Neutral Citation Number: [2017] EWHC 2056 (Admin)

Case No: CO/6220/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 04/08/2017

Before :

THE HONOURABLE MR JUSTICE SINGH

- -

Between :

The Queen (on the application of The Midcounties Co-operative Limited)	**Claimant**
- and -	
Forest of Dean District Council	**Defendant**
Aldi Stores Limited	**Interested Party**

- -
- -

Mr James Maurici QC (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Mr Vincent Fraser QC (instructed by **the Solicitor to the Council**) for the **Defendant**
The Interested Party did not appear and was not represented at the hearing.

Hearing dates: 21 and 22 June 2017

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Approved Judgment

Mr Justice Singh :

Introduction

1. In this claim for judicial review the Claimant, which is the owner of a supermarket in the town centre of Coleford, Gloucestershire, challenges the planning permission granted by the Defendant on 27 October 2016 to the Interested Party ("Aldi") for the development of a discount food store, car parking and landscaping on land at Tufthorn Avenue, Coleford ("the Site").

2. Permission to bring this claim for judicial review was granted by me after an oral hearing on 14 March 2017.

3. The Site lies within the settlement boundary of Coleford but outside the town centre. On 28 October 2014 Aldi had made an earlier application for planning permission for a similar store on the Site. On 15 July 2015 the Defendant, which is the local planning authority for the area, refused that application.

4. On 23 May 2016 Aldi made a further application for planning permission to develop a store with a few minor modifications. The proposal had slightly reduced car parking. The gross area of the store would be slightly larger but the net floor space would be the same. On 13 September 2016 the Defendant's planning committee was deadlocked and so referred the planning application to the full Council.

5. On 20 October 2016 the full Council considered the planning application and resolved to grant permission. That permission was formally granted on 27 October 2016 and is the subject of the present challenge.

Factual Background

6. The Site is approximately 0.91 ha in area and is undeveloped. It is identified as an employment site in the Defendant's Core Strategy and is allocated for employment-generating uses in the Council's emerging Allocations Plan. The Site is also identified as an employment site by a saved Local Plan policy, which the Allocations Plan will replace.

7. When the Defendant refused the 2014 application for planning permission on 15 July 2015 it gave the following two reasons:

> "01. By reason of the scale of the store proposed and location outside the defined town centre boundary, it would have a significant harmful impact upon the vitality and viability of Coleford Town Centre contrary to the aims and objectives of paragraph 27 of the NPPF [National Planning Policy Framework], paragraphs 13-18 of PPG – Ensuring the Vitality of Town Centres and Policy CSP.14 of the Core Strategy.

> 02. The application site is not sequentially preferable to a known suitable, available and viable alternative site within the town centre. Accordingly the proposal is contrary to the aims and objectives of paragraph 27 of the NPPF and Policy CSP.14 of the Core Strategy."

8. That reference to an alternative site within the town centre was a reference to a site adjacent to Lord's Hill and Pyart Court ("the Lord's Hill Site"). That site is located within the defined town centre boundary. It benefits from an extant planning permission (granted in October 2013) for a food store, although the proposed operator (Tesco) pulled out of the development in late 2014 for financial reasons. The Lord's Hill Site is identified for retail use in the emerging Allocations Plan (draft policy AP54).

9. It was common ground before me that the differences between the applications for planning permission in 2014 and 2016 were minor and that, consequently, the two applications were virtually identical. The minor differences were that:

   i) the gross floor space was 14 sq m greater;

   ii) the canopy over the main entrance lobby was enclosed;

   iii) the total number of parking spaces was reduced by two to 121.

10. In support of the 2016 application there was submitted further information on behalf of Aldi. This included a viability appraisal for each of four alternative site layouts, two of which had been submitted previously in support of the 2014 application. The information also included a Planning and Retail Assessment ("PRA") prepared by Turley Associates Limited in May 2016.

11. The Claimant's agent (Richard Holmes) objected to the 2016 application by emailed letters dated 13 June and 19 July 2016.

12. The Defendant instructed its own independent consultants, GVA Grimley Limited ("GVA") to review the retail planning policy aspects of the 2016 application. GVA gave advice in writing dated 22 August 2016.

13. The Council's officers prepared a report for the Planning Committee. It recommended refusal for the same reasons as the refusal in July 2015.

14. Aldi then made further representations dated 7 September 2016, supported by a written opinion from counsel (Neil Cameron QC). Those documents were reported to the Planning Committee in an update to the Officers' Report.

15. At a meeting of the Defendant's Planning Committee on 13 September 2016, neither a motion for refusal nor a subsequent motion for granting planning permission could gain a majority vote. Accordingly the Committee referred the planning application to the full Council.

16. On 17 October 2016 the Claimant sent the Council a written opinion by Gwion Lewis.

17. On 20 October 2016 an email was sent by Wendy Jackson, the Council's Regeneration Manager.

18. The Council's officers also circulated an update report before the full Council meeting on 20 October 2016. They continued to recommend refusal of the planning application for the same two reasons as before.

19. At its meeting on 20 October 2016 the full Council voted to grant planning permission (31 votes were in favour, 5 were against, with 6 members of the Council abstaining). The full Council set out its reasons in a resolution in the following terms:

> "(a) It would recoup trade that had previously been lost to Coleford.
>
> (b) It would increase employment.
>
> (c) The Site was accessible and well connected to the town centre.
>
> (d) The sequential test fails because the town centre site was not comparable or suitable for the broad type of development.
>
> (e) It would add retail choice.
>
> (f) It would support economic regeneration.
>
> (g) It was sustainable development."

