

CURRENT LEGAL TRENDS IN RETAIL POLICY AND PRACTICE

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SECTION 1 - INTRODUCTION



SECTION 2 – THE CENTREPIECE OF RETAIL POLICY

THE NPPF AND NPPG



- THE TWO MAIN SOURCES OF RETAIL POLICY IN ENGLAND – NPPF (MARCH 2012) AND NPPG (MARCH 2014).
- KEY POINTS OF THE NPPF IN RELATION TO **THE PRODUCTION OF DEVELOPMENT PLANS:**
 - PROACTIVE ROLE FOR LPAS IN INTENTION OF POLICY.
 - TOWN CENTRES FIRST [NPPF23]
 - DEFINE A NETWORK OF CENTRES AND HIERARCHY OF CENTRES [NPPF23]
 - DEFINE EXTENT OF TOWN CENTRES AND PRIMARY SHOPPING AREAS [NPPF23]
 - PROMOTE COMPETITIVE TOWN CENTRES THAT PROVIDE CUSTOMER CHOICE AND A DIVERSE RETAIL OFFER [NPPF 23]
 - ALLOCATE A RANGE OF SITES AND IMPORTANT THAT NEEDS FOR RETAIL ARE MET IN FULL [NPPF23]
 - LPAs SHOULD UNDERTAKE AN ASSESSMENT OF NEED TO ENSURE A SUFFICIENT SUPPLY OF SITES [NPPF 23]
 - ALLOCATE EoC SITES WHERE SUITABLE AND VIABLE TOWN CENTRE SITES ARE NOT AVAILABLE [NPPF 23]
 - WHERE TOWN CENTRES ARE IN DECLINE, LPAs SHOULD PLAN POSITIVELY FOR THEIR FUTURE TO ENCOURAGE ECONOMIC ACTIVITY [NPPF23]

SECTION 2 – THE CENTREPIECE OF RETAIL POLICY

THE NPPF AND NPPG



- KEY POINTS IN RELATION TO **DEVELOPMENT CONTROL AND MANAGEMENT:**
 - LPAs SHOULD APPLY SEQUENTIAL TEST TO PLANNING APPLICATIONS FOR MAIN TOWN CENTRE USES THAT ARE NOT IN EXISTING CENTRE AND NOT IN ACCORDANCE WITH UP TO DATE DEVELOPMENT PLAN [NPPF 24]
 - SEQUENTIAL APPROACH ENVISAGES – TC – EoC – OoC.
 - EoC AND OoC SITES REQUIRES THE PREFERENCE TO BE MADE IN FAVOUR OF ACCESSIBLE SITES WHICH ARE WELL CONNECTED TO THE TOWN CENTRE [NPPF 24]
 - APPLICANTS AND LPAs SHOULD DEMONSTRATE FLEXIBILITY ON ISSUES SUCH AS FORMAT AND SCALE [NPPF 24]
 - LPAs SHOULD REQUIRE AN IMPACT ASSESSMENT IF OUTSIDE TC AND NOT IN ACCORDANCE WITH THE DEVELOPMENT PLAN IF THE DEVELOPMENT IS OVER THE PROPORTIONATE LOCALLY SET FLOORSPACE THRESHOLD.
 - [LPA IN NOTTINGHAMSHIRE HAS CHOSEN 300 SQUARE METRES AS THRESHOLD]
 - IF NO LOCAL THRESHOLD THEN 2500 SQ METRES.
 - IMPACT ON TOWN CENTRE VIABILITY AND VITALITY SHOULD BE CONSIDERED FOR UP TO FIVE YEARS OR EVEN TEN YEARS [NPPF 26]
 - WHERE APPLICATION FAILS SEQUENTIAL TEST OR IS LIKELY TO HAVE SIGNIFICANT ADVERSE IMPACT ON ONE OR MORE OF THE ABOVE FACTORS IT SHOULD BE REFUSED [NPPF 27]

