



Neutral Citation Number: [2015] EWHC 1948 (Admin)

Case No: CO/4915/2014

IN THE HIGH COURT OF JUSTICE
PLANNING COURT (LEEDS DISTRICT REGISTRY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2015

Before :

MR JUSTICE DOVE

Between :

The Queen

Claimant

- on the application of -

**MILTON (PETERBOROUGH) ESTATES
COMPANY TRADING AS FITZWILLIAM
(MALTON) ESTATE**

- and -

RYEDALE DISTRICT COUNCIL

Defendant

- and -

GMI HOLBECK LAND (MALTON) LIMITED

Interested Party

Peter Village QC & James Strachan QC (instructed by **Pinsent Masons LLP**) for the
Claimant

David Manley QC (instructed by **Ryedale District Council**) for the **Defendant**
Paul Tucker QC and Michael Rudd (instructed by **LB & Co Limited**) for the **Interested
Party**

Hearing dates: 10th – 11th June 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE :

Introduction

1. This claim is a challenge by way of Judicial Review to the grant of planning permission by the defendant to the interested party for A1 retail units, offices, petrol filling station, car park and landscaping at a site known as Wentworth Street Car Park ("WSCP") in Malton, North Yorkshire. The planning permission was granted on 12th September 2014. The claimants are landowners who own a significant part of Malton town centre and who also have the benefit of the grant of a planning permission on appeal on 29th October 2012 for another retail development in the town on what is known as the Livestock Market Site ("LMS").
2. The claimant contends, in brief, that in granting planning permission the following errors of law occurred. Firstly, the members of the planning committee were seriously misled in relation to the conclusions that the Inspector had reached in the claimant's appeal in relation to the LMS site when he granted permission as set out above. This was, in particular, in relation to the Inspector's conclusions in respect of the sequential ranking of the LMS site and the WSCP site and his reasons for concluding that the former was preferable to the latter. They were further misled by the failure to allude at all to the Inspector's conclusion that for the purposes of retail impact analysis the LMS site should be counted as part of the town centre.
3. Secondly, in disagreeing with the Inspector's conclusions in particular in relation to the sequential test the officer's report on which members relied to make their decision to grant planning permission, failed to provide adequate reasons for that disagreement.
4. Thirdly, it is contended that the council failed to have regard to the impact on planned investment which would occur in relation to the implementation of the LMS if planning permission were granted for the WSCP. It is contended that the officers failed to properly disentangle the intentions of the proposed operator of the LMS site, Booths, from the intentions of the claimant, the landowner. Finally, it is contended that consideration should have been given to rescreening the proposed development for EIA purposes in the light of circumstances having changed since it was originally screened.

History

5. On 10th May 2011 the claimant applied for planning permission for the retail development of the LMS site. The proposal sought to demolish all buildings on the site and construct four new retail units with a total gross external floor space of 4,092 square metres along with a three storey decked car park and new public area. The largest of the retail units was proposed for a high quality food store and had a gross external floor space of 2,360 square metres. The three smaller retail units were proposed for comparison goods retailing.
6. In August 2011 the interested party applied for outline planning permission for a new food store of 5,205 square metres gross together with other ancillary development as described above. Around the time of making the application the interested party sought the opinion of the defendant as to whether or not their proposed development

was Environmental Impact Assessment (“EIA”) development pursuant to the then relevant Regulations, namely the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulation 1999. This request for a screening opinion was made by way of a letter dated 22nd August 2011. Amongst a number of characteristics of the proposed development the letter addressed the question of cumulative effect. The information provided in the letter was as follows:

“4.2 The Subject Site lies adjacent to the existing Malton town centre commercial limits (Ryedale Local Plan adopted March 2002). The emerging Core Strategy includes a proposal for the town’s commercial limits to be extended to an area known as the Northern Arc, which is suitable for mixed use development including new convenience and comparison retail uses. The area of the Subject Site proposed for built development lies broadly within the Northern Arc and there is currently another application for planning permission submitted to RDC for retail uses with the Northern Arc and thus adjacent to the existing town centre commercial limits. However, the two sites are not contiguous and are separated by existing town centre uses and residential streets. No adverse environmental effects are anticipated were both sites to include built development such as would result in a requirement for an EIA.

4.3 A full statement has been prepared by Nathaniel Lichfield and Partners (“NLP”) pursuant to Planning Policy Statement 4, which covers retail impact and the strategic retail policy implications of the proposal. The work by NLP includes a conclusion that only one large new convenience store/foodstore can be accommodated in Malton or the District generally. This is consistent with work undertaken on behalf of RDC by Roger Tym and Partners (“RTP”). Additionally Arup has prepared an economic impact assessment of the proposal which takes other development into account, where such potential is identified. These documents have been submitted as part of the planning application.

4.4 It is submitted that there are no developments anticipated to be constructed or conducted in the area which would together give rise to significant environmental effects such as to warrant EIA of this scheme.”

7. On 14th October 2011 the defendant responded to the screening opinion and the covering letter made clear that the opinion had been “given strictly on the basis of the information provided in the submitted application”. The screening opinion concluded that the development, whilst within Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the applicable Regulations at the time of providing the opinion), it was a development which was not likely to give rise to significant effects on the environment and therefore did not qualify as EIA development.

8. On 12th April 2012 the defendant refused the claimant's application for planning permission for four reasons. The first and fourth reasons are of materiality to the matters in this case. So far as relevant the first reason for refusal was expressed as follows:

"Whilst the application site is on edge of centre as defined in National Planning Policy, and would function as an immediate and logical extension to the town centre, it is considered that the site is not currently available for the proposed development or suitable for the type/mix of retail development proposed by this application. Furthermore, the applicants have failed to demonstrate to the satisfaction of the Council that the proposed development would be viable, and therefore that the scheme would be deliverable.

It is considered that an alternative site, located to the east of Wentworth Street and currently in use as a car park, is sequentially preferable to the application's site on the basis that it is available suitable and viable.

The application is therefore judged to have failed to demonstrate compliance with the sequential approach required by National Planning Policy."

9. The fourth reason for refusal, again so far as relevant, provided as follows:

"The National Planning Policy Framework states that where a proposed development is likely to have a significant adverse impact on town centre vitality and viability planning permission should be refused...

There is a resolution to approve an application for a foodstore with a gross floor space of 4,494 square metres (net floor space of 3,086 square metres) as part of a scheme at Wentworth Street, Malton taking the impacts of the proposed development into account it is considered that in combination with this commitment the proposed development is likely to have a significant adverse impact on town centre vitality and viability, contrary to the provisions of the National Planning Policy Framework and Regional Spatial Strategy."

10. The claimants appealed and the appeal was heard by the public inquiry procedure. During the course of the inquiry the following material formed part of the evidence before the Inspector who made the decision on the appeal on behalf of the Secretary of State:

- a) Within the inquiry's Core Documents the Inspector was presented with reports from Roger Tym and Partners ("RTP") that had been commissioned to provide the evidence base for the defendant's emerging forward plan (which started as a Core Strategy and later developed into a Local Plan Strategy). The role of these reports was to provide the Council with evidence in relation to matters concerning retail planning both in terms of the retail needs that had to be planned for and also the potential candidate sites which might accommodate those needs. In the first report of May 2006 RTP noted that the LMS site had closer adjacency to the town centre and offered "good potential for retail uses" in particular for a small number of retail shops. They noted that the WSCP site was "approximately 160 metres to the north-east of the town centre" and edge of centre in terms of the then National Planning Policy on retail. They suggested that the WSCP had potential for retail warehousing. In the next report dated September 2008 they advised in relation to the LMS that it appeared "to offer excellent potential for retail uses because of its close adjacency to the town centre core". They noted that the site was already well connected to the retail core and "would form a natural extension to the town centre". In particular they considered that the site would be a suitable location for unit shops for comparison goods retailing. In respect of the WSCP they observed that this site was "more peripheral being separated from the town centre by existing residential development... and being located on a different lower level to town centre shops". They went on to say that whilst pedestrian linkages between the site and the town centre existed "the degree of separation by other non-retail uses means that the site is unlikely to form an "extension" to the existing town centre". RTP's most recent report was provided in July 2011 and in relation to the LMS site they noted that the site was "technically edge of centre" for the purposes of the sequential test but went on to provide as follows:

"However, the [LMS] site is well-connected to the retail core of Malton town centre, which can be easily accessed by pedestrians via The Shambles or Spittle Street / New Gate. Indeed the site lies just to the rear of the existing retail / service units at Market Place, which – in our professional judgment – is part of the primary shopping area of Malton (although we recognise that the Proposals Map does not formally define a primary shopping area). We therefore consider that the cattle market site, if developed for town centre uses, would form a natural extension of the town centre, and that it represents the most sequentially preferable opportunity in Malton."

RTP went on to reaffirm their view that the LMS site was well placed to provide comparison retail units albeit a foodstore could be acceptable as part of a mix of uses at the site they did not advocate a supermarket only scheme which would rule out the prospect of attracting comparison retailers. So far as the WSCP site was concerned they reiterated that it was approximately 160 metres to the

north-east of the town and they went on to conclude that the site was more suited to convenience rather than comparison retail development “because new high-street stores should be focused on the cattle market site as the first priority given its close proximity to the primary shopping area”.

