drive time. It was excluded because it made no sense for Aldi to develop a store which would draw trade from two of its own stores so close by. There was no justification for redefining the application. At the application stage and even more so at the pre-application stage, where the approach to the sequential test was set, it would not have been right to look forward to the possibility that a condition would be imposed limiting the occupation to Aldi, as being part of the application- and still less when the applicant opposed it. And, as I have said, such a condition, with all its difficulties, would not have met the purpose to which the sequential test was directed.

47. Second, the Supreme Court was not addressing the meaning of “suitable” with this sort of issue in mind. It intended the focus to be on the development proposed. It did not deal with and cannot have meant to cover all aspects of the role of the identity of the applicant or its proposed operator by the phrase “suitable for the development proposed by the applicant”, or by its other comments. The Supreme Court cannot have intended that the identity of the applicant or proposed operator, and the commercial requirements which flow from that particular operator’s manner of retailing, or competitive position, should determine the way in which the sequential search area was defined or the sites available for that type of development were considered for suitability.
48. What the Supreme Court rejected was Tesco’s argument about the role of need; there is no conflict between that and this judgment. What requires qualification in this context is the alternative construction, which it accepted in the context of the issues in that case. But it cannot have supposed that this alternative construction, accepted by way of contrast with the one it rejected, left no issues uncovered, all to be dealt with under the rubric of the “development proposed by the applicant”, qualified only by flexibility as to format and scale. The true focus of interpretative debate is still the wording of the policy in context, and here of the English policies. Policy interpretations arising from litigation may be context and argument specific, and not intended as substitutes for the text at issue for all cases and contexts. The good sense of the planning consequences of any given interpretation may be a guide to its correctness.
49. This first ground succeeds. The District Council has misinterpreted NPPF 24, and the necessary sequential test has not been carried out and considered. A material factor has not been taken into account.

Ground 2: the personal condition

50. The justification for condition 20, that the permission should enure only for Aldi’s benefit, makes sense, and indeed follows logically from the way in which the sequential test was carried out. Once it was accepted that the area covered by the sequential test would have been different for any other retailer, such a condition might

even have been necessary. Indeed, the policy warnings against such a condition suggest that an approach to the sequential test which necessitates it, cannot be right. Of course, the condition now falls with the failings in the sequential test itself.

51. But Mr Kolinsky's point is a little different: it is that there are policy warnings against such a condition, which were not placed before the Committee, and if they had been, the Committee might have decided that they could not impose it, and so, in the light of the way in which the sequential test had been carried out, could not grant permission. The relevant policy guidance is in the 2014 Planning Practice Guidance of the Department of Communities and Local Government. Such personal conditions were "rarely appropriate". An instance of where it could exceptionally be appropriate was where certain people or groups of people would benefit, such as agricultural workers. But the grant of permission for a permanent building on the basis of an individual's personal circumstances would "scarcely ever be justified." A condition limiting the benefit of the permission to a company would be inappropriate because its shares could be transferred without affecting the legal personality of the company.
52. Mr Sheppard submitted that, although there had been no reference to this guidance, the condition itself was not unlawful, since it reasonably related to the development, and served a planning purpose. Members had received training in the use of conditions and should be assumed, in the absence of contrary evidence, to understand the difficulties with personal conditions without the need for specific advice.
53. I accept that the condition is not itself unlawful, at least not for the purpose for which it was imposed. I can see that a condition related to Aldi is not affected by the fact that shares in it may change hands, and the objection that the occupier, while retaining the corporate name and legal personality, could become something quite different as a business, has less force than it might for a small company. But the other strictures against such a personal/corporate condition in relation to a personal condition are very strong. In reality, how enforceable would it be if Aldi left the building and some other occupier wanted to use it? Nor does it prevent Aldi changing its corporate style or trading in a different style.
54. I cannot accept that the Committee were aware of the Guidance on their aspect through training, in the absence of specific evidence to that effect. This is not just because this is not a very common point, but also because the evidence produced by the District Council did not show that their training had covered this particular aspect of conditions, and nothing more was forthcoming despite requests. In my judgment this Guidance was a material factor, not taken into account in the decision. I am not sure that, however, taken solely by itself, I would have quashed the decision on that account, because its purpose related to the basis upon which planning permission was granted.
55. I add, although not the argument raised, that the condition does not in fact restrict occupation to Aldi; it restricts the enuring of benefit to Aldi and to no other retailer. This is odd, since the benefit of the permission in the first place will enure to the applicant, and benefit may enure thereafter to Aldi plus any lessor of the site. This would contravene the restriction to Aldi, but not the requirement that no other retailer benefit. So the condition is meant to be read as requiring the benefit to enure to Aldi and anyone but another retailer, which unfortunately is not what it says. If occupation is to be controlled, it is occupation which should be the subject of the condition.

