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B&Q Premises, Trimdon Street, Sunderland

Appraisal of the Retail Policy Aspects of a Section 73 Application (ref: 16/02130/VAR)
Submitted on Behalf of Wm. Morrisons Supermarkets Plc, Seeking a Variation to
Condition No. 3 of Outline Planning Permission (ref: 99/00084/OUT)

On behalf of Sunderland City Council

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FINAL REPORT

HV107



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1 INSTRUCTIONS, THE APPLICATION PROPOSAL AND OUTLINE OF REPORT

Instructions

- 1.1 In June 2016, Sunderland City Council instructed HollissVincent to engage in pre-application discussions with Peacock and Smith, concerning an emerging application proposal, by Wm Morrisons Supermarkets Plc, in respect of the B&Q premises at Trimdon Street. Pursuant to these instructions, a meeting was held with Peacock and Smith, on the 13th July 2016, at the City Council's offices. The proposal being discussed at that time would have involved the conversion of the vacant part of the B&Q premises into three non-food units, together with a fourth non-food unit to be constructed on the site of B&Q's former builders yard. These four units would have had an aggregate floorspace of 6,262 sq.m GIA. However, at the time of the pre-application meeting, in July 2016, there were no named retailers, and there was no confirmation as to the type of non-food goods that may be sold from these units.
- 1.2 Indeed, the illustrative, four-unit scheme discussed at the pre-application meeting did not materialise. Instead, we were instructed, in January 2017, to appraise the retail policy aspects of a Section 73 application proposal (Ref: 16/02130/VAR) which sought to amend Condition No. 3 of the original outline parent consent to construct a retail warehouse, garden centre and building materials outlet (Ref: 99/00084/OUT), which, following reserved matters consent (Ref: 99/00376/REM), became an outlet for B&Q. Condition No. 3 of the original outline consent read:

"The Class A1 development hereby permitted shall not be used for the retailing of any of the following goods without the prior consent of the local planning authority: (a) food and drink (excluding the sale of food and drink for consumption on the premises); (b) fashion clothing (excluding gardening/DIY overalls and protective clothing); (c) fashion accessories; (d) footwear (excluding gardening/DIY protective footwear); (e) jewellery; (f) cosmetics and toiletries; (g) pharmaceutical products; (h) books and magazines (excluding gardening/DIY books and magazines); (i) toys (excluding garden toys and play equipment); (j) sports goods

(including walking and climbing equipment); and, (k) camping equipment, in order that the local planning authority may retain control over the development”.

- 1.3 The suggested revised wording for Condition No. 3 put forward, on behalf of Morrisons, by Peacock and Smith in Paragraph 1.4 of its Planning and Retail Statement, of November 2016, was as follows:

“No more than 5,162 sq. m of the Class A1 development hereby permitted shall be used for the retailing of any of the following: (a) food and drink (excluding the sale of food and drink for consumption on the premises); (b) fashion clothing (excluding gardening/DIY overalls and protective clothing); (c) fashion accessories; (d) footwear (excluding gardening/DIY protective footwear); (e) jewellery; (f) cosmetics and toiletries; (g) pharmaceutical products; (h) books and magazines (excluding gardening/DIY books and magazines); (i) toys (excluding garden toys and play equipment); (j) sports goods (including walking and climbing equipment); and, (k) camping equipment, in order that the local planning authority may retain control over the development”.

- 1.4 We understand, however, that following the submission of Peacock and Smith’s Planning and Retail Statement, in November 2016, Wm Morrisons Supermarkets Plc secured interest from a non-food retailer that wishes to occupy the whole of the vacant part of the B&Q premises, together with the former B&Q builders yard, that Morrisons had intended to occupy and expand into, under planning permission Ref: 14/01440/FUL. As a consequence of this retailer interest, Peacock and Smith put forward an amendment to the Section 73 application, under cover of its letter to the City Council of 17th March 2017.
- 1.5 However, prior to discussing the revised application proposal, it is important to record that extant consent Ref: 14/01440/FUL, has not been implemented. Indeed, paragraph 2.13 of Peacock and Smith’s Planning and Retail Statement, records that no external alterations have been made and that B&Q has merely rearranged its operations internally, so as to make room for the Morrisons store, which was intended to have a gross internal area of 6, 547 sq. m, as per the provisions of Condition No. 3 of the abovementioned 2014 consent. It seems clear that Morrisons no longer wishes to open a new store at Trimdon Street, but, for the reasons explained in Section 5 of this report, we consider that planning consent Ref: 14/01440/FUL continues to represent a ‘real’ fall-back position, rather than being ‘theoretical’. This is because there is at least an ‘outside

chance' that Morrisons' leasehold interest in the premises could be transferred to another food retailer. As a consequence, we consider that the extant 2014 consent represents a 'real' fall-back position (albeit not for Morrisons), and that weight should be given to the extant consent as a material consideration in determining the current Section 73 application.

- 1.6 Similarly, we consider that the reoccupation of the vacant floorspace within the B&Q building, by a non-food, bulky goods retailer, in line with the provisions of the 1999 consent (ref: 99/00084/OUT), also represents a 'real' fall-back, so that this second fall-back is also a material consideration to be taken into account in determining the current Section 73 application.