- b) The Inspector received evidence from Mr Goddard on behalf of the claimant contending that the first reason for refusal set out above was misconceived and that the LMS site was sequentially preferable to the WSCP site. It appears from the closing submissions of the defendant that during the course of cross-examination their witness on retail planning issues, Mr Johnston, accepted that the LMS site was “sequentially the most preferable site in Malton”. The council were therefore no longer able by the end of the inquiry to sustain the first reason for refusal in particular as it was conceded that members had not been properly advised as to the policy content of the sequential test when they had reached their decisions both on the LMS but also on the WSCP which they had resolved to grant consent for at the same meeting that they refused the claimant’s application. Not only therefore was the council’s case at the close of the inquiry that the LMS site was sequentially preferable to the WSCP site but also they conceded that it would be necessary for the members to reassess their resolution to grant planning permission “in the light of the concession that the nature and application of the sequential test was not properly spelled out in the LMS Committee Report”.
- c) In order to address the fourth reason for refusal Mr Goddard undertook a cumulative impact on the town centre which included the impact of both the claimant’s and the WSCP proposed developments. In undertaking that analysis Mr Goddard incorporated the additional turnover from the claimant’s scheme within the overall figure for expenditure in the town centre. The effect of the analysis was to show that the claimant’s proposal would lead to an overall positive increase in the retail turnover in the town centre in the region of 24.7% leading to the conclusion that the claimant’s proposals would have a positive impact on the town centre. This approach was predicated on the RTP acknowledgement that the LMS site would form part of the functional town centre. This approach was disputed by the defendant.

11. The Inspector concluded that the claimant’s appeal should be allowed in a decision date 29th October 2012. The Inspector explained the backdrop provided for the application by the RTP studies and noted the claimant’s justification for the proposals on the basis that they would fulfil Malton’s convenience and comparison retail floor space needs up to 2021 and beyond. He then turned to consider the sequential approach. His conclusions are expressed as follows:

“21. I turn now to the sequential test, formerly set out in PPS4 and now carried forward into the Framework. Paragraph 24 of the Framework explains that local planning authorities 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. It further notes that 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, and goes on to say that applicants and local planning authorities should demonstrate flexibility on issues such as format and scale.

22. The RTP retail assessments referred to above have consistently taken the view that the LM site represents the most sequentially preferable opportunity in Malton. However, in the LM report to Committee, Officers adopted what the Council referred to at the inquiry as a "novel" application of the sequential test. As a result, the Planning Committee was advised that the WSCP site was preferable to the appeal site in PPS4 terms. A reading of the Committee Report reveals that this advice was based on the Officers' view that the appeal site was not suitable for the development proposed; could not be considered as currently available for the proposed development; and that the development proposed had not been demonstrated to be viable.

23. However, at the inquiry the Council's planning witness acknowledged that there had been significant flaws in the way this matter had been approached. Firstly, there is nothing within the Framework, nor was there anything within PPS4, which requires a developer to apply tests of availability, suitability and viability to the site being promoted for development. The sequential approach is intended to establish whether or not there are any more sequentially preferable sites for the development proposed, than the site in question. In this case there is no dispute between the parties that the LM site could accommodate the appeal proposal.

24. Moreover, an assessment of the site provided to the Council by RTP in the RRCIAU comments that a retail-led scheme would be viable at the site and could form a natural extension of the existing town centre. It considers that the site would be an ideal location for a development providing a small number of unit shops to attract the type of "high street" comparison retail outlets presently missing from Malton's offer. It further suggests that such units could potentially form part of a mixed-use development, described as possibly including a basket foodstore and/or residential/office uses, although a supermarket-only scheme is not advocated. The study also comments that the WSCP site is located about 160m to the north-east of the Town Centre Commercial Limits and is more suited to convenience rather than comparison retail development.

25. A final point of note is that the LM report to Committee acknowledges that the LM site is not specifically allocated for comparison retail development at the present time. The report does indicate that the supporting text to policy SP7 of the LPS publication draft refers to the LM site as being particularly suitable for non-food retailing, but there is nothing to suggest that this need be to the exclusion of other uses. In any case, I understand that objections have been lodged to this policy and its supporting text, including from the appellant, and in these circumstances I can only give this emerging policy limited weight.

26. Taking the above points into account it is my view that the LM site is the sequentially preferable site to accommodate the development proposed and that its development for such uses would be in line with guidance in the Framework. Moreover, no firm evidence has been placed before me to suggest conflict with any adopted development plan policy in this regard.

32. However, whilst it is common ground that the grant of planning permission for a larger store on the WSCP site would make it more difficult for an operator to be found for the appeal proposal, this underscores the need and purpose of the sequential approach in seeking to promote and strengthen town centres. Despite the Officers' conclusion in the LM Committee Report, the submitted evidence as a whole, leads me to conclude that the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site. Moreover, having visited both sites as part of my inspection I consider that a development on the WSCP site would have poorer pedestrian links to the town centre than the LM site, notwithstanding the fact that enhancement works to the connecting route are proposed."

12. The Inspector then turned to consider the question of the fourth reason for refusal and matters related to retail impact. He first looked generally at the relationship between the LMS site and the town centre to assess whether or not there would be an adverse effect on the town centre in principle and concluded as follows:

"36. The SoCG indicates that the Council does not accept that the LM site forms a logical extension to the town centre, but this does not sit comfortably with its first reason for refusal, which quite clearly states a contrary view. However, notwithstanding this point the fact remains that at the present time the Council is promoting, through its emerging LPS, a "northern arc" (which includes both the LM site and the WSCP), to the north of the existing town centre, to

accommodate new retail space to support the role of the town centre. In addition, paragraph 5.25 of the LPS Submission document of May 2012 notes that the LM site has the ability, overtime to form a logical extension to the town centre.

37. Having regard to these points and the fact that there would be good linkages between a development on the appeal site and the town centre, I consider it reasonable to assume that the appeal proposal would strengthen and enhance the town centre, rather than adversely impact upon it. In coming to this view I have also had regard to the retail advice consistently given to the Council by RTP prior to this inquiry, through the various retail assessments referred to earlier, that the LM site would be an appropriate location for further retail development. I do not believe that this advice would have been given if RTP considered that it would result in harm to the existing town centre.”

13. The Inspector determined that the WSCP scheme could not be regarded as a commitment in the light of the concession that the resolution to grant planning permission had arisen from a committee report which had provided the members with erroneous advice as to the proper application of the sequential test and that resolution would need to be revisited. Nevertheless in considering the arguments in relation to impact the Inspector provided conclusions on the analysis provided by Mr Goddard on cumulative impact. His conclusions were as follows:

“41. Finally on this issue, I briefly consider the scenario whereby the WSCP scheme is granted planning permission. The first point of note is that there is agreement within the SoCG that the cumulative scale of both the appeal proposal and the WSCP scheme would significantly exceed the retail capacity identified for Malton within the RTP 2008 Retail Study. In addition, the submitted evidence indicates that the WSCP scheme would draw trade from the town centre Morrison’s store, which is currently over-trading. However, I accept that in resolving to grant planning permission for the WSCP proposal the Council considered that the overall impact on the town centre, including linked-trips, would be acceptable.

42. Nevertheless, trade would be drawn from the existing centre, and this impact would be increased if the appeal site was also granted planning permission. In such circumstances a judgement has to be made as to the overall extent of any impact, having regard to the specific details of the cases and the locations of the respective sites. In this regard it is of note that in asserting that the appeal proposal would result in harm to the vitality and viability of the town centre, the Council has not undertaken an y specific assessment of this matter.

43. In contrast, the appellant has argued that although a greater impact on the existing town centre would arise if both the WSCP and the appeal proposal were to proceed, custom drawn to the LM scheme should be seen as contributing to town centre turnover, in view of the general acceptance that it would function as a logical extension to the town centre. Indeed the appellant argues that on this basis the appeal proposal would lead to an overall positive impact of 24%, compared to the situation if only the WSCP scheme proceeds.

44. I fully accept that such arguments have to be treated with some caution, in light of the view expressed by the Inspector and endorsed by the Secretary of State, in a call-in case in Stoke on Trent⁴, that including edge-of-centre stores in assessments of “functional” centres could generate misleading conclusions. However, I am not persuaded that the particular circumstances of that case, which related to a much larger centre and a different disposition and juxtaposition of foodstores, are directly comparable to the current situation which involves a relatively modest development immediately adjacent to an existing market town centre. On balance, and particularly having regard to the Council’s aspirations for additional retail areas in the “northern arc”, set out within the emerging LPS, I consider that the appellant’s assessment of this matter is to be favoured.

45. Having regard to all the matters detailed above, I conclude that the proposed development would accord with the sequential approach to town centre uses, set out in the Framework, and would not have an unacceptable effect on the vitality and viability of Malton town centre. Accordingly I find no material conflict with policies YH5 or E2 of the RSS which seek, amongst other matters, to make Principal Towns (such as Malton) the main local focus for shopping activities and facilities, and to strengthen the role and performance of existing city and town centres.”

14. In the light of these conclusions the Inspector granted planning permission. He also concluded that the defendant had behaved unreasonably in relation to “the very significant admission that it had misapplied the sequential test” and the members had been wrongly advised that the WSCP site was sequentially preferable to the LMS site. The Inspector further concluded that the defendant’s fourth reason for refusal was also unreasonable and costs were awarded against them in respect of that issue as well.
15. On 19th November 2013 the interested party submitted revised documentation in respect of their application which had a resolution to grant consent. The size of the foodstore was reduced from 5,205 square metres gross to 4,530 square metres gross and other changes of detail were made in the application. A suite of updated documents including in particular an updated Retail Statement from Nathaniel Lichfield and Partners (“NLP”) was provided.

