

## Retail Planning Update

12 October 2015  
Roddy Macdonald  
Principal Associate



## Topics

- Retail Planning Policy – interpretation
- Impacts on Town Centres – approach to mitigation
- Sequentially preferable sites – meaning of available
- Previous appeal decision – material consideration
- Retail Restrictions – Peel case

## Cases

Tesco Stores Limited v Dundee City Council [2012] UKSC 13  
 R(Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2013] EWHC 1908 (Admin)  
 R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2014] EWHC 3059 (Admin)  
 R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2015] EWHC 1251 (Admin)  
 R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2013] EWHC 1908 (Admin)  
 R (Trashorfield Limited) v Bristol City Council and Sainsbury's Limited [2014] EWHC 757 (Admin)  
 R (Tesco Stores Limited) v Forest of Dean District Council and Others [2015] EWCA Civ 800  
 R (Tesco Stores Limited) v Forest of Dean District Council and Others [2014] EWHC 3348 (Admin)  
 R (CBRE Lionbrook (General Partners) Limited) v Rugby Borough Council and Hammerson (Rugby) Limited [2014] EWHC 646 (Admin)  
 R (Milton (Peterborough) Estates Co (t/a Fitzwilliam (Malton) Estate)) v Ryedale DC [2015] EWHC 1948 (Admin)  
 R (Peel Land and Property Investments plc) v Hyndburn Borough Council and Others [2013] EWCA Civ 1680

## Retail Planning Policy - Interpretation

## Retail Planning Policy

### Interpretation

*Tesco Stores Limited v Dundee City Council [2012] UKSC 13*

- In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgement: it is a logically prior question as to the issue to which planning judgement requires to be directed.

## Impacts on Town Centres – approach to mitigation

## Impacts on Town Centres

### Approach to mitigation

R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2013] EWHC 1908 (Admin)

- Previous store application refused in 1999.
- The Council needed enough information to be able to appraise the contributions on offer and, in particular, to assess the extent to which (if at all) those contributions would reduce the harm identified.
- Failure to satisfy the CIL Regulations. Mitigation proposals found not to be "necessary to make the development acceptable".

## Impacts on Town Centres

R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2014] EWHC 3059 (Admin)

- "The same of similar errors were made again, all stemming from the Council's continuing failure to explain how, for example, paying for a 'bus service' between the new store and the town centre, or for 'cosmetic enhancements' in the street scene, could mitigate harm to vitality and viability if the town centre would be lacking retail attraction as a result of the abstraction of trade from the centre to the proposed out-of-centre store. Shoppers come to the town centre to visit retail facilities such as the food store operated by the [Claimant]; they do not come to view new street lights in front of vacant stores."

08/10/2015

## Impacts on Town Centres

R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2014] EWHC 3059 (Admin)

- OR2 failed to consider how S106 obligations would or might encourage more town centre visits.
- No adequate explanation of how mitigation sufficient.
- Failure to distinguish from 1999 decision.
- Incorrect interpretation of NPPF.

## Impacts on Town Centres

R (Mid Counties Co-operative Ltd) v Forest of Dean District Council and Others [2015] EWHC 1251 (Admin)

- Full impact on town centre and Claimant's store not clearly identified.
- Balancing exercise vitiated by flaw in approach.
- Conclusion that mitigation was "necessary" not justified.

## Impacts on Town Centres

### Approach to mitigation

R (Trashorfield Limited) v Bristol City Council and Sainsbury's Limited [2014] EWHC 757 (Admin)

- Retail impact risk management statement submitted which set out a range of measures.
- Council run fund with consultation and subsequent fine tuning.
- Council must consider the nature and extent of the predicted adverse impact and how the measures will address that impact, but that does not mean that the precise detail of the measures needs to be specified at or before the obligation is entered into, and then locked into that obligation.