The Revised Section 73 Application Proposal

- 1.7 The revised Section 73 application proposal, as put forward by Peacock and Smith in its letter to the Council of 17th March 2017, seeks to amend Condition No. 3 of outline planning permission Ref: 99/00084/OUT, to read as follows¹:

The Class A1 development hereby permitted shall not be used for the retailing of any of the following goods without the prior consent of the local planning authority: (a) food and drink (excluding the sale of food and drink for consumption on the premises); (b) fashion clothing (excluding gardening/DIY overalls and protective clothing); (c) fashion accessories; (d) footwear (excluding gardening/DIY protective footwear); (e) jewellery; (f) cosmetics and toiletries; (g) pharmaceutical products; (h) books and magazines (excluding gardening/DIY books and magazines); (i) toys (excluding garden toys and play equipment); (j) sports goods (including walking and climbing equipment); and, (k) camping equipment, in order that the local planning authority may retain control over the development. However, the area shown in pink on drawing ref. 15165-SK-05, with a gross internal area of no more than 5,162 sq. m shall be used for the sale of any non-food goods and up to 30% (1,549 sq. m) of food and drink goods'.

1 Corrected, as agreed during telephone conversation with the applicant's consultant, Mr Chris Creighton, of 20th March 2017. See the changes underlined.

Outline of Report

1.8 Thus, with this background in mind, the remainder of our report is structured as follows:

- **Section 2** provides a brief résumé of those aspects of the National Planning Policy Framework (the NPPF) which relate to town centres and the location of development for retail and other main town centre uses;
- **Section 3** provides our appraisal of the application in relation to the retail policy aspects of the current and emerging development plan;
- **Section 4** provides our appraisal of the application proposal in relation to the sequential test, set out in Paragraph 24 of the NPPF;
- **Section 5** provides our assessment of the '*fall-back*' position for the application site, through reference to relevant case law, and it advises on the weight that should be given to the '*fall-back*' in determining the current Section 73 application;
- **Section 6** provides our appraisal of the Section 73 application proposal against the impact tests set out in Paragraph 26 of the NPPF; and
- **Section 7** provides our overall conclusions in relation to retail policy issues and our recommendations to the Council.

2 THE REQUIREMENTS OF NATIONAL POLICY FOR TOWN CENTRES AND SUSTAINABLE ECONOMIC DEVELOPMENT

Introduction

- 2.1 The National Planning Policy Framework (the NPPF) was published on 27th March 2012. Paragraphs 2, 11, 12, 150, 196 and 210 of the NPPF emphasise that planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. Paragraph 13 confirms that the NPPF is a material consideration in planning decisions.

Sustainable Development

- 2.2 Paragraph 6 of the NPPF explains that the purpose of the planning system is to contribute to the achievement of sustainable development and that Paragraphs 18 to 219 of the Framework, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system. Paragraphs 7 and 8 of the NPPF then explain that there are three dimensions to sustainable development – economic, social and environmental – and that these are mutually dependant, so that gains in each should be sought jointly and simultaneously.

The Presumption in Favour of Sustainable Development

- 2.3 Under the heading of 'the presumption in favour of sustainable development', Paragraph 12 confirms that the NPPF '*...does not change the statutory status of the development plan as the starting point for decision making*'. Thus, Paragraph 12 states that:

'...development that accords with an up-to-date local plan should be approved and proposed development that conflicts should be refused unless other material considerations indicate otherwise'.

- 2.4 Paragraph 14 of the NPPF then sets out the presumption in favour of sustainable development in more detail and says that it '*...should be seen as a golden thread running through both plan-making and decision-taking*'.

2.5 For decision-taking this means²:

- *'approving development proposals that accord with the development plan without delay; and*
- *where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:*
 - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole (our emphasis); or*
 - *specific policies in this Framework indicate development should be restricted.'*

2.6 The second decision-taking bullet point in Paragraph 14 of the NPPF only comes into force if the development plan is *'...absent, silent or relevant policies are out-of-date'*.

2.7 The development plan for this part of Sunderland comprises the saved policies of the City of Sunderland Unitary Development Plan, adopted in 1998 (the UDP), together with the saved policies of UDP Alteration No. 2 (Central Sunderland), adopted in September 2007. Paragraph 215 of the NPPF advises that *'...due weight should be given to relevant policies in existing plans according to their degree of consistency with this Framework...'*

2.8 The UDP was prepared in the context of Revised PPG6, dated June 1996. However, for the reasons explained in Section 3, it is considered that there is a deficiency in the relevant saved Shopping Policies in the UDP, namely Policies S1, S2 and S3. These are strategic and aspirational policies, but they do not address the up-to-date development management impact tests for retail development which is located outside town centres, as set out in Paragraphs 26 and 27 of the NPPF.

