

RETAIL PLANNING – CURRENT ISSUES

LGG CONFERENCE

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1. The purpose of my paper is to examine whether the draft of the new PPS6 has taken on board the lessons that should have been apparent from the last 10 years of difficulties in construing and applying previous versions of the PPS.
2. On 18 November this year, Parliamentary Under Secretary Iain Wright M.P. expressly said that in formulating its proposals for the new PPS6, the Government had “had regard to planning cases decided by the Secretary of State and Inspectors” (*Hansard*, Col 395W). I wanted to explore whether any lessons truly have been learned from these previous decisions.
3. At the Oxford planning conference this year I presented a paper which examined whether decisions taken by successive Secretaries of State over a ten year period (1st January 1998 to 31st December 2007) followed a consistent and predictable approach to the determination of planning applications for retail development.¹ (My research concerned English cases.)
4. By “consistent” I mean that in making applications developers and retailers, and in considering applications local planning authorities, should be able to tell where they stand in relation to national planning policies for retail development – of course each case will involve an exercise of planning judgement, but the ground rules should be known and predictable – if nothing else, those who are most directly affected by the Secretary of State’s decisions should be able to say, if you will, “I might not agree with your decision but I can see where you are coming from”.

¹ A full copy of that paper is available on the Landmark Chamber's website:
http://www.landmarkchambers.co.uk/_data/assets/pdf_file/0006/25935/KK_HasRetailPlanningDeliveredTheGoods.pdf.

Has the interpretation and application of the need test been consistent and predictable?

5. Over most of the ten years that I reviewed it is fair to say that no-one can have been left in any doubt that the demonstration of need was seen by the Secretary of State as a fundamental pre-requisite to the grant of a planning permission. One might not agree that the test is a sensible hurdle to erect – why should retailers have to prove need when in the main most other forms of development are not required to do so? – but retailers knew how much significance the Secretary of State attached to the issue. That the test was seen as fundamental does however mean that it can only have been right to expect a consistent interpretation and application of it at the highest level of decision making by the author of the very test in question. Unfortunately this is where the decisions see-sawed over time, with a lack of clarity about what constituted quantitative and what constituted qualitative need. Perhaps the best example of inconsistency is the treatment of the potential benefits of particular forms – or formats – of retailing. So my verdict on the test of need is that following the Caborn Statement we all knew it was there but the Secretary of State was far from consistent and predictable in its interpretation and application.

Has the interpretation and application of the sequential test been consistent and predictable?

13. As with the need test, over the ten years that I reviewed it is fair to say that no-one can have been left in any doubt that the sequential test was seen by the Secretary of State as an important part of retail planning policy – retailers knew how much significance the Secretary of State attached to the issue. However, once again, the significance of the test surely means that those who were affected by it were entitled to expect a consistent interpretation and application by its author. The decisions do show a general trend until towards the end of the period in question of increasingly onerous demands concerning flexibility. This is particularly evident in the decisions which discussed disaggregation. However it was never really clear quite how far a retailer had to go in pursuing this theory – the decisions lurched around with various new sub-sets of the theory appearing and disappearing over time. So my verdict on the sequential test is similar to the view I expressed earlier concerning the need test - we all knew it was there but the Secretary of State was far from consistent and predictable in its interpretation and application.

Has the interpretation and application of the retail impact test been consistent and predictable?

14. I consider that the Secretary of State has been both consistent and predictable in the interpretation and application of the retail impact test over the ten years in question. There is little of note in the decisions because this is a well understood area of retail planning – the test has been in place in some shape or form for decades. I suspect that things would have been different had an enhancement test been maintained.

So has retail planning policy delivered the goods?

17. My overall conclusion is that the Secretary of State’s decisions over the last ten years in dealing with retail planning cases have been consistent, and as predictable as matters of planning judgment can be, by and large in dealing with the test of retail impact, but inconsistent and unpredictable in dealing with quite what comprises quantitative and qualitative need, and never clear and consistent about how far a retailer was expected to go in order to satisfy the theory of disaggregation.