20. It was common ground before me that, although the resolution said at sub-para. (d) that the sequential test "fails", in fact what was meant was "passes."

21. On 27 October 2016 the Defendant formally granted planning permission in accordance with its resolution.

Officers' Reports

22. In preparation for the planning committee meeting on 13 September 2016 there was provided to members an Officers' Report. This was later updated in preparation for the meeting of the full Council on 20 October 2016.

23. The relevant parts of the Report begin at page 76. The Site was considered by the Report in Section 3.

24. After setting out a description of the proposal at paragraph 1 and of the Site at para. 2 and the planning history at para. 3, it was noted at the end of para. 1 that:

> "Revised information has been submitted regarding the sequential test and retail impact."

25. At para. 4 of the Report a summary was provided of the Applicant's representations. These included a reference to the Planning and Retail Assessment.

26. Para. 4 of the Report ended with the following:

> "The Retail Assessment demonstrates that the proposal is in accordance with planning policy at all levels, including key policy tests of impact and the sequential approach to site selection. It confirms that there are no other sites within sequentially preferable locations elsewhere that should be considered appropriate. As the scale of development falls under the 2,500 sq.m. threshold for retail impact assessment, such an assessment is not required in this instance. However, a proportionate impact assessment has been undertaken in any case. The store proposal will deliver a number of major benefits to the Coleford area and the wider community, including the provision of a new limited assortment discount food store, providing increased retail competition and providing the local community with access to affordable, healthy and fresh produce; major employment/economic benefits in terms of construction and retail jobs; reduced unemployment within the area; increased retention of expenditure; and reduced vehicle shopping miles. The application proposal accords fully with the aims and objectives of planning policy towards retail development and there is no policy reason why permission should be withheld."

27. That summary was an accurate and fair summary of the conclusions reached by Turley Associates Limited in its Retail Assessment of May 2016, in particular in the conclusions set out at Section 8 of that Report.

28. Para. 7 of the Officers' Report set out their evaluation by reference to the issues identified in bullet points at the beginning of that paragraph. Those issues included:

    (1) the principle of development;

    (2) the sequential test; and

    (3) retail impact.

29. In relation to (1) the principle of development, the Report concluded that the proposed development was contrary to the aims and objectives of policy CSP.14 of the Core Strategy. This is because policy CSP.14 "supports the provision of up to an additional 1200 sq.m. of convenience goods floor-space and 1300 sq.m. of comparison goods

floor-space within the town centre. It does not make any allowance for such facilities to be located elsewhere in Coleford, be this edge of centre or outside of the town centre."

30. In relation to (2), the sequential test, the Report took the view that, with regards to flexibility on the part of Aldi (or rather what the Officers considered to be lack of flexibility), the applicant "has identified a number of self-imposed commercial requirements." These were said to be that:

> (a) "Aldi has confirmed that for a store in Coleford to be commercially attractive, it would be required to achieve a retail sales area of 1,254 sq.m.";
>
> (b) "Aldi requires 1,254 sq.m. net stores to have 95 [parking] spaces on average ..."; and
>
> (c) "Aldi has confirmed that it would not consider developing a new store in Coleford with shared customer and town centre pay and display car parking."

31. The Report referred to the decisions of the Supreme Court in Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 and the High Court in Aldergate Properties Limited v Mansfield District Council [2016] EWHC 1670 (Admin). It also referred to an appeal decision by the Secretary of State regarding retail development in Exeter, in relation to the issue of parking.

32. Having considered the four alternative site layouts suggested by Aldi for the Lord's Hill Site, the Report expressed the view that:

> "Apart from viability, the only reasons for dismissing these options are: the applicant's self-imposed requirement for a particular number of dedicated parking spaces; the results of a parking accumulation analysis but appears to have ignored the adjacent car parking in the town centre; and, the trading performance of the new Aldi store in Ross-on-Wye."

33. In relation to the issue of viability the Report had earlier advised members that:

> "It should be noted that 'viability' is not a stand-alone test for the sequential test in paragraph 24 of the NPPF. Indeed, the applicant also states that viability is not expressly referenced by the NPPF and merely suggest that the authority incorporate it into the concept of 'suitability'."

34. The Report ended the passage on the sequential test in the following way:

> "The applicant's assessment of this site has also been reviewed by the authority and it is concluded that *no evidence* has been provided to demonstrate why the site is not a suitable alternative. It is considered, that the self-imposed requirement of having dedicated parking spaces and discounting other adjacent spaces in the parking accumulation analysis to be [*sic*] both inflexible and unreasonable. Furthermore, notwithstanding the alleged disadvantages of that store, the applicant has freely developed and continues to operate a new store in the knowledge of shared town centre parking and, as a result, dismissal of that store in Ross-on-Wye is unreasonable. The site at Lord's Hill is available, has the benefit of full planning permission for a store of a similar scale and is located within the town centre adjacent to public car parks. As a result, it is considered that the site at Lord's Hill has the potential to provide a suitable and available sequentially preferable alternative location for the proposed store. The applicant has, therefore, failed to demonstrate that there are no sequentially preferable sites available within the town centre and the proposal should be refused in accordance with paragraph 27 of the NPPF." (Italics added)

35. Mr Fraser QC submitted that the Report was unfair and went too far when it suggested that "no evidence" had been provided by Aldi to demonstrate why the Lord's Hill Site was not a suitable alternative. He reminded me of the contents of the Retail Assessment Report by Turley Associates Limited. He submitted that, even if the Officers' Report and GVA Grimley took a different view, it could not be said that there was *no* evidence before the local authority to support the case being advanced on behalf of Aldi.