2.9 Moreover, although the application site falls within the boundary of Central Sunderland in UDP Alteration No. 2, it is not subject to any specific land use proposals. Thus, although we note that Policy S2A of UDP Alteration No. 2 requires proposals for key town centre

² Unless material considerations indicate otherwise.

uses, which lie beyond the Retail Core, to address the sequential and impact criteria incorporated within the policy, we consider that Policy S2A is not fully consistent with the NPPF. We reach this conclusion for a number of reasons:

- firstly, because Policy S2A incorporates criteria relating to ‘*need*’ and ‘*scale*’, which are no longer development management tests in the NPPF;
- secondly, because Policy S2A incorporates Criterion iv), which refers to there being ‘*...no unacceptable impacts on the vitality and viability of the retail core...*’, rather than using the NPPF test, which is whether there is likely to be a ‘*significant adverse impact*’; and
- thirdly, because Policy S2A states that: ‘*There will be a strong presumption against proposals for retail development which [like the application site] are located outside the City Centre boundary, other than in the new Local Centre proposed for the Grove site under Policy SA6A.1*’ – this amounts, almost, to a moratorium against retail development outside the City Centre boundary, which is not consistent with the tests set out in Paragraphs 26 and 27 of the NPPF.

- 2.10 As a consequence, we consider that the application does benefit from the presumption in favour of sustainable development, because relevant policies in the development plan are out-of-date.

Core Planning Principles

- 2.11 Paragraph 17 of the NPPF then sets out 12 core planning principles which it says ‘*...should underpin both plan-making and decision-taking*’. These principles, amongst other things, include the need for the planning system to:

- be genuinely plan-led;
- be a proactive driver of sustainable economic development, so as to deliver the homes, business, industry and infrastructure that are needed;
- secure high quality design and a good standard of amenity;

- be aware of the different roles and character of different areas and promote the vitality of our main urban areas;
- encourage the effective use of previously developed land that is not of high environmental value;
- promote mixed use developments; and
- make the fullest use of public transport, walking and cycling and focus significant development in locations which are, or can be made, sustainable.

Building a Strong, Competitive Economy

- 2.12 Paragraph 18 of the NPPF explains that the Government is committed to securing economic growth in order to create jobs and prosperity and meet the twin challenges of global competition and a low carbon future. Paragraph 19 goes on to state that the Government is committed to ensuring that the planning system does everything it can to support sustainable economic growth. In order to achieve such growth, Paragraphs 20 and 21 emphasise the need to meet the development needs of business and to address potential barriers to investment, including a poor environment, or any lack of infrastructure, services or housing.

Ensuring the Vitality of Town Centres

- 2.13 Paragraphs 23 to 27 of the NPPF deal with the need to promote the vitality of town centres. Paragraph 23 states that planning policies should promote competitive town centre environments and that, in drawing up Local Plans, LPAs should, amongst other things:
- recognise town centres as the heart of their communities and support their vitality and viability;
 - promote competitive town centres that provide customer choice and a diverse retail offer;
 - ensure that needs for retail, leisure, office and other main town centre uses are met in full and are not compromised by limited site availability, so that local planning

authorities should undertake an assessment of the need to expand town centres to ensure a sufficient supply of suitable sites;

- allocate appropriate sites for main town centre uses, in accordance with the sequential approach; and
- plan positively for centres in decline.

2.14 Paragraph 24 then sets out the sequential test that applies to planning applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date Local Plan. Paragraph 24 states that *'...applications for main town centres uses should 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.'* In considering edge and out-of-centre proposals, Paragraph 24 states that *'...preference should be given to accessible sites that are well-connected to the town centre'*.

2.15 In applying the sequential approach, Paragraph 24 requires applicants and local planning authorities to demonstrate flexibility in relation to issues such as format and scale. However, in contrast to the provisions of Policy EC 15.1d of the former PPS4, Paragraph 24 of the NPPF makes no specific mention of the words *'car parking'* and *'disaggregation'* in applying the flexibility component of the test.

2.16 Paragraph 26 of the NPPF then sets out the impact tests for applications for retail, leisure and office development that are located outside town centres and which are not in accordance with an up-to-date Local Plan. Paragraph 26 requires applications for such development, which are over 2,500 sq.m (or a locally set threshold), to include an assessment of:

- a) *'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*
- b) *'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.'*

- 2.17 Paragraph 27 of the NPPF then confirms that *'Where an application fails to satisfy the sequential test or is likely to have a significant adverse impact on one or more of the above factors [in paragraph 26], it should be refused'*. However, it seems clear from Court Judgments (such as the High Court Judgment of 20th December 2012, in respect of the Queen on the application of Zurich Assurance Limited and North Lincolnshire Council and Simons Developments Limited) that Paragraph 27 of the NPPF is not necessarily determinative, if there are significant material considerations which displace its presumption for refusal in the event of a failure of the sequential and/or impact tests.

Decision Taking

- 2.18 Finally, we draw attention to Paragraphs 186 and 187 of the NPPF. Paragraph 186 states that local planning authorities should approach decision-taking in a positive way to foster the delivery of sustainable development. Paragraph 187 reinforces the point in stating that *'local planning authorities should look for solutions rather than problems, and decision takers at every level should seek to approve applications for sustainable development where possible'* and work with applicants to *'...secure developments that improve the economic, social and environmental conditions of the area.'*

Principles Established in the NPPF

- 2.19 The NPPF establishes a number of fundamental principles which are of relevance in determining the Section 73 planning application proposal which is the subject of this report; we draw attention, in particular, to the following principles:
- a) The NPPF emphasises the role of the development plan as the statutory starting point in the consideration of planning applications, so that applications which accord with an up-to-date development plan should be approved without delay, whereas if there is conflict with the development plan, applications should be refused, unless material considerations indicate otherwise.
 - b) The NPPF itself is a material consideration, to which we give significant weight.
 - c) Due weight should be given to the relevant policies in an existing development plan, according to their degree of consistency with the policies of the NPPF.