## Impacts on Town Centres

### Approach to mitigation

R (Tesco Stores Limited) v Forest of Dean District Council and Others [2014] EWHC 3348 (Admin)

- Alleged that the Committee lacked relevant information that it needed to assess the extent to which the contribution offered would mitigate the harm identified. *Mid Counties* cited.
- Members knew what the benefits were and were satisfied that the contents of the obligation outweighed the harm.
- The Council was not constrained by prior findings, as in *Mid Counties*.

## Impacts on Town Centres

*R (Tesco Stores Limited) v Forest of Dean District Council and Others [2015] EWCA Civ 800*

- Appellant argued that scale of S106 obligations not established therefore impossible to conclude that these were “fairly and reasonably related in scale and kind to the development”.
- Officer’s conclusions that obligations could mitigate in part not *Wednesbury* unreasonable.
- Approach to Regulation 122(2) would vary depending upon circumstances of each case.
- NB Permission to appeal has been sought.

## Sequentially preferable sites – meaning of “available”

## Sequentially Preferable Sites

### Meaning of “Available”

*R (CBRE Lionbrook (General Partners) Limited) v Rugby Borough Council and Hammerson (Rugby) Limited [2014] EWHC 646 (Admin)*

- Claimant argued that it owned a sequentially preferable town centre site that was “available”, “suitable” and “viable”.
- Hammerson said town centre site involved complex land ownership and not being actively progressed. Certainly would not be brought forward within the next five years – not therefore “available sequentially preferable site”.

## Sequentially preferable sites

### Meaning of “Available”

- Court noted that there were:
  - No obvious arrangements for the relocation of the office within the site
  - No application for planning permission
  - No development agreement in place
  - No likely tenants or anchor
  - No evidence of viability
- Perfectly reasonable to conclude that not available within the next 5 years and the timescales were reasonable given the trade loss and urgency to improve the situation.
- NB: Rushden Lakes Call-in.

## Previous appeal decision – material consideration

08/10/2015

## Previous appeal decision material consideration

*R (Milton (Peterborough) Estates Co (t/a Fitzwilliam (Malton) Estate) v Ryedale DC [2015] EWHC 1948 (Admin)*

- Planning applications for retail development on Livestock Market Site (LMS) and Wentworth St Car Park Site (WSCPS) in ‘Northern Arc’.
- Council refused application for LMS on basis WSCPS was sequentially preferable.
- On appeal, the Council acknowledged had misapplied the sequential test.
- Inspector granted PP for LMS, finding WSCPS to be sequentially less preferable.

08/10/2015

## Previous appeal decision material consideration

- Claim brought by owners of LMS.
- Claimant contended officer's report had significantly misled Committee re. Inspector's sequential approach.
- Court held an Inspector's decision capable of being a material consideration, a Committee should usually follow the reasoning of an Inspector's report.
- The OR had misled Committee with no adequate reason provided for reaching different conclusion
- Exclusion of Inspector's decision that LMS was a town centre site meant NPPF applied without considering Para 26 protection to Claimant's proposals.

08/10/2015

## Retail Restrictions – Peel case

## Retail Restrictions

### *Peel case*

*R (Peel Land and Property Investments plc) v Hyndburn Borough Council and Others [2013] EWCA Civ 1680*

- Out of town retail shopping park with bulky goods restriction in s.106 Agreement.
- Peel secured planning permission for physical changes to the units and argued that this released them from the restriction.
- The Court of Appeal disagreed, noting that the planning permission was for operational development and not change of use, therefore the restriction still applied.

## Retail Restrictions

### *Peel case*

- The Court of Appeal stated that the "outcome of the appeal will have wider repercussions for other local planning authorities and other developers of out-of-town retail shopping parks as well as for town centres, for other kinds of retail outlets and for the public generally".

EVERSHEDS

Roddy Macdonald  
Principal Associate

Eversheds LLP  
Bridgewater Place  
Water Lane  
Leeds  
LS11 5DR

[eversheds.com](http://eversheds.com)

©2015 Eversheds LLP  
Eversheds LLP is a limited liability partnership