16. In September 2013 the defendant adopted its "Ryedale Plan – Local Plan Strategy". This observed that current commitments which had been granted consent accounted for most, if not all, of the quantitative additional food retail floor space which was required to 2026. It indicated that if commitments failed to come forward then any outstanding requirements within the district would be directed to Malton in order to improve the range and choice of food stores in that town. It will be recalled that the Inspector had made reference to a "Northern Arc". This was explained in paragraph 5.25 of the local plan strategy which provided as follows:

"5.25 Excellent edge of centre opportunities exist to accommodate new retail space to support the role of Malton Town Centre. A "Northern Arc" lies to the north of the town and it stretches from the existing Livestock Market to Wentworth Street Car Park. It is a band of existing and former agricultural buildings and spaces that were carved out of the medieval street pattern to relocate livestock trading in the mid 19th century. Today, whilst this broad area is not derelict, parts of it are under used and there are opportunities to redevelop sites and buildings to accommodate additional retail space with excellent connectivity with the existing town centre. Although this document does not allocate specific sites for new uses, it is considered that within this "Northern Arc", the Livestock Market area is of strategic significance. It provides a key opportunity to accommodate a mix of uses and in particular to provide much needed space for additional non food retailing. Whilst it currently occupies a location which abuts the existing town centre, it has the ability – once developed – to form a logical extension to the town centre. Currently outline planning consent has been granted for a mixed convenience and comparison retail scheme on the site."

17. In order to assess the revised application which had been provided by the interested party the defendant commissioned two pieces of independent work from consultants. Firstly they commissioned a review of the NLP retail planning work which they received in February 2014. It is unnecessary to set that material out in detail at this stage since it was, understandably, heavily drawn upon in the compilation of the committee report on the application. In summary England and Lyle ("EL") endorsed the conclusions of the NLP retail work that there was greater potential for the creation of retail floor space for convenience retailing and that the LMS site and the WSCP site were sequentially equal. In the light of this and also the fact that the scale of the foodstore proposed in the interested party's application could not physically be accommodated on the LMS site they accepted NLP's conclusion that the sequential test was passed.
18. In relation to impact on planned investment EL relied upon the second piece of independent work commissioned by the council, namely a report from DTZ dated 11th February 2014, in relation to the commercial viability of both the claimant's consented scheme and the interested party's proposed scheme. In their report DTZ concluded that none of the principle foodstore operators would be interested in the

consented scheme on the LMS site and that whilst that location might appeal to Booths or Aldi the form of the consented scheme would be unacceptable to them. It would require redesign before having any chance of attracting commercial interest.

19. Further objections were made to the application by the claimant's planning consultant on 11th March 2014. That letter coincided with a letter from the claimants enclosing a letter of support from EH Booths and Company Limited ("Booths") expressing Booths' interest in the site and the fact that they were in the process of negotiating an agreement for a lease with the claimant for the foodstore element of the LMS site. In the letter the chairman of Booths indicated that they remained "very concerned" about the interested party's unresolved planning application. Following this up on 25th March 2014 the claimant wrote in the following terms:

"The estate company is willing to accept the scale and risk profile of investment required to develop the LMS. However the threat of a large area of excess retail capacity in an edge of town centre location with a surface car park on WSCP significantly increases the risks of the investment in LMS. With that threat hanging over the town, the Estate Company will be unlikely to proceed with the LMS development."

20. On 1st April 2014 Booths again wrote to confirm for the avoidance of doubt that the outline consent on the LMS site was acceptable. In the light of these new developments EL provide further advice to the council on 9th April 2014. Amongst a number of matters they addressed the recent confirmation of interest from Booths and observed as follows:

"We have allowed for a foodstore of the size approved on the Livestock Market site in the capacity analysis and the cumulative impact assessment. Although a Booths store would provide an improve range of choice and convenience retailing, as sought by the Ryedale Plan there remains a need for another large foodstore in Malton to provide choice and competition for Morrison's in main food shopping and claw back leakage that is going to large stores elsewhere. But the need for a large foodstore could not be met in the Livestock Market scheme. A store on the WSCP and a Booths store on the Livestock Market site would have a complimentary role."

21. EL went on to consider the question of retail impact in particular in terms of the criticism raised by the claimant's planning consultants that no scenario had been provided seeking to test foodstores being present on both the LMS site and the WSCP in the opening year of 2018. They advised as follows:

"In terms of retail impact, GVA criticise the fact that NLP considered only two scenarios, precluding new foodstores on the WSCP and Livestock Market sites in 2018. Our review considers a third scenario in which foodstores are developed on both sites and are trading in 2018. The largest overall

cumulative impact is predicted to be on the Morrison's store, representing three-quarters of total trade diversion from Malton town centre. We do not anticipate that there would be a significant adverse impact upon the overall vitality and viability of Malton town centre which has a high level of vitality and viability. The predicted overall trading impacts on the other town centres are small. We have assessed that the WSCP proposal would have a trading impact of 16% on a foodstore in the Livestock Market scheme. This is a matter of competition with a store located outside the town centre, not a town centre impact, not a material planning consideration."

22. The day before the planning committee was due to meet the claimant provided final objections to the defendant in relation to the application. They alluded in that correspondence to a letter of objection from Booths in relation to the WSCP proposal. In relation to the impact upon planned investment in the form of the LMS scheme their observations were as follows:

"For the avoidance of doubt, Fitzwilliam Malton Estate (FME) is willing to make the investment in redeveloping the Livestock Market Site (LMS) as soon as it has secured a pre-letting of the main food store to Booths. Whilst the preference is to have one or more of the smaller retail units let before we start on site, the development is not conditional upon retailer commitment for those units. However, the prospect of almost double the retail floor space being given consent by RDC is considered to be a considerable threat to FME's investment in LMS. FME will not make that investment if consent is given to the GMI application...for a large superstore on Wentworth Street car park."

23. On 24th April 2014 the defendant's planning committee met to consider the interested party's application. In addition to a lengthy committee report the members had a number of matters appended to the report including the EL report and letter of 9th April 2014 together with the advice which had been received from DTZ (which included a response to the claimant's planning consultant's objections) also included in the appendices were correspondence from the claimant planning consultant and from the claimant's themselves and Booths. Not included within the appendices circulated to the committee but provided to them at the meeting was a copy of the Inspector's report in relation to the claimant's appeal.
24. The committee report summarised the objections which had been received to the applications along with the other representations which had been made. The first topic that was addressed by the officer's conclusions was the question of retail planning policy. The report noted the content of the local plan strategy which has been set out above. It went on to set out the provisions of the National Planning Policy Framework and, whilst the contents of the report ranged far wider across the Framework for present purposes two paragraphs of the Framework were central, namely paras 24 and 26 which provide as follows:

"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.

26. When assessing applications for retail, leisure and office 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 floorspace threshold (if there is no locally set threshold, the default threshold is 2,500 sq m). 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."

25. Dealing firstly with the sequential test derived from paragraph 24 of the Framework and the comparative conclusions which had been reached by the Inspector in the claimant's appeal, the officers concluded as follows:

"6.27 The Livestock Market Site in Malton is also considered in detail within the submitted Updated Retail Statement. The Livestock Market site benefits from an extant planning permission for retail development for four new retail units, comprising of a 2,360 sq.m (gross) foodstore and three smaller comparison goods units (1,732 sq.m gross in total) and a three-storey car park, granted on appeal on 29th October 2012. The Inspector concluded that the Livestock Market site was both sequentially preferable to the WSCP site to accommodate the actual development proposed but also that the Livestock Market site was generally sequentially preferable, stating at Paragraph 32: *'However, whilst it is common ground that the grant of planning permission for a larger store on the WSCP*

site would make it more difficult for an operator to be found for the appeal proposal, this underscores the need and purpose of the sequential approach in seeking to promote and strengthen town centres. Despite the Officers' conclusion in the LM Committee Report, the submitted evidence as a whole, leads me to conclude that the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site. Moreover, having visited both sites as part of my inspection, I consider that a development on the WSCP site would have poorer pedestrian links to the town centre than the LM site, notwithstanding the fact that enhancement works to the connecting route are proposed.'

6.28 The Livestock Market Inspector's Appeal Decision is an important material consideration and must carry significant weight in decision-making. However, it is not a binding precedent. The Inspector's conclusion as to why the Livestock Market site is sequentially preferable to the WSCP is not fully reasoned other than pointing to poorer pedestrian links. The issue of sequential preference is one for informed planning judgement. Officers have commissioned an independent review of the applicant's Updated Retail Statement by England & Lyle, who have submitted a report dated February 2014. In the report they consider whether the Livestock Market site is sequentially better located than the WSCP site. England & Lyle note that both sites are within the 'Northern Arc' and that the differences in accessibility to the town centre are minimal. Officers agree, for the reasons set out below that the differences are so negligible that the sites are, for all practical purposes, on an equal footing in terms of sequential testing.