- d) In decision taking, the presumption in favour of '*sustainable development*' applies not only where development proposals accord with the development plan, but also in circumstances where the development plan is absent, silent, or relevant policies are out-of-date.
- e) The NPPF maintains previous policy in seeking to promote competitive and healthy town centres.

2.20 For the reasons set out in Section 3, it is considered that there is a deficiency in the relevant saved Shopping Policies in the UDP, namely Policies S1, S2 and S3, in that they are strategic and aspirational policies which do not address the up-to-date development management impact tests for retail development that is located outside town centres, as set out in Paragraphs 26 and 27 of the NPPF. Similarly, we consider that Policy S2A of UDP Alteration No. 2 does not fully reflect the provisions of the sequential and impact tests set out in the NPPF. As a consequence, we consider that more weight should be given to the latter.

2.21 The application proposal benefits, therefore, from the presumption in favour of sustainable development, because the relevant Shopping Policies in the UDP and in UDP Alteration No. 2 are out of date. The application should be permitted, therefore, unless:

- a) any adverse impacts of doing so, including cumulative impacts, would significantly and demonstrably outweigh the benefits; or
- b) specific policies in the Framework indicate that such development should be restricted (e.g. because of a breach of the provisions of Paragraph 27 of the NPPF).

3 APPRAISAL OF THE APPLICATION AGAINST THE RETAIL POLICY ASPECTS OF THE CURRENT AND EMERGING DEVELOPMENT PLAN

Introduction

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

'If regard is to be had to the Development Plan for the purpose of any determination to be made under the planning acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.'

- 3.2 The first test, and the statutory starting point is whether the application is *'in accordance with the plan'*, which is a phrase that has been the subject of debate in the High Court in the context of Section 54A of the Town and Country Planning Act 1990. In his judgment of 31 July 2000 (R v Rochdale Metropolitan Borough Council ex parte Milne), Mr Justice Sullivan (as he then was) concluded as follows:

'...I regard as untenable the proposition that if there is a breach of any one Policy in a development plan a proposed development cannot be said to be "in accordance with the plan"...'

'For the purposes of Section 54A, it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.'

- 3.3 This Rochdale judgment is applicable to the interpretation of Section 38 (6) of the 2004 Act and the Council must reach a decision, therefore, as to whether the application is in accordance with the development plan when it is considered as a whole.

The Development Plan in this Part of Sunderland

- 3.4 The development plan for the area in which the Trimdon Street application is located comprises the saved policies of the City of Sunderland Unitary Development Plan,

adopted in 1998 (the UDP), and the saved policies of UDP Alteration No. 2 (Central Sunderland), adopted in September 2007.

The City of Sunderland Unitary Development Plan

Shopping Policies

- 3.5 Following the Secretary of State's saving direction, the Shopping Policies of most relevance to the application being considered are Policies S1, S2 and S3. Each of these policies are strategic Part 1 policies that relate to the Council's overall shopping strategy and to the hierarchy of centres. They are consistent with the objectives set out in Paragraph 23 of the NPPF, which seek to ensure the vitality of town centres. However, the development management policy within the UDP that would have been of most relevance to the consideration of retail development proposals in out-of-centre locations, Policy S5, was not saved, on the ground that it was considered unnecessary, because it repeated the policy set out in the (then) PPS6.
- 3.6 Policies S1, S2 and S3 seek to sustain and enhance the existing network of centres and incorporate the sequential test. However, they are not considered to be fully up-to-date, because they are not consistent with the development management impact tests for applications for out-of-centre retail development, as contained in Paragraphs 26 and 27 of the NPPF. We give more weight, therefore, to the latter.
- 3.7 Thus, with this background in mind, Policy S1, which is saved, states that:

'The City Council will seek to enhance the role of the City's shopping service in the region and ensure it meets local needs by encouraging a wide range of attractive, well-distributed facilities to meet future shopping and related needs. Where appropriate, new development will be based on existing centres, which will be improved wherever possible; development elsewhere should result from application of the sequential test, be in accordance with other policies of the plan and complement existing facilities' (our emphasis).

- 3.8 Retail development - such as the Section 73 application proposal – which is located outside existing centres is subject to the sequential test, must be in accordance with other policies in the UDP, and should complement existing centres (our emphasis). It is clear, therefore, that Policy S1 incorporates the sequential approach. However, as explained in Section 2, the policy position under Paragraphs 26 and 27 of the NPPF, in respect of the impacts of out of centre retail development on existing centres, now requires an assessment as to whether or not the development proposal will have a ‘*significant adverse impact*’ on existing, committed and planned investment, or on the overall vitality and viability of the existing centre. The tests in Paragraph 26 do not require an assessment of whether the development proposal will ‘*complement*’ the existing centre, which is a materially different approach to development management.
- 3.9 Indeed, it is hard to envisage the circumstances under which retail development in out-of-centre locations could ‘*complement*’ existing town centre facilities, other than through provision, perhaps, of bulky goods that require a large-scale retail warehouse format that cannot be accommodated within or on the edge of existing centres, even having applied the appropriate degree of flexibility.
- 3.10 In Section 4, we assess the application proposal in relation to the sequential test incorporated in Paragraph 24 of the NPPF. In summary, we accept that there are no alternative sites or premises within, or on the edge of, Sunderland City Centre, or in nearby Local Centres, which meet each of the ‘*available*’, ‘*suitable*’ and ‘*viable*’ components of the sequential test. As a consequence, the retail components of the application are consistent with the sequential aspect of Policy S1.
- 3.11 Whilst this Section 73 application proposal is likely to cause some limited adverse impact on the City Centre, and on nearby Local Centres, we consider, for the reasons set out in Section 6, that this harm would not be significantly adverse. Thus, although there is some slight conflict with Policy S1, we give more weight to the impact tests incorporated in Paragraph 26 of the NPPF.
- 3.12 Shopping Policy S2 then states that:

‘The City Council will give favourable consideration to proposals which will sustain and enhance the vitality, viability and appropriate diversification of the following existing centres and thereby facilitate regeneration’.

- 3.13 Sunderland City Centre, together with Chester Road Local Centre, are included in the list of centres to which Policy S2 applies. However, although the application proposal is unlikely to assist in sustaining and enhancing the vitality and viability of the centres protected by Policy S2, we consider that the degree of conflict is limited and, as previously stated, we consider that more weight should be given to the impact tests set out in Paragraph 26 of the NPPF, which we deal with in Section 6.
- 3.14 Policy S3 of the UDP states that the City Council will support the retention of other existing shopping centres not specifically identified in Policy S2, including centres such as Hylton Road Local Centre, which is the nearest Local Centre to the application site. However, for the reasons set out in Section 6, we do not anticipate that the Section 73 application proposal will jeopardise the future of Hylton Road Local Centre, or indeed any other Local Centre.

UDP Alteration No. 2

- 3.15 The Section 73 application site is unannotated on the Proposals Map of UDP Alteration No. 2. However, the application proposal is subject to the provisions of Policy S2A. This policy seeks to direct new retail development to the defined Retail Core. Where no suitable site exists within the Retail Core, and subject to there being a proven need, the policy favours edge-of-centre sites that are well-connected to the centre.
- 3.16 Policy S2A requires, also, that development located outside the Retail Core should cause *‘...no unacceptable impacts on the vitality and viability of the Retail Core’*, and it sets out *‘...a strong presumption against proposals for retail development which [like the Section 73 application site] are located outside the City Centre Boundary’*. Nevertheless, we give limited weight to the conflict with Policy S2A, because we do not consider that it reflects, fully, the sequential and impact tests set out in Paragraphs 24 and 26 of the NPPF.

Conclusion in Relation to the Development Plan

- 3.17 For the reasons set out in Section 4, we consider that the application proposal is consistent with the sequential approach aspects of the UDP's relevant saved Shopping Policy S1 and with the sequential aspect of Policy S2A of UDP Alteration No. 2. Furthermore, for the reasons set out in Section 6, we consider that the application proposal would not cause a '*significant adverse*' impact on Sunderland City Centre's overall vitality and viability, or have a significant adverse impact on the vitality and viability of any nearby Local Centre. Similarly, there is no evidence to suggest that the application proposal will have a significant adverse impact on existing, committed and planned public and private investment in the City Centre, or in any Local Centre.
- 3.18 Thus, whilst there is likely to be some conflict with the town centre enhancement objectives contained in Policies S1, S2 and S3 of the UDP, as a result of trade diversion, and whilst there is some conflict with aspects of Policy S2A of the UDP Alteration No. 2 (including its presumption against retail development outside of the City Centre boundary), we consider that these policies do not address, or are not consistent with, the up-to-date sequential and impact tests for out-of-centre retail development, as set out in Paragraphs 24 and 26 of the NPPF. We give more weight, therefore, to the latter.

Emerging Local Plan

- 3.19 Paragraph 216 of the NPPF states that decision takers may give weight to relevant policies in emerging plans, from the date of publication, according to:
- a) the stage of preparation of the emerging plan;
 - b) the extent to which there are unresolved objections to relevant policies; and
 - c) the degree of consistency of the relevant policies with the NPPF.
- 3.20 In August 2013, Sunderland City Council published, for consultation, its Core Strategy and Development Management Policies (Draft Revised Preferred Options). However, the Council has decided to progress a Local Plan that will contain a Core Strategy and a Site Allocations Document, and the submission version of the Local Plan is not expected to be published until later in 2017, with no date yet set for the Examination in Public. Thus, the

aforementioned consultation document represents a very early stage in the process and, in accordance with the policy set out in Paragraph 216 of the NPPF, very limited weight can be given to its provisions. In short, the emerging Local Plan is not sufficiently advanced for it to be of any assistance in determining this Section 73 application.