Ground 3: accordance with the development plan, and the assessment of impact

56. Criteria two and three to Policy R6 of the Local Plan, part of the statutory Development Plan, applied to out of centre retail proposals: the viability and vitality of nearby centres should be not seriously affected, and the proposal should not affect future investment in existing centres. The Report had concluded that Policy R6 was in accordance with the NPPF and should be accorded considerable weight, and that the proposal accorded with the Development Plan.
57. Yet, Mr Kolinsky submitted, these two criteria were not considered in the Officer's Report or at the meeting. They were relevant to whether the proposal did accord with the policy or the Development Plan, and by s38(6) of the Planning and Compulsory Purchase Act 2004, the decision had to be made in accordance with the Development Plan unless material considerations indicated otherwise. The subject matter of the criteria were also material considerations in their own right.
58. Mr Sheppard endeavoured to rely on the passage in the conclusions related to a "proportional assessment" of the impact on district and local centres having been carried out by the applicant. But for the reasons already given, this passage in the conclusions is simply incorrect; no such assessment was ever carried out. And it did not even suggest that an assessment had been carried out in relation to the town centre, a sub-regional centre.
59. His main submission was that the NPPF, in [26] had superseded those criteria, so that in that respect R6 was out of date, and those criteria should be given minimal weight. The comments in the Report about consistency with the NPPF related to the part of R6 summarised in the Report, and the reason the proposal accorded with the development plan was because there was no compliance with the first criteria, while minimal weight was given to the remaining two criteria.
60. There is not much which is correct about that approach in law. The starting point for any application is whether it accords with the development plan. The NPPF is a material consideration, which may indicate a conclusion otherwise than one which accords with the development plan. An out of date policy or part of a policy, is still part of the development plan, in relation to which a decision is still required as to whether the proposal accords with it. It is possible, if a proposal does not accord with the development plan, that the planning authority will decide to give greater weight to the NPPF if it supports the proposal. If the plan is out of date, or inconsistent with the NPPF, the planning authority can decide to give less weight to any non-compliance with out of date policies. But the starting point is accordance or otherwise with the development plan.
61. Here, leaving aside the breach of the development plan and NPPF in relation to the sequential test, the proposal may or may not have been judged to accord with the second and third criteria of R6, since they were not referred to in the Report. I note that the criteria do not as such require an assessment; they require a judgment about issues which would normally require an assessment unless the answer was clear enough without it. An accurate report would have said that it was not known whether the proposal accorded with those criteria because there had been no assessment or that there was no need for an assessment because the answer was clear enough without it. A judgment would then have been required as to whether R6 was complied with and,

if not, whether that meant that the proposal still accorded with the development plan as a whole.

62. The fact that at least one of the criteria, that relating to viability and vitality, had been superseded by the NPPF, did not affect the question of whether the proposal accorded with the development plan; it affected the weight to be given to the outcome of that exercise. The fact that the NPPF did not require an assessment of the impact on vitality and viability is not relevant to the interpretation of the development plan. The NPPF is not a tool for the interpretation of a development plan or at least of one which has not been cast in the light of its guidance. In reality, the District Council considered the weight to be given to the policy at the wrong stage.
63. By itself, such an error may not require the quashing of the decision, since had the correct analysis been followed, and had the answer been that the proposal failed to accord with the development plan on account of a breach of those two criteria, it is clear enough that the Report would have recommended that little weight be given to that non-compliance, and greater weight to the fact that it complied, as was thought, with the up to date, NPPF compliant, parts of the development plan. Again if that is how matters had been left and that were the sole issue, I doubt that I would have quashed the decision on account of the error in the point at which little weight was given to non-compliance with out of date policies, which did not comply with the NPPF.
64. The NPPF does not however on its face make the issues raised by the two criteria immaterial simply because no assessment is required. It is removing the burden of doing a proper, researched assessment. The issue may still be relevant, though the threshold must reflect an NPPF view that adverse impact is unlikely below the default threshold unless a local authority has decided that a lower threshold is relevant.
65. The issues were however of clear relevance here in view of what the District Council must or ought to have appreciated was an unusual approach to the sequential test, and one which excluded the town centre of Mansfield where there was a qualitative need at least for a food store and where it had been advised, in reports it had commissioned, food stores should be encouraged. The effect which the proposal would have on that hoped for investment, directly related to the vitality and viability of the town centre, was never addressed in the report. The report did deal with the lack of quantitative need, and the remaining qualitative need but simply treated impact as a matter of the requirement for what may be termed a formal reported assessment, and which was not now required.
66. It is possible that there was some brief Officer analysis of the position which led to the conclusion in the Planning Policy Observations, not carried forward into the Report, to the effect that no adverse effect was likely, because of the relationship of the proposals to the town centre and the Aldi Nottingham Road store. The fact that some thought must have been given to the issue is also supported by the reason for condition restricting the floor space which can be used for the sale of comparison goods, since those were feared to compete with comparison shopping in the town centre, damaging its viability and vitality.
67. But I cannot accept that the Committee considered the issue. I accept that they would have appreciated the significance of the location of the proposal, further from the