SECTION 2 – THE CENTREPIECE OF RETAIL POLICY

THE NPPF AND NPPG



- KEY POINTS THEREFORE:
 - TOWN CENTRE FIRST THROUGH IMPACT TESTS AND SEQUENTIAL APPROACH.
 - IT IS FOR THE APPLICANT TO DEMONSTRATE COMPLIANCE WITH BOTH REQUIREMENTS BUT:
 - IN REALITY THE IMPACT TEST IS VERY HIGH THRESHOLD – SIGNIFICANT ADVERSE IMPACT ON THE CENTRE AS A WHOLE.
 - SEQUENTIAL APPROACH BEEN SERIOUSLY AFFECTED BY THE RUSHDEN LAKES DECISION OF 2012 WHICH HAS GIVEN GREAT FLEXIBILITY TO THE DEVELOPER IN TERMS OF COMPLIANCE.
 - CURRENT POLICY DECISION ALLOWS TOLLGATE VILLAGE APPLICANTS TO SUBMIT THAT THERE ARE NO POLICIES IN THE NPPF WHICH RESTRICT THE DEVELOPMENT [NEARLY 30,000 SQUARE METRES OF A1-A5 USES PARTLY ON A DISTRICT CENTRE AND 3 MILES FROM COLCHESTER TOWN CENTRE]
 - IT IS ALSO CRITICAL TO CONSIDER HOW THE LAW HAS CONSIDERED THE IMPACT AND SEQUENTIAL TEST.

SECTION 3 – THE CORRECT APPROACH IN LAW TO POLICY



- DECISION OF TESCO STORES V DUNDEE CITY COUNCIL [2012] SUPREME COURT.
- PLANNING POLICIES ARE NOT STATUTORY OR CONTRACTUAL PROVISIONS AND SHOULD NOT BE CONSTRUED AS IF THEY WERE.
- THE PROPER INTERPRETATION OF PLANNING POLICIES IS ULTIMATELY A MATTER OF LAW FOR THE COURT.
- THE APPLICATION OF POLICY IS FOR THE DECISION MAKER.
- BUT STATEMENTS OF POLICY ARE TO BE INTERPRETED OBJECTIVELY BY THE COURT IN ACCORDANCE WITH THE LANGUAGE USED AND IN ITS PROPER CONTEXT.
- A FAILURE TO PROPERLY UNDERSTAND AND APPLY RELEVANT POLICY WILL CONSTITUTE A FAILURE TO HAVE REGARD A MATERIAL CONSIDERATION OR WILL AMOUNT TO HAVING REGARD TO A IMMATERIAL CONSIDERATION.
- SEE JUDGMENT OF LORD REED AT PARAGRAPH 17-22 OF THE DECISION.

SECTION 4 – RECENT CASE LAW

- KEY LEGAL ISSUE 1 - WHAT DOES SUITABLE MEAN IN RELATION TO THE SEQUENTIAL TEST?
 - SUITABLE MEANS SUITABLE FOR THE DEVELOPMENT PROPOSED AND NOT SUITABLE TO MEET DEFICIENCIES IN RETAIL PROVISION [SEE TESCO V DUNDEE]
 - THE QUESTION THEREFORE IS WHETHER THE ALTERNATIVE SITE IS SUITABLE FOR THE PROPOSED DEVELOPMENT, NOT WHETHER THE PROPOSED DEVELOPMENT COULD BE ALTERED OR REDUCED SO THAT IT CAN BE MADE TO BE FIT THE ALTERNATIVE SITE.
 - AN APPROACH ENDORSED BY THE SECRETARY OF STATE IN THE RUSHDEN LAKES DECISION.
 - AN APPROACH ENDORSED BY OUSELEY J IN THE ALDERGATE PROPERTIES DECISION WHERE SUITABLE AND AVAILABLE MEAN FOR THE BROAD TYPE OF DEVELOPMENT WHICH IS PROPOSED IN THE APPLICATION BY APPROXIMATE TYPE, SIZE AND RANGE OF GOODS.
- KEY LEGAL ISSUE 2 – WHAT DOES FLEXIBILITY MEAN?
 - NOT NECESSARY TO HAVE DISAGGREGATION TO DEMONSTRATE FLEXIBILITY [RUSHDEN LAKES AND SCOTCH CORNER DECISION.
- KEY LEGAL ISSUE 3 - NO NEED TEST IN THE NPPF
 - NO REQUIREMENT TO DEMONSTRATE NEED IN THE NPPF [SEE WARNERS RETAIL V COTSWOLD DISTRICT COUNCIL [2016]

SECTION 4 – RECENT CASE LAW

- KEY LEGAL ISSUE 4 – THE ASSESSMENT OF IMPACT MUST BE CONSIDERED ON THE TOWN CENTRE AS A WHOLE
 - SECRETARY OF STATES DECISION IN RUSHDEN LAKES AND SCOTCH CORNER MAKE CLEAR THAT IMPACT NEEDS TO BE CONSIDERED ON WHOLE OF CENTRE AND BOTH COMPARISON AND CONVENIENCE GOODS EXPENDITURE.