36. In relation to (3), retail impact, the Officers' Report ended with the following:

> "The applicant's assessment has been independently appraised on the Council's behalf and the conclusions are that the proposed development is likely to have a significant financial impact on the health of Coleford town centre. The applicant estimates that the impact of the town centre's convenience goods sector will be reduced by around 18%, the analysis undertaken on the Authority's behalf estimates the impact to be 23%-27% of the current level of expenditure flowing to Coleford town centre diverted to the proposed store. Whichever impact estimate is used, it is considered that either amounts to a significant loss of trade for the town centre's convenience goods sector. The applicant also suggests that the store will also act to 'claw back' trade attracted to other stores further afield and the Council's Retail Study has also acknowledged that expenditure from the Coleford catchment area is being lost to other centres. In addition, it is acknowledged that the proposal could provide linked trips with

> the town centre as suggested by [the] applicant's January 2016 household survey, estimating that some 55% will link their trips and help retain expenditure. However, the strength of these benefits is unclear in terms of how they may mitigate in part or in whole for the loss of trips to town centre food stores because the applicant has not provided sufficient information to make a full and proper assessment. It is considered, therefore, that limited weight should be given to this aspect. As a result, it is considered that the vitality and viability of the Coleford town centre will be significantly harmed by the proposed development, contrary to paragraph 27 of the NPPF and paragraphs 13-18 of the associated Planning Policy Guidance – Ensuring the Vitality of Town Centres."

37. The Officers' Report set out its "Planning Balance and Conclusion" in para. 8. The Officers acknowledged that the proposal would retain or "claw back" some of the expenditure that was currently being spent in other town centres. However, they repeated that the applicant's assessment had not provided sufficient detail in order to quantify the extent of those net benefits for Coleford town centre. As a consequence they were of the view that only limited weight (the Report wrongly used the word "benefit" when clearly it meant "weight") could be placed on the potential for any benefits for the town centre.

38. The concluding section also stated that:

> "… There is a sequentially preferable site within the centre that is also available and the resultant harm to the existing town centre is estimated to be significant, at between 18% and 27%. Whilst there are positive factors that are welcomed, this is not a balancing exercise as in a housing development and Paragraph 14 of the NPPF. Paragraph 27 is explicit and states that where an application fails to satisfy the sequential test or is likely to have a significant adverse impact upon town centre vitality and viability, it should be refused."

39. The conclusion went on to state:

> "Moreover, it is considered that there have been no material changes in circumstances which could lead the authority to make a different decision to that of the refusal previously given. Indeed, the recent cases in Mansfield and Exeter, … [have] clarified a number of key issues relating to how to assess the suitability and availability of sites and the weight to be given to the preferences of individual operators. These matters reinforce the position that the scheme is unacceptable."

40. After stating that the proposal was contrary to the aims and objectives of policy CSP.14 in respect of retail development, the conclusion ended in the following way:

> "The proposed site is not sequentially preferable to a known suitable and available alternative within the defined town centre. In addition the vitality and viability of Coleford town centre would be adversely affected by the proposed development. Accordingly, as stated by paragraph 27 of the NPPF and paragraphs 13-18 of the associated PPG – Ensuring the Vitality of Town Centres, when an application fails to satisfy the sequential test or is likely to have significant adverse impact on town centre vitality and viability, it should be refused."

41. The Report ended with para. 9, which set out the Officers' recommendation, that the application for planning permission should be refused for the draft reasons set out in it. Those reasons were the same as the reasons for refusal in July 2015.

42. As I have mentioned, an addendum to the Officers' Report was prepared for the planning committee. This included a summary of the legal opinion which had been submitted on behalf of Aldi from Mr Cameron QC. This included what the opinion said about the Secretary of State's decision in the Exeter case about car parking. The opinion also included reference to the Mansfield case and suggested that that could be distinguished from the present case. However, the Officers remained of the view that the reasons why the Lord's Hill Site was not put forward by the applicant were "self-imposed and therefore failed the relevant tests." The recommendation of the Officers remained one of refusal.

43. Before the meeting of the full Council on 20 October 2016 an update report was provided by Officers, in similar terms to the update to the planning committee. This included a summary of the representations received from Aldi, including the legal opinion from Mr Cameron QC. However, the Officers' recommendation remained one of refusal. In particular the Officers remained of the view that the reasons why the Lord's Hill Site was not considered to be sequentially preferable by the applicant were "self-imposed and therefore failed the relevant tests."

44. Finally, in this context, I should mention the email dated 6 October 2016 from Wendy Jackson (the Regeneration Manager employed by the Council) sent to Tony Pope, its Principal Planning Officer. She was not convinced that the applicant had demonstrated that a food store in this location would enable regular linked shopping trips between Aldi and town centre shops and services. She was also concerned, on the basis of the report from GVA Grimley, that the level of trade diversion "may pose a serious threat to the viability of existing businesses." She concluded by saying that:

> "Although the Aldi proposal would indeed attract new investment and job opportunities to the wider Coleford settlement, I am not convinced that this development will provide any regenerative benefits for Coleford town centre."

Legal and Policy Framework

45. Section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") requires a local planning authority, in dealing with an application for planning permission, to have regard to the provisions of the development plan (so far as material to the application) and to any other material considerations.

46. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

47. The National Planning Policy Framework ("NPPF") is a material consideration. Para. 24 of the NPPF states:

> "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."

48. Para. 26 of the NPPF states:

> "When assessing applications for retail … 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 square metres). 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 5 years from the

> time the application is made. For major schemes where the impact will not be realised in 5 years, the impact should also be assessed up to 10 years from the time the application is made."