4 THE SEQUENTIAL TEST

Requirements of the NPPF

- 4.1 Paragraph 24 of the NPPF sets out the sequential test that applies to planning applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date Local Plan. Paragraph 24 states that *'...applications for main town centres uses should 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.'* In considering out-of-centre proposals, such as this Section 73 application at Trimdon Street, Paragraph 24 states that *'...preference should be given to accessible sites that are well-connected to the town centre'.*
- 4.2 In applying the sequential approach, Paragraph 24 requires applicants and local planning authorities to demonstrate flexibility on issues such as format and scale. However, in contrast to the provisions of Policy EC 15.1d of the former PPS4, Paragraph 24 makes no specific mention of the words *'car parking'* and *'disaggregation'* in applying the flexibility component of the test.
- 4.3 Indeed, we note that the Inspector for the Vulcan Road appeal in Sheffield (ref: APP/J4423/A/13/2189893) stated, in Paragraph 34 of his decision of 3rd July 2013, that *'...the absence of any reference to other elements of flexibility such as car parking provision and disaggregation... is both telling and intentional'*. Furthermore, in his decision of 11th June 2014, in respect of a major mixed-use development proposal at Rushden Lakes (ref: APP/G2815/V/12/2190175), the Secretary of State confirms, in Paragraph 16 of his decision letter, that *'...there is no requirement to disaggregate'*.
- 4.4 Another important difference compared to Policy EC15.1 of the former PPS4 is the fact that Paragraph 24 of the NPPF makes no specific reference to the issue of viability in assessing the suitability of sites. Nevertheless, we consider that viability is an important aspect of the suitability component of the sequential test and we note that Paragraph 23 of the NPPF, which deals with local plan preparation, does include a viability requirement

in stating that local planning authorities should *'allocate appropriate edge of centre sites...where suitable and viable town centre sites are not available'* (our emphasis).

- 4.5 Indeed, it would be odd if viability was not to be a relevant requirement in development management, when delivery is such a key part of the NPPF; for example, Paragraph 173 requires *'...careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable* (our emphasis)'.
- 4.6 Moreover, we would emphasise that helpful clarification on this matter has been provided by the Inspector's report in respect of the aforementioned Rushden call-in Inquiry, in which he concludes that *'...the task is to identify sequentially preferable sites that are suitable and available which necessarily includes consideration of deliverability/viability'* (IR Paragraph 8.54, our emphasis); and we note that the Secretary of State's decision letter does not contest this conclusion.
- 4.7 The final aspect of the Inspector's report in Rushden that we wish to emphasise relates to the issue of availability. In Paragraph 8.55 of his report to the Secretary of State, the Inspector argues that the NPPF requires that the site is *'currently available'*, thereby, rejecting the approach taken in the now superseded Planning for Town Centres Practice Guidance, which referred to availability *'... within a reasonable period of time... having regard to ... the urgency of the need'*.

National Planning Policy Guidance (the NPPG)

- 4.8 Paragraph ID: 2b-010 of the National Planning Policy Guidance (the NPPG) provides further advice on how the sequential test should be used in decision taking. It confirms that it is for the applicant to demonstrate compliance with the sequential test, with support from the local planning authority, which has a duty to share any relevant information. The NPPG confirms that there is a requirement to demonstrate flexibility, with respect to format and scale, in assessing the suitability of more central sites.
- 4.9 Paragraph ID: 2b-011 states that *'...use of the sequential test should recognise that certain main town centre uses have particular market and locational requirements which mean that they may only be accommodated in specific locations'*. The Guidance states that

there must be a robust justification if a location-specific requirement is being advanced, and that land ownership does not provide such a justification. However, in this particular case, at Trimdon Street, there is clearly a need to promote a productive use within the vacant floorspace that was intended to be occupied by Morrisons under the 2014 permission (ref: 14/01440/FUL).

- 4.10 Finally, we note that Paragraph ID: 2b-012 requires local planning authorities to recognise that town centre locations can be more expensive and complicated than building elsewhere, so that they should be *'...realistic and flexible in terms of their expectations'*.

Supreme Court Judgment in Dundee

- 4.11 Before we turn to our assessment of the applicant's sequential appraisal, we wish to highlight the findings of the Supreme Court Judgment in respect of *Tesco Stores Limited v Dundee City Council*, issued on 21st March 2012. The *Dundee* Judgment provides a ruling on the interpretation of the 'suitability' component of the sequential test. The Court had to decide whether the word 'suitable' means *'suitable for the development proposed by the applicant'*, or *'suitable for meeting identified deficiencies in retail provision in the area'* (Paragraph 21). Subject to the requirement for the applicant to demonstrate flexibility, the Court endorsed the former and rejected the latter. The reasoning and clarification are set out in Paragraphs 28, 29, 30, 36, 37 and 38 of the Judgment.
- 4.12 In Paragraph 28 of the Judgment, Lord Reed confirms that *'suitable'* means *'suitable for the development proposed by the applicant'*, but he adds the qualification that there is a need for *'...flexibility and realism from developers and retailers as well as planning authorities'*. In Paragraph 29, he adds that provided the applicant has shown flexibility and had regard to the circumstances of the particular town centre, the question that remains is *'...whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site'*.
- 4.13 Finally, we draw attention to Paragraph 38 of the Dundee Judgment in which Lord Hope confirms that *'...the whole [sequential] exercise is directed to what the developer is*

proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer’. He goes on to state that ‘...developments of this kind are generated by the developer’s assessment of the market that he seeks to serve...’ and that the sequential criteria ‘...are designed for use in the real world, in which developers wish to operate, not some artificial world in which they have no interest doing so’.