18. My own personal view drawn from reading nearly two hundred decisions and accompanying inspectors’ reports issued over the last ten years is that the lack of consistency and predictability in relation to aspects of the need test is due to the test being, to use the current Secretary of States’s word, “dysfunctional” in the first place. Perhaps the lack of clarity concerning the theory of disaggregation is due to a similar reason.

The new draft PPS6: Lessons learned?

19. At the time of writing, the new PPS6 is still at the consultation draft stage (the consultation closed on 3 October 2008). The revisions to PPS6 are expected to take effect in spring 2009 (see *Hansard*, 18 November 2008, Col 395W).
20. In formulating its proposals the Government has also taken account of a number of studies, particularly: “The Merry Hill Impact Study” (DoE, 1993); “The Impact of Large Foodstores on Market Towns and District Centres” (DETR, 1998); and its research into “The Policy Evaluation of the Effectiveness of PPG6” (ODPM, 2004). It has also drawn on a number of other reports, including: (1) “The Smaller Towns Report”, published by the British Council of Shopping Centres in 2004; and (2) “Town Centre and Retailing Methodologies”, published by One Scotland in 2007.

The changes to the Need test: Plan-making stage

21. The need test is retained at the plan making stage. Significantly the new draft removes the greater emphasis which was previously placed on quantitative need for additional floor space. This reverses the McNulty Statement (April 2003) and should be welcomed because it is clear from my survey of the decided cases that Inspectors and Secretaries of State had great difficulty in deciding what precisely constituted quantitative need and what constituted qualitative need.
22. The new draft also makes clear that in assessing quantitative need, regard must be had to relevant market information and economic data. There is no longer a requirement for an assessment of need to provide sufficient information on which to base strategic choices about where growth should be accommodated and how it can be used most effectively to strengthen or regenerate existing centres, and to address deficiencies in the existing network of centres.
23. The alterations can be seen tracked in the extracts below (deletions are in *italics* and new text is underlined):

Retail and Leisure

2.33 In assessing the need and capacity for additional retail and leisure development, local planning authorities should *place greater weight on* [take account of both the](#) quantitative need for additional floorspace for the specific types of retail and leisure developments. *However local planning as well authorities should also take account of* [as any](#) qualitative considerations. In deprived areas which lack access to a range of services and facilities, and [where](#) there will be clear and demonstrable benefits in identifying sites for appropriate development to serve communities in these *area, areas,* additional weight should be given to meeting these qualitative considerations.

Quantitative Need

2.34 In assessing quantitative need for additional development when preparing its development plan documents, a local planning authority should assess the likely future demand for additional retail and leisure floorspace, having regard to [relevant market information and economic data, including](#) a realistic assessment of:

- existing and forecast population levels;
- forecast expenditure for specific classes of goods to be sold, within the broad categories of comparison and convenience goods and for main leisure sectors; and
- [for retail development](#), forecast improvements in productivity in the use of floorspace.

Such an assessment should provide sufficient information on which to base strategic choices about where growth should be accommodated and how it can be used most effectively to strengthen or regenerate existing centres, and to address deficiencies in the existing network of centres.

The changes to the Need test: Application stage

24. At the application stage, the need test is removed entirely. Only the following considerations should be taken into account by local planning authorities in determining planning applications for all proposals relating to main town centre uses for new development; redevelopment of existing facilities; extensions to existing facilities, changes of use involving development; renewal of extant planning permissions, and applications to vary or remove existing planning conditions which would have the effect of creating additional floorspace or changing the range of goods sold; thereby changing the scale and/or character of development:

ASSESSING PROPOSED DEVELOPMENTS

3.3 *The key considerations for identifying sites for allocation in development plan documents, as set out in Chapter 2, apply equally to the assessment of planning applications. This Chapter sets out only the additional detail relevant to the consideration of planning applications, and should be read in conjunction with Chapter 2.3.4 In the context of development control and subject to the policies set out below, [Where planning applications are not in accordance with an up to date](#)*