town centre than Nottingham Road, so that the trade drawn to Aldi from the proposal's catchment area, lying as it did largely to the south of the town centre, may well come from trade which was already lost to Aldi Nottingham Road. There would clearly be a considerable overlap in catchment areas between Nottingham Road and the proposal. But Aldi was going to get trade from somewhere other than its existing customers, and the large overlap did not persuade it not to compete with itself to that extent, so it must have been expecting considerable trade other than from that done at Nottingham Road. I do not know how the issue would have been appraised at a broad brush level, but it was for the Committee to think about it. Thinking about comparison trade is not the same as showing consideration of convenience trade, and especially in the light of what the Council's consultants had advised. The issue was a material factor not considered by the decision-maker.

68. They were deflected from it by the NPPF not requiring a formal assessment. But the way the sequential test was carried out, even were it right, made it more likely that an assessment of impact on the town centre, and on the likelihood of a food store coming to it, was material. Even without that approach, the effect of the proposal on that point was material in view of the earlier and recent consultant report, and the lack of quantitative need, while the qualitative need remained. And indeed the criteria of the development plan made it so. The relevant issue was ignored. I would quash the decision on this ground as well. It also removes any reason to accept that the decision could nonetheless survive the consideration of the development plan, defective as it was.

69. Accordingly, the decision is in legal error on this ground as well.

Ground 4: the Claimant's version of the proposal's catchment area was not considered

70. Mr Kolinsky put this point forward as tentatively as it deserved. He said that the Committee had failed to consider the Claimant's last minute version of a five minute drive time, which showed the catchment area of the proposal covering all of Mansfield town centre, and not just nibbling at it. The Committee was told of this last minute point. It reached no conclusion about it. But the precise edge of the catchment area was not material to the decision on the sequential test, or to the need for an impact assessment or to any of the factors which weighed with the Committee. I see no reason to suppose that it would not have come to precisely the same conclusion if it had concluded that the whole town centre had been within the five-minute catchment area. But this was not an issue which it needed to resolve for its decision to be lawful.

Delay

71. Mr Sheppard submitted that the application had not been lodged promptly, and, since the grounds of challenge had arisen at the time of the resolution to grant permission on 23 September 2015, the application should have been lodged earlier than the last week of the now six week period for lodging judicial review proceedings from the actual grant of permission on 5 November 2015.

72. I do not accept that contention. I do not propose to resolve the question of whether a promptness requirement applies even with the six-week period. When such a period was commonly imposed by the courts it was as the requirement of promptness itself.

Although the resolution can be challenged, it is well established that precisely the same grounds can be raised in a challenge to the actual grant of permission. Time runs from that. The newly truncated period for lodging the application reflects a desire for promptness. It would be a very strong case which could cut down still further on that six-week period, if promptness were still additionally required. Besides, this is not a rolled up hearing. The question of delay has to be judged against the fact that the decision falls to be quashed. There is no reason, even were there delay, not to quash the decision. There is no argument about prejudice. Mr Sheppard asserted that delay has had a “resultant impact” on the development coming forward. I see no evidence of that. RSOL did not appear. The personal condition may have had the effect Aldi said it would.

Conclusion

73. This permission is quashed.