49. Para. 27 of the NPPF states:

> "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."

50. Retail development is defined as a main town centre use in the Glossary to the NPPF.

51. The Secretary of State's Planning Practice Guidance ("PPG") on "ensuring the viability of town centres" is also of relevance.

The Grounds of Challenge

52. Although numbered in a slightly different order, at the hearing before me it became apparent that the following order may be more logical in considering the grounds of challenge: Ground 1, Ground 3 and then Ground 2.

53. Ground 1 is summarised in the Claimant's skeleton argument at para. 49 in the following way. The Claimant contends that the Defendant:

a) unlawfully misinterpreted or misapplied the suitability criterion of the sequential test in concluding that the Lord's Hill Site was "not suitable for Aldi" or "too small" for Aldi – this was the true basis for the decisions; or

b) alternatively, insofar as it did purport to conclude that the Lord's Hill Site was not sequentially preferable "for the broad type of development" proposed, it failed to identify any or any adequate basis for that conclusion and/or this was not a conclusion that could rationally be made on the evidence; or

c) alternatively, inadequate reasons have been given for the decision reached.

54. Ground 3 is that the Defendant failed to consider a relevant matter by failing to come to a final decision on the impact test and its application in this case.

55. Ground 2 is that the Defendant unlawfully failed to have regard to the importance of consistency with the 2015 decision to refuse the 2014 application or to give reasons for coming to a different conclusion in 2016.

Relevant Legal Principles

56. The first principle to make clear is that, in this country, the planning system is entrusted by Parliament to democratically elected councillors. This was made clear by Lady Hale JSC in Morge v Hampshire County Council [2011] 1 WLR 268. At para. 36 she said:

> "Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. … Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisors who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the court should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's to weigh the competing public and private interests involved."

57. The second fundamental principle, as was mentioned in that passage by Lady Hale, is that questions of weight as to planning matters are for the decision-maker and not for the court: see Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759. As is well known, Parliament has decided, in its wisdom, not to create a system of appeals where a planning permission is granted, whereas an appeal is available to a disappointed applicant where planning permission is refused. It is important, therefore, that the procedure by way of judicial review in this court should not (even inadvertently) be allowed to become in substance an appeal. It would not be appropriate for this court, when considering a claim for judicial review, to enter into a debate about the respective planning merits of proposed development on behalf of either a developer or objectors to the grant of a planning permission.

58. The third principle to bear in mind is that a decision such as that under challenge in the present case is taken by a collective body, in this case the full Council. In R v London County Council, ex p. London and Provisional Electric Theatres Limited [1915] 2 KB 446, at 490-491, Pickford LJ said:

> "With regard to the speeches of the members which have been referred to, I should imagine that probably hardly any decision

> of a body like the London County Council … could stand if every statement which a member made in debate were to be taken as a ground of the decision. I should think that there are probably few debates in which someone does not suggest as a ground for decision something which is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being found on that particular ground is wrong."

59. As Schiemann J (as he then was) said in R v Poole Borough Council, ex p. Beebee [1991] 2 PLR 27, at 31:

> "… I have grave reservations about the usefulness of this sort of exercise when there is no allegation of bad faith. These reservations in part arise out of the theoretical difficulties of establishing the reasoning process of a corporate body which acts by resolution. All one knows is that at the second that the resolution was passed the majority were prepared to vote for it. Even in the case of an individual who expressly gave his reasons in council half an hour before, he may well have changed them because of what was said subsequently in debate."

60. In the present case also it should be noted that Mr Maurici QC does not allege bad faith on the part of the Defendant authority.

61. Finally, in this context, it is important to recall that, insofar as it is helpful to refer to the debate of a collective decision-making body such as this, it is "the general tenor of their discussion rather than the individual views expressed by committee members, let alone the precise terminology used" which will be relevant: see R v Exeter City Council, ex p. Thomas [1991] 1 QB 471, at 483-484 (Simon Brown J, as he then was); see also R (Tesco Stores Ltd) v Forest of Dean District Council [2014] EWHC 3348 (Admin), para. 23 (Patterson J).

62. The fourth principle relates to the duty to give reasons. It was common ground before me that, in this court at least, it was unnecessary to go into the question of whether such a duty to give reasons existed in the present case. There is certainly no statutory duty to give reasons. If necessary, Mr Maurici QC would have argued that there is a duty to give reasons at common law, by way of analogy with the decision of the Court of Appeal in R (Oakley) v South Cambridgeshire District Council [2017] 2 P & CR 4. On behalf of the Defendant Mr Fraser QC wished to reserve his position on this question should the matter go further. However, for practical purposes at this level at least, he acknowledged that the reality of the situation is that reasons were in fact given. Those reasons consisted of the resolution which was passed by the full Council at its meeting on 20 October 2016.

63. Mr Maurici QC submits that, in those circumstances, it is now established that the adequacy of the reasons in fact given for a decision should be tested by the same criteria as if there were a duty to give reasons. In support of that proposition he relies upon the decision of Sedley J (as he then was) in R v Criminal Injuries Compensation Board, ex p. Moore [1999] 2 All ER 90, at 94:

> "It is known that the board, while maintaining its contention that it has no obligation to give reasons … often volunteers them. In such cases it is accepted, consonantly with decisions such as that of Hutchison J in R v Criminal Injuries Compensation Board, ex p. Cummins [1992] 1 PIQR 81, that the reasons are open to scrutiny and review upon ordinary public law principles, which may include the question of their adequacy.
>
> It follows that, since reasons were given in the present case, it is not necessary to decide whether there was a legal obligation to give them. Once given their adequacy falls to be tested by the same criteria as if they were obligatory."