[development plan](#) local *planning* authorities should require applicants to demonstrate:

a) the need for development (paragraphs 3.8–3.11);

b) that the development is of an appropriate scale (paragraph 3.12);

*c) 1. t*That there are no more central sites *for* [which can accommodate](#) the [proposed](#) development ([paragraphs 3.13–3.19](#)); *and*

*d) 2. t*That there are no unacceptable impacts *arising from the proposed development, including* on existing centres (*paragraphs 3.20–3.23*); *and*

e) that locations are accessible (paragraphs 3.24–3.27 [Paragraphs 3.19a-3.19i](#)).

3.5 Subject to the policies set out below, local planning authorities should assess planning applications on the basis of the above [two](#) key considerations and the evidence presented. As a general rule, the development should satisfy *all* [both](#) these considerations. In making their decision, local planning authorities should also consider relevant local issues and other material considerations.

25. This is an extremely positive change. It was anomalous that retailers should have to prove need when in the main most other forms of development are not required to do so. The decisions applying the need test over the ten-year period which I studied were at times wildly inconsistent and it is difficult to disagree with Secretary of State Hazel Blear's description of the test as “dysfunctional”. First, there were evidential problems. Early in my survey period we find the Secretary of State refusing an application for an out of centre Tesco superstore in Hull (15/12/98) on the basis of a conclusion that there was a net deficit of available expenditure to support the proposed new store, with the inspector bemoaning the “computational jungles” that he had been faced with. Five years later (Tesco Stafford 29/9/03) the Secretary of State was concerned that “evidence presented on need is becoming increasingly and unnecessarily complicated”.

26. Secondly, opinion varied as to whether clawing back expenditure leaking from a catchment area constituted need. Early in the survey period, in deciding to grant permission for an out of centre retail warehouse development in Hereford (19/10/98) the Secretary of State concluded that the stemming of expenditure leakage from the catchment area constituted a “real need”. By the time of the Bell Green (Lewisham) decision (29/10/03) arresting leakage was seen as a type of qualitative need although in permitting an out of centre Safeway extension in Hinckley (22/6/04) the Secretary of State indicated that “whilst reducing the need to travel is an aim of PPG6, it does not override the priority of providing comparison retailing in existing centres.” The wheel turned again and the next month (29/7/04) the Secretary of State accepted that arresting leakage can constitute quantitative need and residents being able to shop without travelling outside their catchment area, a qualitative need in a decision permitting an extension to the Peel Retail Park in Washington. Come the Haden Way Birmingham decision (14/2/06) clawback was considered to be an indicator of both quantitative and qualitative need.
27. Thirdly, there was inconsistency in the treatment of the potential benefits of particular forms, or formats, of retailing. Following the McNulty Statement in April 2003, a host of decisions concerning retail warehouse and similar insisted upon need being assessed for comparison goods, and not some or other category of goods such as “bulky goods”: see for example Aylesbury (8/9/03); Kendal (17/9/03) – it became customary for the Secretary of State to include a passage in decision letters making the point. In the Bell Green (Lewisham) decision (29/10/03) the Secretary of State explained that he did “not consider that bulky goods is a category that should be assessed in its own right”; need should be defined either for convenience or comparison goods. But later on it became acceptable to assess the need for DIY goods rather than the far broader comparison goods (see the B&Q Warehouse store Swindon decision 28/10/05).
28. Although the removal of the need to test at the application stage is a beneficial change, it is too early to say whether need arguments will disappear entirely. This is because it is not clear whether the new impact assessment embraces the need to assess capacity. Applicants may still wish to demonstrate that issues of need have been addressed as part of the wide-ranging assessment of impacts.