- 4.14 The Inspector in the aforementioned Rushden call-in inquiry describes the Dundee Judgment as being of ‘*seminal importance*’ (IR 8.44) and he states (IR 8.45) that it establishes:
- a) *‘that if a site is not suitable for the commercial requirements of the developer in question then it is not a suitable site for the purposes of the sequential approach’; and*
 - b) *‘that in terms of the size of the alternative site, provided that the Applicant has demonstrated flexibility with regards to format and scale, the question is whether the alternative site is suitable for the proposed development, not whether the proposed development could be altered or reduced so that it can be made to fit the alternative site’ (Inspector’s underlining).*

The Sequential Location Category of the Application Site

- 4.15 Peacock and Smith’s Planning and Retail Statement accepts that the application site is located approximately 650m to the North-West of the City Centre’s Retail Core and, although Hylton Road Local Centre is within 300m, we regard the application site to be in an out-of-centre location for the purposes of the definition given in Annex 2 of the NPPF.

Applicant’s Sequential Site Assessment

- 4.16 Section 6 of Peacock and Smith’s Planning and Retail Statement sets out the applicant’s sequential assessment. In line with the pre-application discussion held on 13th July 2016, Peacock and Smith focuses on:
- i) the site of the former Crowtree Leisure Centre;
 - ii) the remainder of the Holmeside Triangle, following completion of the City Centre Campus for Sunderland College;

- iii) the former Vaux Brewery site; and
- iv) large, vacant premises within the City Centre.

4.17 We have also examined the suitability of the development opportunity at Farringdon Row, for which the Council proposed a Development Framework in July 2006.

Former Crowtree Leisure Centre

4.18 The former Crowtree Leisure Centre site measures 1.2 hectares and falls within the Retail Core Boundary established in Figure 2 of UDP Alteration No. 2. The site forms part of the area covered by Policy SA55B.2 of Alteration No. 2 (i.e. the City Centre West area). In this area, the Council is seeking to support the diversification of food/drink and cultural opportunities, with retail identified as a use to be encouraged in redevelopments, subject to the requirements of Policy S2A.

4.19 This site is to form Phases 3 and 4 of extensions to the Bridges Shopping Centre. Phase 3 is the subject of a detailed planning permission (ref: 16/00892/FUL) for a retail unit of up to 4,180 sq.m gross (together with public open space), targeted at Next, which wishes to develop a Home & Garden style format store. Phase 4 is intended to provide for leisure and food/drink uses. In any event, the opportunity afforded by Phase 4 could not accommodate the floorspace requirements of the retailer targeted by the Section 73 application proposal (which is for 5,162 sq.m GIA, excluding the Garden Centre), even having applied the appropriate degree of flexibility. Nor would this part of the site be available to a retailer, because the strategy of the owner is to deliver an improved food and beverage offer. As a consequence, the site of the former Crowtree Leisure Centre is neither available nor suitable for the scale and form of retail use incorporated within the Section 73 application.

The Remainder of the Holmeside Triangle

4.20 We estimate that the remainder of the Holmeside Triangle site, following completion of the City Centre Campus for Sunderland College, and excluding the inaccessible land over the railway, measures approximately 1.2 hectares. The site is located within the defined

Retail Core, shown in Figure 2 of UDP Alteration No. 2, and is subject to Policy SA55A.1, which supports mixed-use development, including Class A1 retail. However, the remaining part of Holmeside is not currently available and is in a variety of land ownerships, so that a Compulsory Purchase Order procedure may be required if a development opportunity is to be made available in the future. At present, the remainder of Holmeside is neither suitable nor available for the type of retailer sought to be accommodated by the Section 73 application proposal.

The Former Vaux Brewery

- 4.21 The former Vaux Brewery site is located within the City Centre Boundary shown in Figure 2 of UDP Alteration No. 2, but outside the Retail Core Boundary, so that it is located in an edge-of-centre location for the purposes of the NPPF. The Vaux site forms part of the area covered by Policy SA55A.2 of UDP Alteration No. 2, which seeks to support residential and employment-led mixed-use development, with any retail component required to be of an ancillary scale.
- 4.22 Thus, Siglion is promoting the redevelopment of the former Vaux Brewery site as a business-led, mixed-use development, the first phase of which has recently commenced. Indeed, the Vaux site benefits from a consent in respect of hybrid application ref: 15/02557/HY4. The detailed part of the hybrid consent provides for a first phase of 7,319 sq.m GEA, to include 6,319 sq.m GEA of offices and 1,000 sq.m GEA at ground floor, to provide for leisure, food/drink and retail uses. The outline consent provides for up to 201 residential units, commercial uses in Use Classes B1 (a further 53,000 sq.m), C1 (a maximum of 4,000 sq.m), D1 and D2 (Exhibition Centre, up to 6,000 sq.m), food/drink (A3/A4, up to 4,000 sq.m) and retail (A1), but with a limit for Class A1 retail use of 2,499 sq.m, across the entire site.
- 4.23 It is clear, therefore, that the dominant elements of the redevelopment at the Vaux site will be in the form of business park development (59,376 sq.m) and housing (27,013 sq.m), with the Exhibition Centre, food/drink and retail elements being very much of an ancillary nature. As a consequence, we do not consider the Vaux site to be suitable for

accommodating a retailer with premises of the size envisaged in the Trimdon Street Section 73 application proposal.