6.29 The Livestock Market Site lies adjacent to the defined Town Centre Commercial Limits of Malton Town Centre and is therefore located slightly closer to the town centre than the application site, although the difference is minimal given the application site itself only lies 30m to from the Town Centre Commercial Limits and it is noted that both sites lie within the extent of the 'Northern Arc,' which is identified as an area that offers opportunities to redevelop sites and buildings to accommodate additional retail space with excellent connectivity with the existing Town Centre. Furthermore, it is considered that there are minimal differences between the sites in terms of accessibility and connectivity with the town centre, and the consequent ability to generate linked trips. Both sites offer easy access to the town centre for pedestrians using existing connections that are easy to follow. On this basis, it is considered that the application site and Livestock Market site should be considered as being 'sequentially equal.'

6.30 It is noted that applications for planning and listed building consent have recently been submitted by Fitzwilliam (Malton) Estates for the erection of a two storey retail extension to existing store with attached stairwell building on three levels and external flight of steps together with formation of retail unit(s) on two floors within Building D to include installation of new shop fronts, windows and chimneys all following removal of three existing outbuildings (LPA Ref. 14/00059/FUL & 14/00060/LBC) at Kings Head Yard, which lies to the direct south of the consent Livestock Market site. The Planning Statement that accompanies the Kings Head Yard application confirms that the development proposed can be viewed as a stand-alone proposal, albeit a precursor to the Livestock Market development. It is suggested that the proposed development will support the expansion of an existing retail business, as well as opening up a key route into the town centre from the Livestock Market development and residential properties to the east. It is accepted that the Kings Head Yard proposals will provide an improved link between the town centre and the Livestock Market site, however, these improvements are not considered to be so significant as to alter the conclusion that the Livestock Market site and WSCP should be considered '*sequentially equal*,' notwithstanding the fact that the Kings Head Yard proposals do not yet benefit from planning and listed building consent.

6.35 The applicant's supplementary information concludes that, in the context of the issues outlined above, a large foodstore on the Livestock Market site, which is comparable to that proposed by the current application, could only be developed over two or more storeys. It is also likely that such a store would need to be accommodated by decked parking, in order to provide a sufficient number of spaces. The applicant contends that this would be unacceptable to the main foodstore operators, who do not split their convenience goods sales area over different floors and such a compromised scheme would be highly unlikely to attract any retailer interest. These findings have been broadly endorsed by DTZ, who were appointed by the Council to advise on the commercial retail considerations in relation to the planning application. The applicant also suggests that it is also highly questionable as to whether a scheme could be developed which would be satisfactory in heritage, residential amenity and highways / transportation terms.

6.36 The applicant's findings in this respect are broadly accepted and, even taking into account the scope for flexibility in the format and scale of the proposal, it is not considered that the Livestock Market site offers a suitable practical alternative

to accommodate the proposed development. However, even if the Livestock Market site was considered to be a suitable practical alternative to accommodate the proposed development, the WSCP and Livestock Market sites are considered to be 'sequentially equal' and, accordingly, would not result in the sequential test being failed.

6.37 The NPPG advises, in applying the sequential test, that it is necessary to consider what contribution more central sites are able to make individually to accommodate the proposal and it is noted that an objection received from GVA on behalf of Fitzwilliam (Malton) Estates suggests that the sequential assessment has failed to consider whether there are available sites within or better integrated sites on the edge of the town centre that could accommodate the proposed smaller retail unit. The constituent main town centre elements of the application proposals comprise of a foodstore (4530 sq.m), a retail unit (227 sq.m) and office accommodation (253 sq.m) and, based upon Officer's local knowledge of centres and a review of commercial property websites to identify potential available sites / premises, Officers are satisfied that there are no suitable and available sequentially preferable premises or potential development sites that could accommodate any of the constituent main town centres uses. Furthermore, it is considered that the provision of the stand alone retail unit provides benefits from a design perspective, helping to create an active and interesting public frontage along the Wentworth Street frontage.

6.38 It is therefore accepted that the application complies with the sequential approach to site selection set out at Paragraph 24 of the NPPF and there are no sequentially preferable sites that are suitable and available alternatives to accommodate a large foodstore development."

26. The report then turned to the question of retail impact and advised members as follows:

"6.42 The planning application is accompanied by an Updated Retail Statement prepared by Nathaniel Lichfield & Partners. The impact assessment contained within the Updated Retail Statement considers two potential scenarios:

- **Scenario 1** – this is based upon what NLP regard as the '*most realistic scenario*' taking into account advice received from commercial agents outlining a lack of operator interest in the Livestock Market Site. This scenario therefore assumes that WSCP site is developed for a new large foodstore in isolation over the period to 2018.

- **Scenario 2** – this scenario considers a situation whereby a store of the size approved on the Livestock Market site is developed out over the longer period to 2023, although NLP suggest that this scenario is unlikely.

6.43 NLP state that the assumption that the Livestock Market store comes forward over the period to 2023 is considered to be a cautious approach, particularly in the context of the views from their commercial agents that there is no demand for a foodstore of the size currently proposed on the Livestock Market site and that the approved scheme is undeliverable. Notwithstanding this, the Retail Review undertaken by England & Lyle agrees that Scenario 2 represents a possible cumulative impact situation in Malton if both schemes were to be developed.

6.44 England & Lyle have therefore undertaken an independent review of the retail impact assessments for convenience and comparison goods and have fully reviewed NLP's Scenario 1 and Scenario 2 assumptions. In addition, although NLP have not considered the potential cumulative impact of the proposed and consented development on the WSCP site and Livestock Market site coming forward by 2018, England & Lyle have reviewed a scenario for 2018 in which both schemes are developed for sensitivity purposes.

6.45 It is noted that Fitzwilliam (Malton) Estates have suggested that they would not bring forward the approved Livestock Market site if the current proposals are approved and this would represent a significant impact on planned investment in the town centre. However, the Livestock Market lies to the northern edge of the defined Town Centre Commercial Limits and is not therefore in-centre, which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF. In any event, the Livestock Market site is a sequentially equivalent site to WSCP. It is noted that the Local Plan Strategy identifies that the Livestock Market site abuts the existing town centre and has the ability, once developed, to form a logical extension to the town centre. Whilst the WSCP lies slightly further from the town centre, the difference is minimal and both sites lie within the identified 'Northern Arc,' which is identified as an area that offers potential to redevelop sites and buildings with excellent connectivity to the town centre. It is considered that the application proposals provide an opportunity to improve choice and competition in Malton and to claw back expenditure, thus helping to broaden the town's consumer base.

6.60 It is anticipated that in convenience goods the proposed development on the WSCP site would draw 15% of its trade

from inflow / visitor spending, 40% from claw back of leakage and the remaining 45% from trade diversion within the catchment area. In comparison goods, the proposed development on the WSCP site is expected to draw 15% of its trade from inflow / visitor spending, 55% from claw back of leakage and the remaining 30% from trade diversion within the catchment area. In terms of cumulative impact, it is assumed that, to an extent, the WSCP scheme and the Livestock Market scheme would compete with each other and draw some of their trade from the other scheme, albeit that, were both to commence trading, there is plainly an increased opportunity for clawing back trade to the town which presently leaks outside of the district.

6.61 In convenience goods, the largest cumulative impacts of the proposed development together with the Livestock Market scheme and commitments in 2018 are predicted to be on Morrison's in Malton (30%), the Co-op in Pickering (16%), Lidl and Asda in Norton (11%), the new Tesco in Kirkbymoorside (8%), Kirkbymoorside centre (7%) and other shops in Malton (6%). The predicted cumulative impacts in 2023 are very similar to those predicted for 2018 because the turnovers of stores / centres and the turnovers of the proposed schemes have been increased in line with expenditure growth."

27. In respect of impact on planned investment in centres the officers advised as follows:

"6.69 Fitzwilliam (Malton) Estates in their objection have stated that they will not bring forward their consented scheme if the current application is approved and this would represent a significant impact on planned investment in the town centre. However, the Livestock Market lies to the northern edge of the defined Town Centre Commercial Limits and is not therefore in-centre, which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF. In any event, the Livestock Market site is a sequentially equivalent site to WSCP.

6.74 Despite the advice received from DTZ highlighting concerns over the deliverability of the approved foodstore on the Livestock Market site, the subsequent correspondence received from GVA highlights retailer interest on behalf of Booths and suggests that the outline consent delivers a store and layout with adequate parking and servicing to meet their requirements. The confirmation of interest from Booths in the approved scheme on the Livestock Market site is acknowledged and Booths will be a welcome addition to the retail offer in Malton. However, the expression of interest in the Livestock Market site from Booths should not, in Officer's view, be seen

as a reason to prevent the provision of a larger foodstore on the WSCP.

6.75 The independent review of the application undertaken by England & Lyle illustrates that, whilst the capacity for two new foodstores (i.e. Livestock Market site and WSCP) in 2018 is marginal, the impact assessment demonstrates that the two stores would not have a significant adverse impact on town centre vitality and viability in 2018, which is the policy test set out in the NPPF. Furthermore, there would be more than sufficient capacity in both convenience and comparison goods for both stores in 2023, based on a revised and more up-to-date assessment than that used to inform the preparation of the Ryedale Plan – Local Plan Strategy. Although it is evident that a Booths store would provide an improved range and choice of convenience retailing, as sought by the Local Plan Strategy, it is accepted that another large foodstore in Malton would provide choice and competition for Morrison's and claw back leakage that is going to stores elsewhere and this has been reflected within a number of letters of support received from local residents in respect of the application. A large foodstore on WSCP and a Booths store on the Livestock Market site would have a complementary role to one another.