64. The case of Moore went to the Court of Appeal but that Court, in an unreported decision dated 23 April 1999 (1999 WL 250047) did not pronounce on this question. This was because the Court of Appeal held that there was a duty in that case to give reasons at common law.

65. The issue was considered more recently by Lang J in R (Hawksworth Securities plc) v Ireef Queensgate Peterborough Propco SARL [2016] EWHC 1870 (Admin). At para. 71 Lang J referred to the decision of Sedley J in the Moore case. However, as she explained at para. 72, she was not convinced that the principle in Moore applied to the circumstances of the case before her because "unlike the oral ruling given by the Criminal Injuries Compensation Board at the end of its hearing, the Committee's minutes were not volunteered as its formal reasons for the decision." Lang J held that the reason why the committee had provided a record of its proceedings was that it was under a duty to record minutes of proceedings at its meetings, pursuant to para. 41 of Sch. 12 to the Local Government Act 1972 and not so as to give its reasons for a decision under the planning legislation. At para. 75 she said that:

> "If the claimant's analysis was correct, the mere act of recording some reasons for a decision in the minutes of the meeting would trigger an obligation on local planning authorities to provide legally adequate reasons in every case where planning permission was granted, even though the Secretary of State has made an order, laid before Parliament, which does not require local planning authorities to give reasons for the grant of planning permission. This would be surprising. As recently as 2013, the Secretary of State, pursuant to his duties under the Town and Country Planning Act 1990, decided it was appropriate to remove the duty to give 'summary reasons' for the grant of planning permission …"

As is well known that statutory duty to give some reasons had only been imposed in 2003.

66. At para. 82 Lang J said that if, contrary to her view, the minutes of the meeting were to be treated as voluntary reasons which had to be tested by the same criteria as if reasons for the decision were obligatory, the parties in that case disagreed as to the standard of reasoning which was required. The claimant submitted that Lord Brown of Eaton-under-Heywood's classic formulation applied: see South Buckinghamshire District Council v Porter (No. 2) [2004] 1 WLR 1953, at para. 36. In that well known passage Lord Brown said:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospect of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

67. At para. 86 Lang J reminded herself that she was considering a situation where there was not even the statutory requirement to give "summary reasons", let alone full reasons. At para. 87 she said:

> "I agree with submissions made by the defendant and the [interested party] that Lord Brown's formulation in South Buckinghamshire, which applies where a minister or inspector is giving a decision on appeal, is not the standard to be applied to a local planning authority's decision to grant planning permission. Planning appeals are an adversarial procedure akin to court or tribunal proceedings, in which opposing parties make competing submissions, and the decision-maker

> adjudicates upon them, giving reasons for his conclusions on the 'principal important controversial issues', limited to 'the main issues in dispute' not 'every material consideration' … In contrast, a local planning authority is an administrative body, determining an individual application for planning permission. Its reasons ought to state why planning permission was granted, usually by reference to the relevant planning policies. But it is not conducting a formal adjudication in a dispute between the applicant for planning permission and objectors, and so it is not required to give reasons for rejecting the representations made by those who object to the grant of planning permission."

68. At para. 88 Lang J said:

> "… Whereas a minister's decision on appeal is intended to be a 'stand-alone' document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal, a local planning authority's reasons for granting planning permission by their very nature do not present a full account of the local planning authority's decision-making process, in which the planning officer's report is a crucial part. It is expected that the report will form the background to the reasons. I also consider it would be unduly onerous to impose a duty to give detailed reasons, as proposed by the claimant, given the volume of applications which have to be processed."

69. At para. 89 she concluded:

> "For these reasons, I consider that where a local authority planning committee gives reasons for a grant of planning permission it need only summarise the main reasons for the decision and can do so briefly. The committee is not required to set out each step in its reasoning, nor indicate which factual matters were accepted or rejected. Indeed, as the committee will comprise a number of councillors who may well have reached their shared conclusion by different routes, it would be impractical and undesirable for the committee to set out its step-by-step reasoning. …"

70. At para. 90 Lang J said:

> "I do not consider that this causes any unfairness since those who have a particular interest in the outcome will already be well aware of the competing arguments and recommendations. An unsuccessful objector can safely assume that his objections

> were either not accepted or were not considered of sufficient weight to outweigh the case in favour of the application."

71. However, as will be apparent from para. 91 of her judgment, that was a case in which the planning committee had accepted the conclusions set out in the planning officers' report to it.

72. The decision of Lang J in the Hawksworth case was considered by the Court of Appeal in R (CPRE Kent) v Dover District Council [2016] EWCA Civ 936, in which the main judgment was given by Laws LJ.

73. At para. 20, having considered the judgment of Lang J in Hawksworth Laws LJ said:

> "I would by no means suggest that this reasoning is wrong in principle: the differences between an inspector's decision after a planning inquiry and a planning authority's resolution to grant permission are real enough. … That said, I think that Lang J's approach needs to be treated with some care. Interested parties (and the public) are just as entitled to know why the decision is as it is when it is made by the authority as when it is made by the Secretary of State."

74. Laws LJ then went on to say that, in any event, there were a number of features in the CPRE case which pointed away from Lang J's approach in Hawksworth. First was "the pressing nature of the policy" in paras. 115-116 of the NPPF relating to areas of outstanding natural beauty. He said:

> "A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must surely give substantial reasons for doing so." See para. 21.

75. Secondly, he pointed to the fact that the planning committee did not accept the officers' recommendation but departed from it. He cited with approval what had been said by Hickinbottom J (as he then was) in Mevagissey Parish Council [2013] EWHC 3684 (Admin), at para. 54. He went on to state:

> "Where the Planning Committee is disposed to disagree with the Council's officers – especially in an AONB case – it must ('if but briefly') engage with the officers' reasoning."