The Sequential test: Application stage

29. There are no changes made at the plan-making stage, but several amendments relating to the application stage. The amended test reads as follows:

3.14 In selecting sites, all options in the centre should be thoroughly assessed before less central sites are considered. Where a development plan is out of date and it can be demonstrated that there are no town centre sites to accommodate a proposed development, proposals in edge of centre locations which are well connected to the centre by means of easy pedestrian access should be considered favourably under the sequential approach unless there are significant adverse impacts on the town centre, taking account of local circumstances. The order for site assessment is set out in paragraph 2.44...

3.16 *The purpose of this* This exercise *is aims* to explore *the possibility of enabling the* whether development *to would* fit onto more central sites by reducing the footprint of the proposal...

3.17 As part of this exercise it is important to explore whether specific parts of a development could be operated from separate, sequentially preferable, sites. For retail and leisure proposals in edge-of-centre or out-of-centre locations which comprise a group of retail and/or leisure units, such as a retail park, leisure park or shopping centre, the applicant should consider the degree to which the constituent units within the proposal could be accommodated on more centrally-located sites *in accordance with the objectives and policies in this policy statement.*

30. The reform of the sequential test is disappointing. The most obvious candidate for reform was the concept of disaggregation in the application of the sequential test. Many of the decisions during the ten years discussed the Secretary of State's expectation that in applying the sequential test retailers were expected to be flexible concerning the scale, format and design of proposals so as to ensure that more central locations were not dismissed too readily, and should consider disaggregating their proposals. Early examples of this approach are: the Secretary of State's decision to refuse a retail warehouse park at Northbrook College in Worthing (23/11/98) pointing out that "flexibility ...means that ...retailers should consider whether their proposed development could be accommodated in a town centre, in whole or in part, by altering the format, design and scale of their scheme", and the Secretary of State's decision to refuse an out of centre retail warehouse park (including a B&Q) at Trafford Park (16/12/98) on the basis that the required degree of flexibility had not been shown in

considering “disaggregated or more modest schemes”. The demands of flexibility and disaggregation grew ever greater until towards the end of the survey period, but it was never sufficiently clear quite how far a retailer had to go in pursuing the disaggregation theory. It is deeply unsatisfactory that this highly problematic aspect of PS6 has not been rectified.

The Retail Impact test

31. At the plan-making and application stages, a much more complex set of issues have been introduced under the heading of the retail impact test. Impact is now declared to be a key consideration in determining the acceptability of a proposal. Impact assessments will have to be carried out for main town centre uses over 2500 m² gross floorspace which would be in an edge of centre or out of centre location. An assessment of impact may occasionally also be necessary for development of less than 2500 m² gross floorspace if it is likely to have a significant impact on a smaller town centre.
32. The new draft makes clear that both positive and negative impacts must be assessed. It also requires judgments about the extent of any impacts to be informed by the development plan where this is up to date, in particular whether development will promote or put a planned strategy at risk.
33. The five “key impact considerations” are outlined in the draft PPS: first, how the proposal relates to the development plan for the area; secondly, the impact on existing, committed and planned public and private investment in a centre or centres in the area; thirdly whether a proposal which is in or on the edge of a town centre is of an appropriate scale in terms of gross floorspace, in relation to the size and role of centre and its catchment; fourthly, in the context of retail or leisure proposals, whether there will be an impact on in-centre trade/turnover; finally the extent to which the proposal will promote or undermine town centre vitality and viability, including local consumer choice and retail diversity in terms of the range type and quality of goods.
34. In my survey of previous decisions on the retail impact test I found that the Secretary of State had been both consistent and predictable in the interpretation and application of the

test. The test was well-established and well understood. It is foreseeable that there will be interpretation issues with the new impact test at least until it beds in. The more complex test is likely to have a significant effect on local authority resources and many local authorities will have to employ specialist consultants with the necessary expertise and skill to assess and evaluate impact assessments under the new approach.