6.76 The correspondence received from GVA indicates that Booths remain 'very concerned' regarding the WSCP proposals, although it is not explicitly stated that they would not proceed if the WSCP proposals were approved and it is noted that Booths have expressed an interest in the Livestock Market site in full knowledge of the planning application that has been made on the WSCP site. Fitzwilliam (Malton) Estates have, however, suggested that they be unlikely to bring forward the Livestock Market site scheme if the WSCP proposals were approved, which would represent a significant impact on planned investment in the town centre. However, Officers are of the view that this statement should be treated with a degree of caution given that, whilst 'very concerned,' Booths have not explicitly stated that they would not proceed with a store on the Livestock Market site were the WSCP proposals to be approved. With this in mind, there is no reason to believe that further investment in the Livestock Market site in the form of comparison shopping development would not follow the development of a Booths store, as it is considered that Booths would act as a catalyst for the development of the consented non-food retail units. On this basis, Officers are of the opinion that Fitzwilliam (Malton) Estates' comments in respect of not bringing forward the Livestock Market site should planning permission be forthcoming for the WSCP proposals should be treated with a degree of caution.

6.77 Notwithstanding this, the Livestock Market site lies to the northern edge of the town centre and is not therefore 'in-centre,' which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF and, in any event, the Livestock Market site is a sequentially equivalent site to WSCP. The planned investment within the Livestock Market site is not therefore conferred policy protection under the provisions of the impact test contained at Paragraph 26 of the NPPF and, as such, any impact on investment in the Livestock Market site would not form reasonable grounds for refusing planning permission for the WSCP proposals."

28. The officers summarised the retail policy considerations as follows:

"6.79 Capacity is not a policy test; it is simply an indicator of whether any retail impact may occur. Policy SP7 of the Local Plan Strategy indicates that current commitments account for the quantitative convenience retail needs to 2026. The recognition within Policy SP7 that current commitments meet convenience retail needs to 2026 was based upon the findings of the *'Ryedale Retail Capacity & Impact Assessment Update'* prepared by Roger Tym & Partners, which formed part of the evidence base for the Local Plan Strategy. However, it should be acknowledged that the Retail Capacity & Impact Assessment Update was prepared in 2011 and it is clearly important that forecasts of need are kept under regular review. The assessment of capacity for additional retail floorspace must be considered on the basis of the latest available evidence to ensure that retail needs are met. The independent assessment of the proposals undertaken by England & Lyle demonstrates that the capacity for the proposed foodstore, as well as the approved scheme on the Livestock Market site, would be marginal in 2018, however, the impact assessment demonstrates that the development of both schemes would not have a significant adverse impact on town centre vitality and viability in 2018, which is the policy test outlined in the NPPF. Furthermore, there would be more than sufficient capacity in both convenience and comparison goods for both stores in 2023, within the Local Plan period.

6.82 It is agreed that the proposed foodstore on the WSCP site is not likely to have any adverse impact upon the ability to bring forward any other planned investment in existing centres. Whilst it has been suggested that Fitzwilliam (Malton) Estates would not bring forward the Livestock Market site scheme, which has secured retailer interest from Booths, if the WSCP proposals were approved, it has been demonstrated that, whilst the capacity for two new foodstores (i.e. Livestock Market site and WSCP) in 2018 is marginal, the two stores would not have

a significant adverse impact on town centre vitality and viability in 2018, which is the policy test set out in the NPPF. Furthermore, there would be more than sufficient capacity in both convenience and comparison goods for both stores in 2023, based on a revised and more up-to-date assessment than that used to inform the preparation of the Ryedale Plan – Local Plan Strategy. Although it is evident that a Booths store would provide an improved range and choice of convenience retailing, as sought by the Local Plan Strategy, it is accepted that another large foodstore in Malton would provide choice and competition for Morrison’s and claw back leakage that is going to stores elsewhere and this has been reflected within a number of letters of support received from local residents in respect of the application.

6.83 Officers are of the view that the statement from Fitzwilliam (Malton) Estates that they would not bring forward the redevelopment of the Livestock Market site if the WSCP proposals are approved should be treated with a degree of caution given that, whilst ‘*very concerned*,’ Booths have not explicitly stated that they would not proceed with a store on the Livestock Market site were the WSCP proposals to be approved. With this in mind, there is no reason to believe that further investment in the Livestock Market site in the form of comparison shopping development would not follow the development of a Booths store, as it is considered that Booths would act as a catalyst for the development of the consented non-food retail units.

6.84 Notwithstanding this, the Livestock Market site lies to the northern edge of the town centre and is not therefore ‘*in-centre*,’ which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF and, in any event, the Livestock Market site is a sequentially equivalent site to WSCP. The planned investment within the Livestock Market site is not therefore conferred policy protection under the provisions of the impact test contained at Paragraph 26 of the NPPF and, as such, any impact on investment in the Livestock Market site would not form reasonable grounds for refusing planning permission for the WSCP proposals.”

29. In the light of these views the officers concluded that the relevant retail planning policy tests had been passed. Having appraised a range of other topics unrelated to retail planning the overall conclusion reached by the officers was that planning permission should be granted. That conclusion was accepted by the members and permission was ultimately granted following the completion of a S106 obligation on 12th September 2014.

30. The grant of planning permission is governed by s70(2) of the Town and Country Planning Act 1990 which requires the decision maker to have regard to the provisions of the development plan and any other material considerations. Additionally s38(6) of the Planning and Compulsory Purchase Act 2004 provides that if the determination is being made with regard to the development plan then it must be made in accordance with the plan unless material considerations indicate otherwise. The interpretation of the development plan, and indeed any other planning policy, is a matter of law for the court (see Tesco Stores Limited v Dundee City Council 2012 UKSC 13).
31. Here, as is good practice, the planning application was determined by a committee having the benefit of an officer's report. The principles governing the approach to a committee report to seek to establish whether or not there may have been an error of law were captured by Hickinbottom J in R (Zurich Assurance Limited v/a Threadneedle Investments) v North Lincolnshire Council 2012 EWHC 3708 at paragraph 15 as follows:
- i. In the absence of contrary evidence it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted
 - ii. When challenged such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole consequently:

"An application for Judicial Review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at a meeting of the planning committee before the relevant decision is taken." (Oxten Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18th April 1997) 1997 WL 1106106 per judge LJ as he then was)
 - iii. In construing reports it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (R v Mendip District Council ex parte Fabre (2000) 80 P and CR 500 per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory tests" for determination of a planning application (Oxten Farms per Pill LJ)."
32. One of the matters capable of being a material consideration in the determination of a planning application is a previous decision, in particular a previous appeal decision. The commencement of the jurisprudence in relation to this issue is the case of North Wiltshire District Council v Secretary of state for the Environment [1993] 65 P&CR 137 at page 145 where Mann LJ observed as follows:

“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 am 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 in aesthetics. On other occasions they may have to be elaborate.”

33. This issue was further considered by the Court of Appeal in the case of Dunster Properties Limited v FSS 2007 EWCA Civ 236 where Lloyd LJ at paragraph 23 stated as follows:

“In my judgment, notwithstanding Ms Olley’s submission to the contrary, Mr Mead did not adequately perform his obligation to give reasons for this decision in respect of his refusal to follow the basis of the earlier appeal decision which was a material consideration. In this respect it seems to be that by declining to comment, other than to refer to his own reasons already expressed, Mr Mead appears not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. An omission to deal with the conflicting decision, as in the North Wiltshire case, mightn’t have been sufficient in itself. But Mr Mead’s last sentence in paragraph 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons.”

34. The essence of the principle has also been applied, as a matter of common law, to previous decisions of the local authority and their relevance to subsequent decisions. In the case of R (Thompson) v Oxford City Council 2014 EWCA Civ 94 Lloyd Jones LJ stated at paragraph 34 as follows:

“The principles stated in Dunster are of general application and are not limited to planning cases. The explanation provided by Lloyd LJ as to why the reasons provided were inadequate was in no sense dependant on the planning context: on the contrary it flows from the function of reasons as a safeguard to sound

decision making. Moreover, I do not consider that Dunster turned on its particular facts or the refusal to give reasons following a request. Accordingly, I consider that while it was open to the Sub-Committee in the present case to depart from the decision of its predecessor, it was under a duty to take account of the earlier decision, to grasp the nettle of any disagreement with the earlier decision and to state its reasons for coming to a different conclusion. That obligation to give reasons arises at common law...”