76. In the circumstances of the CPRE case Laws LJ concluded that the committee had failed to give legally adequate reasons for their decision to grant planning permission: see para. 31. He went on to add this at para. 32:

> "… This is an unusual case. … The scale of the proposed development is unprecedented in an AONB. This judgment … should not be read as imposing in general an onerous duty on local planning authorities to give reasons for the grant of permissions, far removed from the approach outlined by Lang J in Hawksworth. As Lord Brown said in South Buckinghamshire, 'the degree of particularity required depend[s] entirely on the nature of the issues falling for decision'."

77. Before the statutory duty to give reasons for the grant of planning permission was imposed in 2003, it had been held by the Court of Appeal that there was no general duty to give reasons in such cases: see R v Aylesbury Vale District Council, ex p. Chaplin (1996) 76 P & CR 207. That decision has more recently been explained by the Court of Appeal as being one where it was obvious why the planning committee had reversed an earlier decision. It had made a site visit and had reconsidered the advice of the planning officer, which was in favour of the proposal. It was clear therefore that the planning committee must have reached a different judgement, as it was entitled to do: see the explanation given by Lang J in Hawksworth, at para. 77; and also the explanation given in Oakley at paras. 47 and 49 (Elias LJ).

78. Another case which was decided before the statutory duty to give reasons was imposed in 2003 was R v Mendip District Council, ex p. Fabre (2000) 80 P & CR 500. That was a case concerned with whether there was a duty to give reasons. However, in holding that, in the circumstances, no such duty arose Sullivan J (as he then was) acknowledged that there might be circumstances where such a duty would arise. At p. 510 he said:

> "An obvious example of such a circumstance is, in principle, where a local planning authority has changed its mind and decided to grant planning permission for a development which it has previously refused … I say 'in principle' because it may be plain from all the surrounding circumstances why the council has changed its mind, as was the case in ex p. Chaplin (per Pill LJ at p. 53). There may be cases where reasons should be set out in a minute. … Equally, there may be cases where that would be unnecessary in the light of the factual background. I am satisfied that this case falls into the latter category … If there has been an earlier refusal, as recommended by a planning officer, followed by a grant of planning permission, contrary to the planning officer's considered recommendation, some explanation will be required, since by definition it will not be possible to find it in the officer's report. So it will be necessary to search elsewhere for the reasons why the members decided to change their minds. In such circumstances, it might well be sensible at the very least to record the members' reasons in the form of a minute …"

79. The final principle to which it is necessary to make reference here is that there will be circumstances in which an earlier decision must be taken into account by the decision maker, and if a different decision is to be made, reasons for that departure will have to be given. This principle was established by the Court of Appeal in North Wiltshire District Council v Secretary of State for the Environment (1993) 65 P & CR 137.

80. At p.145 Mann LJ, who gave the main judgment, said:

> "… It was disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way and I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate." (Italics in original)

81. In R (Midcounties Co-operative Limited) v Forest of Dean District Council [2013] EWHC 1908 (Admin) Stewart J held that the principle in the North Wiltshire case also applies to decisions of a local planning authority. At para. 16 he said:

> "The principle is not limited to decisions of an Inspector/the Secretary of State. It requires an earlier material decision to be taken into account. A decision is material unless it is distinguishable. A decision maker in a subsequent matter therefore should
>
> (a) decide whether the earlier decision is distinguishable;
>
> (b) if not distinguishable, then any disagreement must weigh the earlier decision and give reasons for departure from it. …"

Ground 1

82. I have already set out the different ways in which Ground 1 is formulated by Mr Maurici QC on behalf of the Claimant. Ground 1(a) is that the Defendant unlawfully misinterpreted or misapplied the suitability criterion of the sequential test. In particular Mr Maurici QC submits that the Defendant fell into the same error as in the Mansfield case. He submits that it did not consider whether the Lord's Hill Site was suitable for the broad type of development concerned but rather whether it was suitable for this particular developer, that is Aldi. He submits, as this ground was formulated in writing, that "this was the true basis for the decision."

83. In my view that formulation comes perilously close to an allegation of bad faith. In other words the submission appears to be that, whatever the reason given in the resolution passed by the full Council on 20 October 2016 (see in particular sub-para. (d)), that was not the true reason. However, at the hearing before me, Mr Maurici QC disavowed any suggestion of bad faith.

84. Nevertheless Mr Maurici QC sought to persuade me that there was evidence that the Defendant misdirected itself as to the correct legal test and considered that the Lord's Hill Site was too small for this particular operator rather than the broad type of development. For example, he drew my attention to the minutes of the meeting (at p. 16) when a Councillor Easton "advised that this was too small for Aldi." He also observed that (at p. 18 of the minutes) a Councillor Morgan stated that:

> "People just want choice and the town centre site was simply not suitable for Aldi."

85. In similar vein Mr Maurici QC drew attention to certain passages in the transcript of the same meeting. For example (at p. 506 of the bundle) a Councillor James said "yes I don't believe that what has been deemed to be a preferable site in actual fact is comparable to the needs of the applicant."

