

## Current Retail Planning Issues

Richard Moules



### INTRODUCTION (1)



- The sequential test
  - what does 'suitable' mean?
  - what does 'available' mean?
- The impact test
  - what type of investment is protected?
  - how does the SofS test retail impact?
  - use of 'no poaching conditions'
- intu Milton Keynes: 1<sup>st</sup> business neighbourhood plan

## SEQUENTIAL TEST



- NPPF para 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 if suitable sites are not available should out of centre sites be considered. When considering edge of centre and out of centre proposals, preference should be given to accessible sites that are well connected to the town centre. Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale. (emphasis added)

## IMPACT TEST



- NPPF 26

When assessing applications for retail...local planning authorities should require an impact assessment... This should include assessment of:

- the impact of the proposal on existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal; and
- the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and wider area, up to five years from the time the application is made. For major schemes where the full impact will not be realised in five years, the impact should also be assessed up to ten years from the time the application is made.

## THE IMPORTANCE OF PASSING THE SEQUENTIAL $\frac{L}{C}$ AND IMPACT TESTS

- NPPF 27

Where an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the above factors, **it should be refused**.

**FAIL TEST**

## SEQUENTIAL: WHAT DOES 'SUITABLE' MEAN? $\frac{L}{C}$

- ***Tesco v Dundee*** [2012] PTSR 983 –the application of the sequential test is a matter of planning judgment, but its meaning is a question of law for the court
- ***Aldergate Properties Ltd v Mansfield DC*** [2016] EWHC 1670 (Admin) at [35], *per* Ouseley J:
  - ...“suitable” and “available” generally mean “suitable” and “available” for the broad type of development which is proposed by 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

## SEQUENTIAL: OPERATOR REQUIREMENTS (1)



- **Warners Retail (Moreton) Ltd v Cotswold DC** [2016] EWCA Civ 606, per Lindblom LJ
  - [30] what is required by way of flexibility as to format and scale depends on the facts and circumstances
  - [31] But, sites should not be rejected on the strength of self-imposed requirements or preferences of a single operator

## SEQUENTIAL: OPERATOR REQUIREMENTS (2)



- **R (oao) The Midcounties Co-operative Limited v Forest of Dean DC** [2017] EWHC 2056 (Admin)
  - Approval of out of centre Aldi despite allegedly sequentially preferable town centre site
  - Officer’s report said Aldi “would not consider developing a new store... with shared customer and town centre pay and display car parking”
  - Members said “the town centre site was simply not suitable for Aldi” & it is not “comparable to the needs of [Aldi]”

## SEQUENTIAL: OPERATOR REQUIREMENTS (3)



- After intervention by the Council's lawyers, the resolution was worded "the sequential test fails because the town centre site was not comparable or suitable *for the broad type of development*"
- Singh J held at [88] that the resolution was the proper focus, not the debate. The resolution showed a lawful application of the sequential test.
- The claim succeeded on other grounds (inconsistency and reasons)

## SUITABLE: WHAT ABOUT EXISTING FLOORSPACE?



- Cribbs Causeway
  - Large extension to existing out of centre mall (56,550 sqm)
  - Hammerson proposal to redevelop existing shopping centre at Callowhill Court site in sequentially preferable Bristol City centre
  - Callowhill Court = approx 47,000 sqm net new retail floorspace i.e. 83% of mall proposal
  - Should SofS look at the net uplift or the total quantum of retail floorspace?

## SEQUENTIAL: SUITABLE IMPLIES VIABLE (1)



- In order to be “suitable” sequentially preferable sites need to be financially viable
- Tollgate, Colchester
  - No viability evidence concerning retail-led development at Vineyard Gate
  - The Council’s development partner had recently pulled out & sold its interest back to the Council
  - No development agreement in place

## SEQUENTIAL: SUITABLE IMPLIES VIABLE (1)



- Cribbs Causeway
  - Hammerson assertion its in centre scheme would be viable
  - Viability appraisal showing ‘healthy land value’
  - BUT no account taken of value of existing asset
  - Applicant’s appraisal shows Hammerson’s scheme is ‘significantly underwater’
- How will SofS deal with the issue?