35. Turning to the issues arising in relation to Environmental Impact Assessment, Regulation 3(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 prevents the decision maker from granting planning permission for development which is EIA development without having first considered the environmental information relevant to the development in the form of an Environmental Impact Assessment. Regulation 5 entitles a proposed developer to request from a local planning authority a Screening Opinion, namely a determination as to whether or not their proposed development is EIA development.
36. In this case the question has arisen as to the correct approach to when, as a matter of law, a development which has been the subject of a Screening Opinion may require a further Screening Opinion in order to discharge the obligation under Regulation 3 of the 2011 Regulations. Reference was made to the decision of Lindblom J in The Queen (on the application of CBRE Lionbrook (general partners) Limited) v Rugby Borough Council and another 2014 EWHC 646. The circumstances of that case were that a planning application had been made by the interested party and been the subject of a negative Screening Opinion in September 2011. The application then changed and in November 2012 consultants instructed on behalf of the interested party drew attention to the changes which were considered to be slight and invited the local planning authority to consider whether or not the Screening Opinion remained valid, it being the opinion of those consultants that a fresh Screening Opinion was not needed. The council’s officer considered that enquiry and concluded that it was not necessary to submit a fresh EIA Screening Opinion.
37. The main submission made in the challenge brought by an interested developer was that the council were compelled by the 2011 Regulations to re-screen the development or to treat to enquiry of the consultants as a request for a Screening Opinion. The judge concluded that the consultant’s letter was not a request for a Screening Opinion. It was in truth the assertion that no further Screening Opinion was necessary as there had not been any material alteration to the proposal or its environmental context. The judge concluded that the council’s position was lawful and he expressed the principles as follows:

“47. The thrust of this submission [from the defendant and interested party], which I accept, is that the concept of a development having been the subject of a Screening Opinion is broad enough to include a previous screening process for an earlier version of the proposal, so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through. This is classically a

matter of judgment for “the relevant planning authority”. It will always turn on the facts of the particular case.

48. The essential point is that Regulation 7 allows the authority to judge whether any changes to a proposal are such as to cast doubt on the continuing validity of the screening opinion for the proposal in its previous form. In principle, and subject to review by the court on Wednesbury grounds, it is open to an authority to conclude that in the screening process it has already conducted the essential characteristics of the site of proposal bearing on the crucial question – whether the development is likely to have any significant effects on the environment – have been taken into account and the relevant screening thresholds criteria applied.

49. If the result of that process was a Screening Opinion determining that the project was not “EIA development”, and if the result of a further screening process for the revised proposal would inevitably be the same, the authority would be able to conclude that its Screening Opinion is competent for the proposed development in its modified form. The judgment embodied in that Screening Opinion will be no less valid and effective for the proposal as revised as it was for the proposal as originally conceived. The potential effects of the development will already have been dealt with in a formal screening process. The development would have been “the subject of a Screening Opinion” – the concept in Regulation (b). The provisions of paragraphs (4) and (5) of Regulation 5 will not be engaged. The screening process will not have to be repeated. If it were repeated it would be of no benefit to the authority, no benefit to anyone likely to be affected by the outcome, and no benefit to the public interest and the EIA regime being operated being operated with the rigour required.”

38. It will be apparent from the facts of that case that the point which arises in this case, namely what is the threshold at which a previously negatively screened proposed development needs to be re-screened in the light of changed circumstances, did not directly arise. On the facts of that case there had been no change in the environmental context and such changes as were proposed to the application were insignificant. Active consideration had been given to whether the new proposals would have given rise to a potentially different outcome to the Screening Opinion.
39. During the course of argument reference was made to the case of Mageean v SSCLG and another (2011) EWCA Civ 863 (which was subsequently applied in the case of Smyth v SSCLG and others 2013 EWHC 3844). The circumstances of that case were that following a positive Screening Opinion by the local planning authority the proponent of the development asked the Secretary of State for a screening direction under Regulation 6 of the 2011 Regulations. Such a direction is binding on the planning authority for the purpose of reaching its decision on the application. The Secretary of State concluded that the proposed development was not EIA development. After the screening direction and before the consideration of an appeal

against the subsequent refusal of planning permission the site became part of an area designated a World Heritage Site. The challenge proceeded on the basis that the Inspector ought to have invited the Secretary of State to reconsider the screening direction which had been issued in the light of the World Heritage Site designation. Lord Justice Sullivan expressed his conclusions on this point as follows:

“20. It is common ground that an Inspector determining an appeal on behalf of the Secretary of State does have power to invite the Secretary of State to reconsider a screening direction. Although the observations of Simon Brown LJ in paragraph 24 of Evans were obiter they do in my judgement provide eminently sensible guidelines as to the circumstances in which an Inspector not merely may but should invite the Secretary of State to reconsider a screening direction with a view to deciding that an application for planning permission is after all an application for EIA development. An Inspector is under an obligation to invite the Secretary of State to reconsider the matter only if the Inspector considers that, because for example of a change of circumstances, such as the inscription of the WHS in the present case, there is “at the very least a realistic prospect” of the Secretary of State coming to a different screening conclusion. Although Evans was a case where the screening direction had preceded an inquiry by only a few months, I do not accept Mr Kolinsky’s submission that the observations in paragraph 24 of Evans are not applicable to the circumstances of the present case where there was a change of circumstances by reason of the inscription of the WHS after the screening direction. The court plainly had in mind cases where “other material facts [come] to light” after the screening direction. Whether those other material facts come to light because they were not appreciated at the time of the direction or because of a subsequent change of circumstances is in my judgment immaterial. The guidance is equally well applicable.

21. Although as Mr Kolinsky submits, it is for the Secretary of State to decide whether a proposed development is likely to have significant environmental effects for the purpose of issuing a screening direction, whether there is a “realistic prospect” of the Secretary of State changing his or her opinion as to the likely environmental effects on the development is pre-eminently a matter of planning judgment for the Inspector. The Inspector’s judgment on that issue can be challenged on rationality ground: see Evans. It is not for the court to decide for itself whether there was or was not a “realistic prospect” of the Secretary of State making a different screening direction.

22. Precisely because an Inspector has to use his or her own planning judgment on that issue the mere fact that he or she has not been asked by any of the parties to the appeal to exercise the power to refer the matter back to the Secretary of State will

not necessarily be fatal to a legal challenge to a failure to exercise power. However, an applicant under S288, which is of course concerned with an error of law on the part of the Inspector determining the appeal, will face a formidable task in such a case. A S288 challenge in those circumstances will succeed only if the court is satisfied that any reasonable Inspector would, on the facts before the Inspector in that appeal, have concluded that they should exercise the power to refer the matter back to the Secretary of State of their own motion, not withstanding the fact that they had not been asked to do so by any party to the appeal.”

40. The decision in the case of Mageean (and to some extent in the CBRE case) was different to the present circumstances. In Mageean the Inspector had to consider exercising his or her planning judgment as to whether on the facts as known at the time of the appeal the screening direction should be referred back to the Secretary of State. Here the question is when, in the absence of that obligation, the point arises where consideration should be given as to whether or not the Screening Opinion ought to be revisited. The challenge is not therefore to a positive decision not to reconsider an earlier Screening Opinion; the challenge is to a failure to consider the point at all.
41. In my view the germ of the answer to this question is to be found in both of the authorities to which I have referred. In paragraph 47 of the CBRE case Lindblom J caveated the breadth of a previous screening process by stating that it would continue to have validity “so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through”. In the Mageean case the question for the Inspector distilled in paragraph 21 of the judgment is “whether there is a “realistic prospect” of the Secretary of State changing his or her opinion”. Thus the trigger point, if a development has been previously negatively screened, to determine whether any change in its environmental context or its proposals require consideration to be given as to whether or not the Screening Opinion ought to be revisited in order to discharge the duty under Regulation 3(4) at the point at which consent is granted is whether or not those changes create any realistic prospect of the Screening Opinion being different. If such circumstances arise and the local authority apply their mind to the point and reach a further negative Screening Opinion then that is a decision challengeable on the normal public law grounds. Failure to give any consideration to the issue places the local authority in the position of subsequently granting permission for EIA development without having gone through the procedure required for EIA development by the 2011 Regulations.
42. It is correct to observe that the 2011 Regulations do not expressly contain any continuing duty in relation to Schedule 2 development which has been previously negatively screened. However, I accept the submission made on behalf of the claimant by Mr Strachan QC that the effect of Regulation 3(4) is that the discharge of the requirements under the Regulation crystallises at the point at which planning permission is granted since at that point the Regulations preclude the grant of consent for development which is in truth EIA development. It follows that in order to discharge that obligation it is necessary for a decision maker, dealing with a Schedule

2 development subject of a negative Screening Opinion (and not the subject of a definitive direction in that respect under Regulation 4(3) of the 2011 Regulations) to continue to ensure that the requirements of the Regulations and the directive are met throughout the lifetime of the application prior to consent.

43. Denial of this proposition could envisage a Schedule 2 application being made to the local authority and the subject of a negative Screening Opinion followed by a change in its environmental circumstances or in the nature of the proposal which would make it obviously EIA development but which as a result of the earlier Screening Opinion the local authority were under no duty or obligation to reconsider. Such an approach would lead to the grant of consent for that development without it having been the subject of EIA contrary to Regulation 3(4) and indeed the wider scope and broad purpose of the parent Directive. In such circumstances, therefore, the local planning authority are clearly under an obligation in order to discharge their duties under the 2011 Regulations to keep the circumstances of the application under review and, if there is a realistic prospect that a change of circumstances may lead to a different outcome to the Screening Opinion, to reconsider that question. That is the key difference between the present case and the CBRE case. In the CBRE case the question was considered and a conclusion reached; in the present case the question was never considered at all.

Conclusions

44. During the course of argument the grounds as originally pleaded by the claimant were refashioned and I propose to deal with them in the manner in which they emerged during the hearing.