35. Iain Wright has explained the Government's intention behind the amended impact test (*Hansard*, 18 November Col 396W). He said that "Our proposed new impact test will also provide a more effective way of assessing the impact of unplanned proposals outside town centres by requiring applicants for such proposals to assess the extent to which a proposal will promote or undermine town centre vitality and viability, including the impact on local consumer choice and retail diversity in terms of the range, type and quality of goods". As I have indicated above, this likely to be seen as an invitation for developers to present detailed evidence on need notwithstanding the abolition of the need test.

36. The following additions are made to the assessment of impact:

2.48 [The assessment of the impact of particular policy choices and site allocations will be critical to promoting the future vitality and viability of town centres.](#) Making additional sites available for development may have both positive and negative impacts on existing centres. Positive benefits are likely to be strongest where additional development takes place in the centre, or by an expansion of the centre, followed by edge-of-centre sites where a development would be well connected to the centre and result in a significant number of linked trips and clawback expenditure. Where a site is proposed to be allocated in an edge-of-centre or out-of-centre location, local planning authorities should assess the impact that the potential development of the site would have on centres within the catchment of the potential development [and take account of any wider economic, social and environmental impacts of such an allocation.](#) Where the potential development of a site or sites proposed to be allocated in a centre would substantially increase the attraction of the centre and could have an impact on other centres, the impact on other centres will also need to be assessed. [The impact considerations which should be taken into account when preparing development plans are set out at Paragraph 3.19a-3.19i.](#)

37. At the application stage considerable changes are made and a much more complex set of issues are introduced:

d) Assessing Impacts

3.20 [19a The assessment of the impacts of a development will be a key consideration in determining the acceptability of a proposal.](#)

[3.19b](#) Impact assessments should be undertaken for any application for a main town centre use [over 2,500 square metres gross floorspace](#) which would be in an edge-of-centre or out-of-centre location and which is not in accordance with an up-to-date development plan *strategy*. Where a significant development in a centre, not in accordance with the development plan *strategy*, would substantially increase the attraction of the centre and could have an impact on other centres, the impact [on other centres will also](#) *on other centres will also* need to be assessed. [An assessment of impact may occasionally also be necessary for development of less than 2,500 square metres gross floorspace if it is likely to have a significant impact on smaller town centres. In such cases a decision on whether an assessment will be needed will depend on the relative size and nature of the proposed development in relation to existing centres in the catchment. Applicants should discuss their proposals with the local planning authority as early as possible to determine whether an impact assessment is likely to be needed for their proposal.](#)

3.21[9c](#) In assessing *sites proposals*, local planning authorities should consider *the impact any positive and negative impacts* of the proposal on the vitality and viability of existing centres within the catchment area of the proposed development, *including as well as any wider impacts arising from a proposal, taking account of* the likely cumulative effect of recent permissions, developments under construction and completed developments. *The identification of need does not necessarily indicate that there will be no negative impact.*

3.22 In particular, local planning authorities should consider the impact of the development on the centre or centres likely to be affected, taking account of:

_ the extent to which the development would put at risk the spatial planning strategy for

[3.19d](#) Judgements about the extent of any impacts should be informed by the [development plan \(where this is up to date\), in particular whether it will promote or put the plan's strategy at risk, taking account of the extent to which a proposal will](#)

the area and the strategy for a particular [alter a town](#) centre or network of centres, or alter its's

role in relation to the plan's hierarchy of centres and whether it will result in sites allocated in existing centres being developed in accordance with an up to date plan. Recent local assessments of the health of town centres, taking account of the vitality and viability indicators in Chapter 4 of this policy statement and any other published local information, will also be relevant.