SECTION 5 – RECENT APPEAL DECISIONS



- THE **FOLLOWING CASES DECIDED IN THE PAST YEAR** ARE TO BE CONSIDERED:
 1. CASE 1 – LARGE RETAIL SCHEME IN OUT OF CENTRE LOCATION IN TRURO – 27 OCT 2016 [A]
 2. CASE 2 – LARGE FOOD STORE IN WILLITON, SOMERSET – 4 JULY 2017 [A]
 3. CASE 3 – EXTENSION TO AN EXISTING RETAIL UNIT IN STOCKTON-ON-TEES – 5 JULY 2017 [A]
 4. CASE 4 – CLEUD APPLICATION AT EXISTING UNIT AT SWANSEA – 5 JULY 2017 [A]
 5. CASE 5– EXTENSION OF MILTON KEYNES TOWN CENTRE – 19 JULY 2017 [A] [CALL IN]
 6. CASE 6 – MIXED USE DEVELOPMENT IN HEMEL HEMPSTEAD – 27 JULY 2017 [D]
 7. CASE 7 – LARGE EXTENSION TO TOLLGAT VILLAGE, COLCHESTER – 4 AUG 2017[A]
 8. CASE 8 – REMOVAL OF RESTRICTIVE CONDITION TO WM MORRISON – 20 SEPT 2017 [D]
 9. CASE 9 – CHANGE OF B8 UNIT TO A1 IN KINGSKERSWELL – 22 SEPT 2017 [A]
 10. CASE 10 – ERECTION OF 3 A1 UNITS AT MACCLESFIELD – 27 SEPT 2017 [A]

CASE 1 – LARGE RETAIL SCHEME IN OoC LOCATION IN TRURO – 27 OCT 2016 - ALLOWED



- APPEAL ALLOWED FOR 6708 SQUARE METRES OF RETAIL IN OoC LOCATION.
- PROPOSAL WOULD PASS SEQUENTIAL APPROACH.
- ALTHOUGH INSPECTOR DID SAY THAT THE APPELLANTS HAD NOT SHOWN SUFFICIENT FLEXIBILITY BY INSISTING ITS RETAIL FORMULATION MUST BE LOCATED AT ONE LOCATION.
- PROPOSAL WOULD NOT HAVE AN UNACCEPTABLE IMPACT ON TRURO CITY CENTRE.
- TRURO IS A VIBRANT RETAIL CENTRE.
- NO IMPACT ON ANY PLANNED INVESTMENT.
- IMPOSITION OF RESTRICTIVE RETAIL CONDITIONS AS WELL – FLOORSPACE LIMITED TO CERTAIN CATEGORIES OF GOODS.
- MOST ACCESSIBLE SITE NEXT TO THE PARK AND RIDE SITE

CASE 2 – LARGE FOODSTORE IN WILLITON, SOMERSET – 4 JULY 2017 [ALLOWED]



- PROVISION OF A FOODSTORE.
- LPA ALLEGE SIGNIFICANT ADVERSE IMPACT.
- NO OVERALL IMPACT ON TOWN CENTRE.
- THE PROPOSAL WOULD INCREASE THE SHARE OF CONVENIENCE GOODS IN THE TOWN.
- THE PROPOSAL WOULD FUNCTION AS PART OF THE VILLAGE'S DEFINED RETAIL AREA.
- EXISTING CO-OP WOULD NOT CLOSE.

CASE 3 – EXTENSION TO EXISTING RETAIL UNIT IN L STOCKTON ON TEES – 5 JULY 2017 [ALLOWED] C

- ERECTION OF ONE RETAIL UNIT WITHIN EXISTING RETAIL PARK AND APPROXIMATELY 1 KM EAST OF STOCKTON TOWN CENTRE.
- NO REQUIREMENT FOR THE SUBMISSION OF A RETAIL IMPACT ASSESSMENT.
- IN ANY EVENT THE IMPACT ON THE TOWN CENTRE WOULD BE 0.18% ON TOWN CENTRE COMPARISON SHOPPING.
- THE APPELLANT HAS SHOWN SUFFICIENT FLEXIBILITY ON THE SEQUENTIAL TEST

CASE 4 – CLEUD APPLICATION AT EXISTING UNIT AT SWANSEA – 5 JULY 2017 [ALLOWED]



- RESTRICTIVE CONDITION ON EXISTING RETAIL PARK ON WHETHER THERE SHOULD BE A RESTRICTION ON GOODS.
- INSPECTOR CONCLUDED THAT THERE WAS A RESTRICTION ON THE RANGE OF GOODS WITHIN CONDITION 5 AND THE SUB-DIVISION OF THE UNITS.
- VERY GOOD EXPOSITION OF THE LAW RELATING TO THE INTERPRETATION OF CONDITIONS.