Ground 1

45. Prior to embarking upon the substance of Ground 1 it is important to offer some observations about submissions that were made in relation to the correct approach to the officer's report. Attention was drawn to the extensive background documentation which was appended to the officer's report together with other documentation circulated during the committee meeting. Notwithstanding this material in my view it must be the officer's analysis which is the key to understanding the member's decision and the legality of it. In this case they followed the officer's recommendation and granted planning permission and therefore can be taken to endorse the officer's reasons in reaching that decision. The basis for the recommendation is, of course, set out in the officer's report not the background documentation. That material no doubt is present to provide further information but it is important to note that it contains material on both sides of the argument. The resolution of those issues and the justification for the decision to grant permission is found within the officer's report and in particular within the officer's conclusions on the various topics that were raised. It is therefore to the officer's report that it is necessary to look to see whether there has been any error of law.
46. Ground 1 is the allegation that the officer's report significantly misled the committee about the contents of the Inspector's report in relation to the sequential approach. Before engaging with that argument in detail it is worthwhile observing that in this case it is beyond argument that the Inspector's decision on the claimant's appeal was an important material consideration that carried significant weight. So much was

observed in terms in paragraph 6.28 of the officer's report. Thus whilst the Inspector's decision was obviously not binding on the members it was nonetheless a weighty and significant matter in their decision making process. It is also undoubted that in relation to the issue of the sequential test the Inspector had made an assessment of the same issue against the background of, for instance, the same physical circumstances on the ground in relation to the location of the sites, the disposition of surrounding uses and their relationship to the functioning of the town centre. Equally clearly the Inspector had reached a contrary conclusion to that which was contemplated by the interested party and the council's consultants in respect of the status of the WSCP site.

47. Having considered the material in this case I am satisfied that the officer's report did mislead members, and mislead them significantly, as to the findings and conclusions of the Inspector in relation to the sequential test. The starting point of the officer's report (having set out solely paragraph 32 of the Inspector's decision) was that the Inspector's conclusions were 'not fully reasoned other than pointing to poorer pedestrian links'. That observation which appears to be the summation of the officer's understanding of the Inspector's conclusions was not merely a gross over simplification but fundamentally misrepresented the Inspector's decision. As will be clear from the far more extensive passages from his decision that I have set out above his conclusions were fully reasoned and in a manner which was legally impeccable (regardless of the fact that there was no challenge by the council on this basis after the decision was received). The totality of the reasons for his decision are to be found from paragraphs 21 of the decision letter onwards. Without repeating them, those reasons were not only fully expressed but covered a range of evidence to which the Inspector was referring when, in paragraph 32, he related his conclusions to 'the submitted evidence as a whole'. The reasons provided engaged, firstly the consistent findings of RTP in relation to the sequential preference for the LMS site bearing in mind its ideal location for incorporation within the functioning of the town centre and its ability to operate as an extension of the town centre unlike the WSCP site. The Inspector's analysis also engaged with the erroneous approach of the defendant in their determination of the LMS application and, importantly, their revised stance that in fact the LMS site was the best site sequentially and their conclusions in the first reason for refusal could not stand to the extent that no further decision could be made on the WSCP site until the erroneous sequential analysis was corrected by a new report re-advising the committee. Whilst it is not made express no doubt such a corrected report would have involved re-advising members along the lines of the revised position which the council presented to the appeal. Further the Inspector's reasons engaged with the consistency of his conclusion with emerging development plan policy. Thus far from being 'not fully reasoned' the Inspector's decision, which was addressed to an informed audience not least the defendant, embraced in its full reasons a range of pieces of evidence all supporting the conclusion that the LMS site was decisively preferable to the WSCP site in terms of the sequential test.

48. This leads to the second way in which Ground 1 is put, namely that since the officers were inviting members to reach a contrary conclusion on the sequential test to that which had been reached by the Inspector, did they provide adequate reasons to justify that disagreement and an alternative decision? In my view it is clear that they did not. That is perhaps unsurprising given that they thought, erroneously, that the Inspector's report wasn't 'fully reasoned' save with respect to pedestrian links. As a result of not

having properly appreciated the wealth of reasoning provided by the Inspector they thereafter do not engage with those reasons in explaining why a different answer to the one reached by the Inspector should be provided. There is in the officer's report at paragraphs 6.28 – 6.38 (and in particular in paragraph 6.29) no mention of the previous consistent advice from RTP providing the evidence base for the local plan strategy, the council's previous position and no engagement with the substance of the points raised by RTP and the Inspector in relation to the capacity of the LMS site to integrate intimately with and function as part of the town centre without any intervening development which underpinned the preference for the LMS site and the conclusion in the RTP evidence that the WSCP site was far less suitable as an extension to the town centre. The principle paragraph which deals with the Inspector's conclusions, paragraph 6.29, focuses on distances between the town centre and the sites and the potential for linkage but does not deal with the capacity for physical integration. A subsequent assertion later in the report that the WSCP site 'also has potential to form an extension to the town centre' which was relied upon by the defendant and the interested party in their submissions does not assist in that regard. This is because that assertion does not engage with the conclusions of RTP and the Inspector that it was the absence of existing intervening development and uses between the site and functional town centre which rendered the LMS site preferable and, in terms, the WSCP less so. This observation does nothing to explain why those earlier, less assertive and more fully explained justifications for preferring the LMS site are to be overridden. The reasons therefore are inadequate.

49. I am unable to accept the submission made by Mr Tucker QC on behalf of the interested party that this was a matter, like for instance an aesthetic judgment, where reasons could be simple or brief. This was an issue which related to explaining earlier and fully reasoned conclusions in both earlier independent advice obtained by the council from RTP, and also the full reasons provided by the Inspector. These earlier judgments were not subjective assessments for instance in relation to visual impression, but were grounded in the physical circumstances of the sites and surrounding uses and their physical proximity and linkages to the functional town centre. It required in my judgment reasons and explanations which were at least comparable to those which the defendant was seeking to gain say, and met the points with which they disagreed. Little more than contradiction is not an adequate form of reasoning in these circumstances. It is notable that the officers did not in the material that they provided seek to rely upon any physical or other contextual or policy matters which had changed since the claimant's appeal. I am therefore satisfied that the reasons provided by the officers in support of the conclusion that a different decision should be reached from that of the Inspector was based on misleading advice to the committee and was inadequately reasoned. All that said there is an important issue for discretion which I shall analyse later.

Grounds 2 and 4

50. These two grounds run together and they are based on the allegation that the officer's report failed to take account of or advise members about the Inspector's conclusions in particular at paragraph 44 of his decision that the LMS site should be treated for planning purposes as part of the town centre in particular when assessing retail impact and its quantification.

51. Having analysed the officer's report there is no doubt that it did not refer at all to the Inspector's conclusions in paragraph 44 of the decision that 'having regard to the council's aspirations for additional retail areas in the 'Northern Arc' set out within the emerging LPS' the LMS proposal should be seen as contributing to town centre turnover and creating (in the analysis then available) a 24 % positive impact on the town centre's turnover. The question that arises is as to whether or not that omission misled the members significantly, or alternatively whether that left out of account a material consideration in the analysis of retail policy and retail impact.
52. Having considered the submissions made in this respect I am in no doubt that this omission did amount to significantly misleading the members about an important material consideration, namely the conclusions previously reached by the Inspector. Although, as set out above, reference was made in the officer's report to the LMS site having the ability to form a logical extension to the town centre what was important in this respect was the failure of the analysis in the officer's report in relation to retail impact to treat the LMS site (as the Inspector had) as part of the town centre for the purposes of assessing impact. The economic modelling results which were presented to members detailing the effects of the establishment of the WSCP proposal did not either include the LMS site within the town centre overall or, more importantly, analyse in quantitative terms the impact of the WSCP scheme on the LMS proposals. As Mr Tucker on behalf of the interested party correctly observed the exclusion of the LMS site from the overall turnover of the town centre is perhaps of little moment. That is because its inclusion would have diluted the impact percentages created by the WSCP scheme. The real question that was obviously and in any event before the members was the effects of the WSCP proposal on the LMS scheme.
53. The officer's report repeatedly contends that the LMS site is not protected by paragraph 26 of the Framework because it is not in the town centre. That is an observation that is made in paragraphs 6.45, 6.69, 6.77 and 6.84. That is a conclusion which has, however, been reached without regard to the important material consideration that the Inspector concluded in analysing the impact of the LMS site that it should be included within the town centre. If the Inspector's approach had been taken into account that conclusion may well have been very different. His incorporation of the LMS site in the centre would have justified its inclusion in paragraph 26 as a commitment to planned in centre investment. Thus the exclusion of this aspect of the Inspector's decision on the claimant's appeal meant that the application of the Framework's policy occurred without taking account of a material consideration.
54. During the course of argument Mr Manley QC submitted on behalf of the defendant that the LMS site could only ever be an edge of centre site and therefore could never be protected by paragraph 26 because the LMS scheme had not been developed and the proposal had not been implemented. In my judgment that is an interpretation of the policy which is difficult if not impossible to sustain especially bearing in mind the particular circumstances of the present case. The reference in paragraph 26 to 'committed and planned public and private investment in a centre or centres' clearly contemplates developments which are planned for and have yet to materialise on the ground. The particular circumstances involved in the present case are that the LMS proposal was a commitment for which permission had been granted on the basis that it would function as part of the town centre and indeed the expenditure it generated

should be counted as part of the town centre. Furthermore the reference in paragraph 26 to the analysis of impact 'up to five years from the time the application was made' envisages a prospective examination of retail impact. Thus in the particular circumstances of this case the application of paragraph 26 to the LMS site cannot be excluded.

