



**In the High Court of Justice
Queen's Bench Division
Planning Court**

CO Ref:
CO/3100/2019

In the matter of an application for Judicial Review

The Queen on the application of

TESCO STORES LIMITED

versus

COLCHESTER BOROUGH COUNCIL

LIDL UK GMBH

**Application for permission to apply for Judicial Review
NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)**

Following consideration of the documents lodged by the Claimant and the Acknowledgement of service filed by the Defendant

Order by the Honourable Mrs Justice Lieven

Permission is hereby refused.

Reasons:

1. Ground one asserts that the Defendant erred in law by referencing Lidl's trading style and that that is the same error as in Ouseley J's decision in *Aldergate*. However, it is clear in *Aldergate* that there is a judgment to be made as to whether what is being assessed is the individual retailer's corporate requirements, or rather whether it is a particular type of development. There is a clear distinction in the retail sector between the deep discounter retailers and the more traditional retail operators. As is set out in the AoS this distinction has been recognised both by the Competition Commission and the Secretary of State.
2. Although there is nothing in principle preventing the permission being operated by another type of retailer, such as the Claimant, in my view it was within the area of planning judgement for the Defendant as to whether it considered a different approach to the sequential test should be taken. The officers' report drew attention to the generic commercial requirements of the development and members will have been aware of the nature of deep discount retailers. Precisely what should be included as part of the sequential test is not a matter dictated by policy but rather one of planning judgment taking into account the facts of the specific proposal and the alternatives sites being advanced, and there is no arguable error of law in the approach taken here.
3. The second limb of this ground is also not arguable. The OR had made clear that Chesterwell Wood was outside the relevant catchment, so members had been informed on this point.
4. Ground Two is also not arguable. A condition can only be imposed if it is necessary. The size and opening hours of the store are restricted. It is not the norm to impose personal conditions on a retail planning permission, even though the RIAs are commonly based on the proposed operators trading data. There was nothing unusual or exceptional in this case that would mean that there could arguably be a legal

obligation to impose a personal condition.

- The costs of preparing the Acknowledgment of Service are to be paid by the claimant to the defendant, in the sum of £4733 unless within [14] days the claimant notifies the court and the defendant, in writing, that "[s]he objects to paying costs, or as to the amount to be paid, in either case giving reasons. If "[s]he does so, the defendant has a further [14] days to respond to both the court and the claimant, and the claimant the right to reply within a further [7] days, after which the claim for costs is to put before a judge to be determined on the papers. [Where the claimant seeks reconsideration, costs are to be dealt with on that occasion].

Signed



*delete where not applicable

23/9/19

The date of service of this order is calculated from the date in the section below

For completion by the Planning Court

84 SEP 2019

Sent / Handed to the claimant, defendant and any interested party / the claimant's, defendant's, and any interested party's solicitors on (date):

Solicitors:

Ref No.

Colchester Borough Council PC/JC/C009/367

Notes for the Claimant

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed FORM 86B within 7 days of the service of this order. A fee is payable on submission of Form 86B. **For details of the current fee see the Court website** <https://www.gov.uk/court-fees-what-they-are>. Failure to pay the fee or lodge a certified Application for Fee remission may result in the claim being struck out. The form for Application for Remission of a Fee is obtainable from the Justice website <https://www.gov.uk/get-help-with-court-fees>.