CASE 5 – EXTENSION TO MILTON KEYNES TOWN CENTRE – 19 JULY 2017 [ALLOWED]



- MAJOR EXPANSION OF TOWN CENTRE.
- SECRETARY CONSIDERED THAT THE PROPOSAL WAS IN ACCORDANCE WITH THE DEVELOPMENT PLAN AND NEIGHBOURHOOD PLAN.
- SUBSTANTIAL PUBLIC BENEFITS FROM DEVELOPMENT TAKING PLACE.
- MATERIAL CONSIDERATION WEIGHING AGAINST THE PROPOSAL WAS HARM TO THE GRADE II SHOPPING BUILDING
- PUBLIC BENEFITS IN CONTEXT OF PARAGRAPH 134 WOULD OUTWEIGH THE HARM.

CASE 6 – MIXED USE DEVELOPMENT IN HEMEL HEMPSTEAD – 27 JULY 2017 [DISMISSED]



- MIXED USE OFFICE AND RETAIL DEVELOPMENT.
- INSUFFICIENT EVIDENCE PROVIDED TO ENABLE INSPECTOR TO CONCLUDE THAT THE DEVELOPMENT FOR BOTH APPEALS WOULD NOT HAVE AN ADVERSE EFFECT ON THE V AND V OF RETAIL OUTLETS INCLUDING THE TOWN CENTRE.
- PROPOSAL WOULD BE CONTRARY TO THE DEVELOPMENT PLAN AND NO MATERIAL CONSIDERATIONS TO OUTWEIGH THAT CONCLUSION.

CASE 7 – LARGE EXTENSION TO TOLLGATE VILLAGE, COLCHESTER – 4 AUGUST 2017 ALLOWED



- DEVELOPMENT PLAN OUT OF DATE BUT PROPOSAL NOT IN ACCORDANCE WITH THE DP.
- THE SEQUENTIAL APPROACH IS SATISFIED BECAUSE NONE OF OTHER SITES CONSIDERED SUITABLE, AVAILABLE OR VIABLE.
- PROPOSAL WOULD NOT CAUSE SIGNIFICANT ADVERSE IMPACT TO THE TOWN CENTRE AND NOT SIGNIFICANT ADVERSE IMPACTS ON EXISTING COMMITTED AND PLANNED INVESTMENT.
- IN THE ABSENCE OF A PUBLISHED DRAFT PLAN IT WAS IMPOSSIBLE TO TEST WHETHER THE PROPOSAL WOULD PRE-DETERMINE ISSUES CENTRAL TO IT.

CASE 8 – REMOVAL OF RESTRICTIVE CONDITION TO WM MORRISON – 20 SEPTEMBER 2017 DISMISSED

- NEW SETTLEMENT WITH PROVISION FOR A SUPERSTORE LIMITED IN TERMS OF SIZE TO 2800 NET SQ M BY CONDITION AND SECTION 106 AGREEMENT.
- WM MORRISON SOUGHT GREATER NET SALES AREA TO 3200.
- INCREASE IN COMPARISON GOODS FLOORSFACE IS NOT HARMFUL TO CAMBOURNE AND NO CONFLICT WITH THE NPPF.
- NO DEVELOPMENT PLAN POLICIES ARE BREACHED EITHER.

CASE 9 – CHANGE TO B8 UNIT TO A1 UNIT

KINGSKERSWELL – 22 SEPTEMBER 2017 [ALLOWED]



- CHANGE OF USE TO A1 UNIT.
- INSPECTOR TOOK INTO ACCOUNT SIGNIFICANT ECONOMIC BENEFITS AND LOCAL ECONOMY.
- LOSS OF EMPLOYMENT LAND OUTWEIGHED BY THE BENEFITS OF THE PROPOSAL.
- IMPOSITION OF RETAIL CONDITIONS TO RESTRICT GOODS IN OUT OF CENTRE LOCATION TO BULKY PET FEEDS AND ANCILLARY GOODS.

CASE 10 – ERECTION OF 3 A1 UNITS AT MACCLESFIELD – 27 SEPT 2017 [ALLOWED]



- ERECTION OF 4 RETAIL UNITS ON PDL LAND TOTALLING 2800 SQ M.
- MAJOR ISSUE AS TO HEALTH OF MACCLESFIELD.
- IMPACT ON MTC WOULD BE 9.6%.
- KEY WEIGHT PLACE ON SIGNIFICANT ADVERSE BY INSPECTOR.
- NO OVERALL SIGNIFICANT ADVERSE IMPACT
- ALSO RESTRICTION PLACED ON THE TYPE OF GOODS.

SECTION 6 – SUMMARY AND CONCLUSIONS