55. Mr Tucker submitted that there was no need for any quantified assessment of the impact on the LMS scheme, but the difficulty with that submission is that if paragraph 26 applied that is precisely what it requires and indeed what was undertaken and reported to members in terms of the impact upon both Malton town centre as a whole and individual elements of it such as the Morrison's store. This (so far as possible) objective, transparent and quantified analysis is a well recognised means of testing the economic impact of retail proposals.
56. It is correct to observe that as set out above in their letter of 9th April 2014 EL appear to have undertaken some analysis of the impact on the LMS store and placed a figure of 16% as an outcome of their analysis. However, that material did not feature as any part of the officer's conclusions and further, and perhaps more importantly, was accompanied by the obviously erroneous conclusion that the impact on the LMS proposal was not a material consideration. That was a proposition which neither Mr Manley nor Mr Tucker were prepared to support and rightly so. The approach which I take to this material is governed by what I have set out above in paragraph 45. The 9th April letter was part of the background material furnished to members but it is clear this element of their advice did not feature in the officer's conclusions which are the important source for the member's reasons. If I were wrong about that and reliance was to be placed upon this material as perfecting the absence of any analysis of impact on the LMS proposal then it is in turn affected by the legal error of suggesting that that issue was immaterial.
57. In a similar vein, both in relation to these grounds and also Ground 1, reliance was placed by the defendant and the interested party on the fact that members had access to the Inspector's report. I am unable to accept that this step perfected or overcame the errors which I have identified. Firstly, for the reasons which I have given above, in circumstances where the members accepted the officer's recommendation the basis for that recommendation provides the reasoning to justify it and in this case that is as set out in the officer's conclusions. In any event it is clear that the Inspector's decision was only provided to members on the night of the meeting and not as part of their pre-reading. Providing them with a relatively lengthy decision letter at the start of the meeting was no sensible substitute for the officers providing them with proper advice as to the content and conclusions of this earlier significant decision.
58. To conclude, the omission of any mention of the Inspector's conclusions in relation to the incorporation of the LMS site within the town centre for retail impact purposes was a material and significant misrepresentation to members. No reasons were provided for departing from the Inspector's conclusion. The conclusions which the officers reached and which the members adopted on the application of paragraph 26 of the Framework and the absence of protection for the LMS proposal were made without regard to that important material consideration and thus were unlawful.

Ground 3

59. In this ground the claimant contends that, in particular in paragraph 6.76 of the officer's report, the defendant conflated the view of Booths (who were solely the proposed tenant and operator of part of the proposed scheme) with the views of the claimant (who had to fund and develop the totality of the proposal). Having reviewed this element of the officer's report it is clear in my view that each of the positions of the parties, both Booths and the claimant, were fairly and properly put before members. However, beyond the advice that the claimant's views should be treated with caution it is a little unclear what definitive view the officers formed about the prospects of the LMS proposal being implemented if consent was granted for the WSCP scheme. They seemed to conclude that it would still happen but during the course of argument Mr Manley was unwilling to be definitive as to what precisely the prospect of that scheme happening was in the minds of the officers. Whilst I am not satisfied that on a fair and full reading of the officer's report they muddled up or conflated the views of the claimant with that of Booths and therefore provided members with incoherent advice, the failure of this ground does not overcome in any way the problems which I have identified for the defendant in relation to Grounds 2 & 4.
60. The 'caution' that the officers counselled in relation to the claimant's views of the prospects for the LMS site coming forward is qualified by the contention that because the LMS site is not part of the town centre paragraph 26 of the Framework did not apply. For the reasons I have already given the latter conclusion was infected with error and led to a failure to undertake any quantified impact analysis on the LMS scheme. If the Inspector's conclusions had been taken into account and his approach of including the LMS within the town centre had been adopted then the economic impact of the WSCP would have been fully analysed and that would have provided an important means of testing the realism of what both the claimants and Booths were contending. As a result of the approach in the officer's report and the absence of analysing the impact on the LMS scheme the conclusions which they reached in relation to the impact on planned investment were inchoate. As a result simple reporting of the position of the claimant and its intended operator did not amount to reaching a decision on planned investment based upon all of the relevant or potentially relevant material considerations.

Ground 5

61. For the reasons which I have set out above in relation to the legal argument which relates to this ground I am satisfied that the correct approach is that the defendant needed to keep under continual review the validity of the Screening Opinion which it had given bearing in mind any changes in circumstances which might lead to a different conclusion. In the light of that legal background the factual question which then emerges is as to whether or not there were any changes in the circumstances of the WSCP proposal which might lead to a different conclusion being reached and which required attention to be given to whether the Screening Opinion needed to be reconsidered.
62. There is no doubt in my view that the original Screening Opinion request made by the interested party clearly drew attention to the existence of the LMS proposal as an application for planning permission at the time when the request was made. Equally

clearly the reference to it in paragraph 4.2 in relation to cumulative effect relates to environmental impacts caused by built development. Paragraph 4.3 of the request then goes on to deal with the economic effects and in particular considerations of retail impact. There can be no doubt that this paragraph in relation to economic effects is predicated on the NLP 'conclusion that only one new large convenience store / foodstore can be accommodated in Malton or the district generally'. Those paragraphs, one dealing with effects from built developments and the other dealing with economic effects are the foundation of the conclusion suggested in paragraph 4.4 of the request that cumulative effects would not give rise to any significant environmental effects warranting EIA.

63. A witness statement has been produced from Ms Lancaster who was the officer of East Riding of Yorkshire Council who undertook the screening opinion. It should be noted that at the time when the Screening Opinion occurred the defendant had passed the assessment of the LMS and WSCP applications to East Riding of Yorkshire Council on the basis that they owned the WSCP site. In a witness statement dated the 10th December 2014 Ms Lancaster states that she 'was fully aware and took into account the LM application as part of the cumulative impact of the respective retailing proposals'. It is understandable given the remove of time that Ms Lancaster is not able to provide any information beyond that observation. I have no doubt that she has been involved in considering many many other applications in the meantime. I have equally no doubt that she was aware and took account of the LMS application in forming her view as set out above that its existence was drawn to her attention through the screening request. However none of this answers the critical question which is whether or not the cumulative economic effect of both stores in operation was taken into account in the Screening Opinion. On the basis of the evidence which I have set out I am not satisfied that it was. Indeed, I can see no reason why Ms Lancaster would have considered the cumulative economic effect of both schemes trading when she had been told in the screening request that that was not a possibility.
64. It may be said that the suggestion that both schemes might be trading (and I bear in mind as I have already observed the absence of any absolute or definitive position adopted by the officers in their assessment of the contentions made by the claimant and Booths in respect of impact on planned investment) was not definitively concluded upon. Nevertheless once the position had changed from one where only one store could possibly be operating to circumstances where the council were undoubtedly contemplating the prospect of both stores operating the need to assess the cumulative effects of that in economic terms arose leading to the conclusion that on the basis that this might lead to a different outcome to the Screening Opinion consideration needed to be given to whether or not the screening process should be revisited. This issue was simply never considered prior to the grant of planning permission and that was, in my judgment, an error of law in dealing with the application.

Discretion

65. In the event of me reaching adverse conclusions in respect of the grounds of challenge the defendant and the interested party raised questions pertaining to the exercise of discretion. I deal with the matters raised in turn. In particular in relation to Ground 1 it was contended that whatever may have been the position about the Inspector's approach to the sequential test, because of the scale of the proposal and the inability to

fit it on the LMS site the conclusion was bound to be reached that the WSCP proposal met the requirements of the sequential test because there was no other site suitable to accommodate it given its size. In my view there is force in this submission and it is one which is based clearly on the conclusions set out in the officer's report that the scale of the WSCP proposal could not be accommodated on the LMS site. That is a conclusion which has not and could not in substance be challenged. Thus were the errors confined to Ground 1 I would not have been persuaded that it was appropriate to grant relief so as to quash the decision.

66. I do not consider, however, that similar considerations pertain to Grounds 2, 4 and 5. So far as Grounds 2 & 4 are concerned the failure to take account of the Inspector's conclusions in paragraph 44 in the way that I have analysed above does not enable me to say that were the matter to be reconsidered the same decision would arise. Upon reconsideration it would be necessary for the defendant to actively consider whether the Inspector's conclusions in paragraph 44 are accepted, and in accordance with their legal duty explain why they were not accepted if that became their position. If they did accept the Inspector's conclusions then issues would arise in relation to the analysis of the impact on the LMS scheme which have not been undertaken. A range of planning judgments therefore would need to be reached and it is simply not possible to conclude that the decision would inevitably (or even very likely) be the same.
67. Similarly in relation to the Screening Opinion under Ground 5, whilst it was contended by the defendant and the interested party that there was no evidence to suggest that any different conclusions might be reached I am not satisfied that that is the case. As was pointed out by Mr Strachan in reply this is not a case like the CBRE Lionbrook case where the Council had indeed expressed a view about whether or not screening was required. The fact is that on the conclusions I have reached the defendant has never considered the point and on the evidence before me it is simply not possible to say that the difference between both schemes operating and only one of the schemes operating is so inconsequential that the outcome of re-screening would inevitably be the same. This is not a case therefore where the failure is purely procedural or trivial in character but is in truth a matter which calls for investigation and about which it would be improper to exercise discretion.

Overall Conclusion

68. For the reasons given the claimant's case succeeds on Grounds 1, 2, 4 & 5 and the decision of the defendant to grant planning permission on 12th September 2014 to the interested party should be quashed.