86. Mr Maurici QC also drew attention to the fact that (at p. 507 of the bundle), the transcript records that, when efforts were being made at the meeting to draft the terms of a resolution, advice had to be obtained and that it was only after such advice had

been obtained that the wording of the resolution as eventually passed by the meeting was drafted. In my judgement that point takes the Claimant's argument no further once it is conceded that there was no bad faith. The Court has to proceed on the basis that the reasons for the decision which are set out in the resolution are the genuine reasons. Furthermore, the fact that they may have had to be refined during the course of drafting does not mean that the reasons as eventually passed by the meeting are anything other than the true reasons. All that one can safely say is that, once the final wording of the motion had been arrived at, that is the wording which a majority of the councillors present at the meeting were willing to pass.

87. Insofar as Mr Maurici QC has sought to draw attention to the statements of some of the councillors who took part in the discussion at the meeting, I have not found that helpful in resolving the issues in this case. This is essentially for the reasons set out in the authorities to which I have already referred. It is clear from those authorities that:

(1) The decision is that of a collective body, not individual members of it.

(2) It is therefore the "general tenor" of their discussion rather than the individual views expressed by members which will be relevant.

(3) Even in the case of an individual who may have expressed something earlier during the course of the discussion, he or she may well have changed their view because of what has been said subsequently in debate.

(4) The law encourages the formulation of the reasons of a collective decision-making body in the form of a minute. It is helpful to all concerned, including the Court if there is an application to it, to have such a minute of the reasons for the collective decision.

88. It is therefore to the terms of the resolution that the Court must turn in order to decide whether an erroneous approach has been taken as a matter of law. It is clear from that resolution, at sub-para. (d), that the Defendant correctly directed itself as to the relevant test, namely whether a site was suitable for the broad type of development and did not fall into the error of thinking that it was the needs of the particular operator Aldi which had to be accommodated. I therefore reject Ground 1(a).

89. Ground 1(b) is in substance an allegation that the opinion to which the Defendant came (that the sequential test was passed) was one that could not rationally be reached on the evidence.

90. The Claimant acknowledges that the test of irrationality imposes a high threshold for it to overcome, especially in matters of planning judgement. Nevertheless Mr Maurici QC submits that this is a case in which that threshold has been passed. In particular he submits that, on the basis of the Officers' Report and the report from GVA, the Defendant could not rationally come to any other view. He also submits that the Planning and Retail Assessment filed on behalf of Aldi did not constitute evidence to the contrary because it was tainted by an erroneous approach in law, which was based upon an understanding of the law which preceded the Mansfield decision. He submits that the Defendant as a whole should have taken the view which its Officers had taken, namely that Aldi had "identified a number of self-imposed commercial requirements."

91. However, in my view, Mr Fraser QC is right to submit that that goes too far. It is not right to say that there was "no evidence" to support the case being advanced on behalf of Aldi. The question of whether the sequential test had been passed or not was essentially one of planning judgement and it was one for the Defendant. It was not one for its Officers, still less for this Court. It should also be borne in mind in this context that, as Lady Hale JSC observed in Morge, which I have cited earlier, the planning system in this country has been entrusted by Parliament to democratically elected councillors. Democratically elected bodies go about their decision-making in a different way from courts, for example. It is their job and not the Court's to weigh the competing interests. They are entitled to take into account their knowledge of the local area.

92. In my judgement, having had the correct legal test drawn to their attention, the members of the Council were reasonably entitled to come to the conclusion which they did on the sequential test. The irrationality challenge therefore fails in this regard.

93. Ground 1(c) is a reasons challenge. Mr Maurici QC submits that inadequate reasons were given for the decision reached upon the sequential test.

94. In addressing this question it is important to recall the principles which I have already set out by reference to the authorities as to the duty to give reasons and the test for the adequacy of reasons in this context. In particular it must be recalled that:

    (1) There was no statutory duty to give reasons, not even summary reasons.

    (2) The degree of particularity required depends entirely on the nature of the issues falling for decision.

    (3) The sort of decision under challenge is very different from a decision letter of a planning inspector or the Secretary of State after an appeal against the refusal of planning permission.

95. Mr Maurici QC is right to observe that in this case, unlike Hawksworth, and more like the CPRE case, the view to which the members came was different from the view of their Officers. Accordingly, he submits, insofar as the parties and others may seek to find the reasons in the Officers' Report, they will not find them there. However, in my judgement, that submission goes too far. Although the Officers made their own view very clear to the members in their report, they did also summarise the contrary view which had been advanced on behalf of Aldi and which was in part supported by the opinion of independent leading counsel (Mr Cameron QC).

96. To require more in the present case would, in my view, amount to requiring "reasons for reasons." In my judgement, the reasons in the resolution in the present case were adequate.

97. Accordingly I reject Ground 1.

Ground 3

98. Under Ground 3 Mr Maurici QC submits that the Defendant failed to consider a relevant matter by failing to come to a final decision on the impact test and its application in this case.

99. On behalf of the Defendant Mr Fraser QC submits that this is simply incorrect. He submits that it is clear that the Defendant did have regard to the question of impact on the town centre. However, he submits, there was a real issue between the parties as to whether the impact would be as severe as contended for by some like the present Claimant or whether it would be offset, for example by "linked trips."

100. The fundamental difficulty with that submission by Mr Fraser QC is that nothing of that sort appears in the resolution passed by the Council at its meeting on 20 October 2016. It is common ground that that is where the reasons for the decision under challenge are to be found. Although Mr Fraser QC is entitled to submit, as he does, that sub-paras. (a), (c), (f) and possibly some of the other sub-paragraphs in the resolution could be regarded as touching to some extent upon the sort of issues which were raised by the question of the retail impact test, the difficulty is that the retail impact test itself was never set out in the resolution at all. This is not a quest for particular wording; what matters is substance not form. As a matter of substance the retail impact test is simply not there.