3.19e Key town centre impact considerations, both positive and negative, will include:

(i) how the proposal relates to the development plan for the area;

_ the likely effect on future (ii) the impact on existing, committed and planned public and/or

private *sector* investment *needed to safeguard the* in a centre or centres in the area;

vitality and viability of the centre or centres;

(iii) whether a proposal which is in or on the edge of a town centre is of an appropriate scale (in terms of gross floorspace), in relation to the size and role of the centre and its catchment, taking account of the considerations in Paragraph 2.41-2.43 of this policy statement;

(iv) in the context of a retail or leisure proposal, whether there will be an *the likely* impact of the *proposed development* on in-centre trade/turnover *and on the vitality*

and, taking account of current and future *viability of existing centres within the catchment area of the proposed development and, where applicable, on the rural economy (an example of a positive impact might be if development results in clawback* *consumer* *expenditure from* *capacity in* *the surrounding* *catchment* *area); and*

_ changes to the range of services provided by centres that could be affected;

_ likely impact on the number of vacant properties in the primary shopping area;

_ potential changes to the quality, attractiveness, physical condition and character of the centre or centres and to its role in the economic and social life of the community; and

_ the implications of proposed leisure and entertainment uses for the evening and night time economy of the centre (see also paragraph 2.24).

(v) the extent to which the proposal will promote or undermine town centre vitality and viability, including local consumer choice and retail diversity in terms of the range, type and quality of goods.

3.23 The level of detail and type of evidence and analysis required should be proportionate to the scale and nature of the proposal. Impact assessments which address the issues in [3.19f](#)

Where there is clear evidence that the proposal is likely to have a significant adverse impact on the town centre, taking into account the considerations in

Paragraph 3.22 above should be provided for all retail and leisure developments over 2,500 square metres gross floorspace, but they may occasionally be necessary for smaller developments, such as those likely to have a significant impact on smaller centres, depending on the relative size and nature of the development in relation to the centre.

Paragraph 3.19e, this will normally justify the refusal of planning permission. Where there are considered to be some adverse town centre impacts but these are likely to be outweighed by significant wider economic, social and environmental benefits arising from the proposal, taking account of the considerations in Paragraph 3.19g below, local authorities should consider such proposals favourably. Proposals which fail to secure a high quality and inclusive design which does not take the opportunities available for improving the character and quality of the area and the way it functions, or which fail to deliver wider sustainable development objectives⁷, in particular those on tackling climate change⁸, are unlikely to be acceptable in impact terms, irrespective of any wider benefits which may arise from a proposal or its location.

A footnote about competition

38. The Competition Commission (“CC”) published its final report into the supply of groceries by retailers in the United Kingdom on 30 April 2008. In general the CC found that the groceries market is generally delivering a good deal for consumers. But it identified two principal areas of concern: first, that several grocery retailers have strong positions in a number of local markets which could lead to a poorer retail offer to the consumer. Secondly, the transfer of excessive risk and unexpected costs to suppliers through practices which the CC believes adversely impact on investment and innovation. The CC recommended to Government that a “brightline” Competition Test be adopted and introduced into the planning system to prevent the emergence of highly concentrated local markets in the future and prevent the strengthening of strong local markets in existing areas.

39. It is not clear at this stage what the government intends to do in relation to this recommendation. The draft PPS6 provides that one of the government objectives which needs to be taken into account in the context of the key objective (of promoting vitality and

viability of town centres) is the need to promote competition between retailers and enhance consumer choice. Iain Wright recently refused to be drawn on whether a competition test would be included in the final version of the PPS (*Hansard*, 18 November, col 395):

“Whether our revised policy will incorporate a ‘competition test’ for planning decisions on larger grocery stores, as recommended by the Competition Commission (CC), will depend on the outcome of the Tesco appeal to the Competition Appeal tribunal and our further consideration of the CC's proposals. As we said in the Government's response to the CC inquiry into UK groceries retailing in July, we will report more fully on our decision in the light of developments.”

Overall conclusions

40. In conclusion, the draft PPS6 is something of a curate's egg –good in parts, for example the abolition of the need test at the application stage and the removal of the emphasis on quantitative need at the plan-making stage. But also bad in parts, for example the failure to address the problems besetting disaggregation in the sequential test. The jury is still out on the reformed retail impact test, but there are warning signs; what was a simple and predictable test threatens to become complex, unpredictable and a backdoor means for re-introducing detailed arguments about need at the application stage.