## SEQUENTIAL: WHAT DOES 'AVAILABLE' MEAN?



OR



## SEQUENTIAL: AVAILABILITY NOT SPECULATIVE



- NPPF 24 simply asks whether sequential sites *are available*
- Tollgate
  - Vineyard Gate required acquisition of 27 different interests
  - CPO likely
  - Difficulties associated with developing close to a Roman wall
  - “any date for deliver of a scheme on Vineyard Gate was speculative” IR/12.3.26 & DL/13

## SEQUENTIAL: AVAILABLE THERE OR THEREABOUTS $\frac{L}{C}$

- Cribbs Causeway –Bristol CC: available within plan period
- Cribbs Causeway –Appellant adopted the approach of looking to see whether development on the sequentially preferable Callowhill Court site was likely in a similar timeframe “there or thereabout” to the Mall. Hammerson’s ‘to do list’ included:
  - Planning permission
  - Development agreement & procurement
  - Land assembly (probable CPO)

## IMPACT: WHAT INVESTMENT IS PROTECTED? $\frac{L}{C}$

- NPPF 26 protects: existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal
- Scotch Corner IR/11.16
  - “...to be considered as planned investment a project has to be at a very advanced stage.”
  - Advanced stage of planning?
  - Opposite of inchoate possible future/hoped for investment (i.e. rejecting Darlington BC’s case)
- Cribbs Causeway: is Hammerson’s scheme planned investment?



## IMPACT: ASSESSING IMPACT ON V&V



- The test in NPPF para 26 looks at

the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and wider area

How do we test the impact on town centre V&V

---

## IMPACT: ASSESSING IMPACT ON V&V



- Rushden Lakes



## THE 'RUSHDEN LAKES' APPROACH



- Impact not significantly adverse because the centres' turnover in the future year of assessment would either be higher than in the base year or similar (DL/24-25 & IR 8.86-8.87)



## IMPACT: ASSESSING IMPACT ON V&V



- Scotch Corner designer outlet



## THE 'SCOTCH CORNER' APPROACH



- IR 11.21
  - There is no percentage impact that would form a threshold or tipping point beyond which the numerical assessment of impact would become significant in Framework terms. Whether there is a significant effect in terms of Framework policy depends on a largely subjective assessment of the underlying strength of the town centres that might be affected i.e. its vitality and viability.

## THE SCOTCH CORNER APPROACH IN ACTION



- IR 11.22
  - A key element in assessing the impact of a proposal on the vitality and viability of town centres is a judgment on the “health” of the centre.
  - Indicators of health include
    - Diversity of uses
    - Proportion of vacant street level property
    - Retailer representation & intentions to change
    - Pedestrian flows & environmental quality

## IMPACT: NO-POACHING CONDITIONS (1)



- Can the planning system do anything to prevent retailers jumping ship from the town centre to new edge & out of centre development?
- Dual representation/no-poaching condition
  - None of approved floorspace shall be occupied by any retailer who occupies (or in the last 12 month occupied) floorspace in the town centre
  - *Unless* the retailer commits to a scheme requiring them to retain their town centre presence for 5 years

## IMPACT: NO-POACHING CONDITIONS (2)



- Scotch Corner: condition 6
- Tollgate: condition 35
- Such conditions have been held by the Court of Appeal: ***R (oao Skelmersdale Limited Partnership) v West Lancashire BC*** [2016] EWCA Civ 1260
- But how effective in practice are they? Especially e.g. Scotch Corner & Cribbs Causeway where the affected town centre is not within the LPA's area...

Will no poaching conditions be enforced?

L  
C



INTU MILTON KEYNES

L  
C



## 1<sup>ST</sup> BUSINESS NEIGHBOURHOOD PLAN



- Policy CMKAP G1 Classic CMK Infrastructure

The classic CMK infrastructure is widely recognised as part of CMK's heritage and as an important public asset that establishes the principle design framework for further development and future prosperity in CMK and its extent, layout and quality will be retained

---

## CLASSIC CKM INFRASTRUCTURE



## SofS's DECISION



- DL/15 & IR279-283

“...harm resulting from the loss of such a small and isolated piece would be outweighed by the benefits of the scheme.”

-Similar conclusion re CMKAP G3 protecting “existing semi-public open space”