101. As Mr Maurici QC rightly submits, the resolution makes no reference to retail impact or harm to the viability of the town centre whatsoever. Still less does it make any reference to whether such impact would be "significant." The resolution makes no reference to questions of degree as to how much impact there would be in the opinion of the members of the Council. Nor does it make reference to the extent to which it would be offset by, for example, linked trips. Finally, as Mr Maurici QC submits, there is no reference at all to the other element of impact mentioned in para. 26 of the NPPF: that is impact on investment. That this was an important feature of the present case is illustrated by the email from Wendy Jackson dated 6 October 2016, which I have cited earlier.

102. Ground 3 is not as such a reasons challenge. Nevertheless, it emphasises the importance of reasons for decision-making. Such reasons need not be lengthy or detailed. Very often, as the authorities I have cited earlier make clear, it will be possible to discern what the reasons for a decision are from the fact that the local planning authority has accepted the recommendation of its Officers, in which case one can reasonably be expected to go to the Officers' report in order to find a fuller statement of what the reasons were. This is not such a case.

103. Nor, in my judgement, does it follow that it is impossible or very difficult for a lay body such as a local authority to formulate reasons on this sort of issue. An example of an attempt at least to formulate a reason based on retail impact and harm to the town centre can be found in the minutes of the meeting of the Planning Committee on 13 September 2016. At p. 11 of the minutes there can be found a draft formulation by Councillor Bevan, which sought to set out the reasons for his proposal that the planning application should then be approved. Although that motion was lost at the committee stage, and although Mr Maurici QC would not necessarily accept the accuracy of the formulation of the reason even then, nevertheless that attempt does

demonstrate, in my view, how it is possible in principle for a body such as this Defendant, no doubt after proper advice, to set out its reasoning on the retail impact issue, albeit briefly. In my judgement the Defendant failed to do the minimum which it was required to do in this case.

104. Accordingly Ground 3 succeeds.

Ground 2

105. Under Ground 2 Mr Maurici QC submits that the Defendant failed to have regard to the importance of consistency with its earlier refusal of an application which was materially the same in 2015 or to give reasons for coming to a different conclusion in 2016.

106. On behalf of the Defendant Mr Fraser QC submits that the Defendant was clearly aware of that earlier refusal. It came to a different view in 2016, not least because further information was placed before it on behalf of Aldi, including the retail assessment and the legal opinions by Mr Cameron QC.

107. In my view, that submission again suffers from a fundamental flaw. The fact is that there is no reference in the Defendant's reasons to the earlier refusal or the reasons for that refusal at all. Although the authorities demonstrate that a local planning authority is not bound by its earlier decision, nevertheless it is required to have regard to the importance of consistency in decision-making. Even if it could be said that the Defendant simply came to a different view as to the sequential test, essentially for the reasons I have set out in addressing Ground 1 earlier, it cannot be said that the Defendant in any way grappled with the earlier reason for refusal based on retail impact and harm to the viability of the town centre. This is for reasons which are essentially the same as I have set out in addressing Ground 3 earlier.

108. Furthermore, in this context it is also important to bear in mind that this was a case in which the council members were disagreeing with the views and recommendation of their Officers. Accordingly, again, it is a case in which it is simply not possible to discern by implication what the reasoning was by reference to the Officers' Report. On this point the Officers would not have set out the competing representations, since their recommendation was for refusal and based on exactly the same reasons as in 2015.

109. Accordingly, this is not a case like Chaplin, where it was obvious what the reason for a change of view was. As I have already explained by reference to the later authorities, that is how Chaplin has been understood in later decisions such as Fabre and Oakley.

110. Accordingly, Ground 2 succeeds.

Relief

111. If the Court should find that either Ground 3 or Ground 2 succeeds, the Defendant submits that the Court should nevertheless refuse relief pursuant to its duty under section 31(2A) of the Senior Courts Act 1981, as amended by section 84 of the Criminal Justice and Courts Act 2015, because it is highly likely that the outcome would not be substantially different for this Claimant even if the conduct complained of had not occurred. It should be emphasised that Mr Fraser QC did not advance that argument in relation to Ground 1 should that ground be successful.

112. Section 31(2A) provides:

> "The High Court –
>
> (a) must refuse to grant relief on an application for judicial review … if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

113. Subsection (8) provides:

> "In this section 'the conduct complained of' … means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting the relief."

114. By virtue of subsection (2B) the Court may disregard the requirements in subsection (2A) "if it considers that it is appropriate to do so for reasons of exceptional public interest."

115. Mr Fraser QC submits that, in the circumstances which have arisen, the Court should refuse relief pursuant to its duty in subsection (2A).

116. I am unable to accept that submission, however attractively it was presented.

117. First, I am not of the view that it is "highly likely" that the outcome would not be substantially different for the Claimant. The errors which I have found to have occurred in the Defendant's approach in this case in Grounds 2 and 3 are such that, in my judgement, the statutory test is not met. I do not know what view the Defendant will take if it directs itself correctly according to law. It did not ask itself the right questions, in particular in respect of the retail impact issue which has been raised under Ground 3. If it did direct itself correctly as a matter of law it would have to reach a planning judgement.

118. That leads me on to my second reason for concluding that the statutory test is not met in the present case. As is well known and well established on the authorities, matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this Court generally speaking to anticipate what the outcome

would be if a planning authority directs itself correctly according to law. In my judgement, this is not a case where the Court can say that the statutory test is met.

119. Accordingly I propose to quash the grant of planning permission in this case on Grounds 2 and 3.

Conclusion

120. For the reasons I have given this claim for judicial review succeeds on Grounds 2 and 3 and the planning permission dated 27 October 2016 will be quashed.