Farringdon Row

- 4.24 The Development Framework for Farringdon Row envisages redevelopment, primarily, for residential and open space purposes, so as to be complementary to the business-led, mixed-use development at the Vaux site. The retail and leisure space at Farringdon Row is intended to be limited to around 1,000 sq.m. As a consequence, we consider that Farringdon Row is entirely unsuitable for the scale and form of retail development being put forward in the Section 73 application proposal at Trimdon Street.

Large, Vacant Premises within the City Centre

- 4.25 Peacock and Smith has also investigated large, vacant premises in the City Centre, focusing on the former Joplings Department store on John Street, and the former Hutchinson's store on High Street West. So far as the former Joplings store is concerned, we are aware of the recent planning permission (ref: 16/00037/FUL) for its redevelopment as a hotel, with retail uses on the ground floor. Moreover, the total size of the former Joplings store, at 2,360 sq.m gross, is less than half the size of the floorspace identified in the Section 73 application proposal (see the area edged in pink in Peacock and Smith's drawing 15165-SK-05).
- 4.26 So far as the former Hutchinson's store is concerned, we accept that the ground floor space amounts to less than 1,000 sq.m, and that Policy EC5B of UDP Alteration No. 2 is seeking to promote diversification, so as to secure a range of uses in Use Classes A2, A3, A4, B1, C3, D1 and D2. We also accept that the premises are listed and that any retail use is likely to be confined to the ground floor. As a consequence, these vacant premises are clearly not suitable for accommodating a retailer of the sort being targeted through the Section 73 application at Trimdon Street.

Conclusion on the Sequential Test

- 4.27 Our overall conclusion is that the applicant has satisfied the requirements of the sequential approach, and that the Section 73 application at Trimdon Street passes the sequential test set out in Paragraph 24 of the NPPF. There are no sites or premises within, or on the edge of, the City Centre, that are currently available and suitable for meeting the scale and form of retail unit that will be created as a result of the Section 73 application proposal. Furthermore, we accept that it would not be appropriate to seek to accommodate a unit of over 5,000 sq.m GIA within a Local Centre, even if any opportunity for such a scale of development was to arise in the future.

5 THE POTENTIAL FALL-BACK POSITION FOR THE TRIMDON STREET PREMISES

- 5.1 Extant planning permission ref: 14/01440/FUL allowed for the sub-division and extension of B&Q's premises at Trimdon Street, with B&Q trading from only part of the floorspace, and with the remainder to be occupied by a Morrisons foodstore which would also extend into the site of B&Q's former builders yard. However, Peacock and Smith's Planning and Retail Statement states that this planning permission has not been implemented, in that there has been no external alterations to the building, or to any of the car parking areas, with B&Q merely rearranging its operations internally, leaving part of the premises (5,162 sq.m GIA) vacant. Moreover, it seems clear that Morrisons no longer wishes to operate a foodstore from this location.
- 5.2 In this Section, therefore, we examine the relevance of the potential fall-back position created by the extant consent and identify the weight that we think should be given to it as a material planning consideration.

Relevant Case Law on Potential Fall-back Positions

- 5.3 In informing our approach to the relevance of the potential '*fall-back*' position which exists at the Trimdon Street application site, and the weight that should be accorded to it, we have taken account of a number of important Court Judgments. First, we refer to Snowden v Secretary of State for the Environment and the City of Bradford Metropolitan Council (July 1980), in which Donaldson LJ defines the '*fall-back*' position of the applicants as being '*... what they could have done without any change in their planning position...*', i.e. without the need for further planning permissions.
- 5.4 Second, we refer to Brentwood Borough Council v Secretary of State for the Environment and Gray (March 1996), in which it was held that in order for a '*fall-back position*' to be a material consideration, the prospects of it taking place had to be '*real*' and not merely '*theoretical*'. This reflects the language used in Snowden, in which it was held that the decision maker is under a duty to make a comparison between the relative planning

‘evils’ of what is proposed (i.e. the development for which planning permission is sought) and the fall-back position (i.e. what the applicant could do on the application site based on the planning position as it stands, without that new planning permission). This duty applies, however, only if there is a ‘*real possibility*’ that the fall-back will occur.

- 5.5 Third, we refer to R (on the application of) Zurich Assurance Limited and North Lincolnshire Council and Simons Developments Limited (December 2012), in which it was held that: *‘The prospect of the fall-back position does not have to be probable or even have a high chance of occurring; it has to be only more than a merely theoretical prospect. Where the possibility of the fall-back position happening is "very slight indeed", or merely "an outside chance", that is sufficient to make the position a material consideration... Weight is, then, a matter for the planning committee’.*
- 5.6 Zurich reflects an earlier judgment of the Court of Appeal in Samuel Smith Old Brewery (Tadcaster) and the Secretary of State for Communities and Local Government (March 2009), in which it is held that *‘in order for a prospect [the fall-back] to be a real prospect [and therefore a material consideration], it does not have to be probable or likely: a possibility will suffice’.*
- 5.7 Thus, the first step for the decision-maker is to decide whether the potential fall-back position for the relevant site is ‘*real*’, as opposed to being merely ‘*theoretical*’. If the fall-back is considered to be ‘*real*’, it is a material consideration and it is for the Local Planning Authority, as decision maker, to decide how much weight, if any, it should give it (as per Lord Hoffmann’s speech in the House of Lords in the case of Tesco Stores Limited v Secretary of State for the Environment and Others, May 1995).
- 5.8 The decision on how much weight to give to a ‘*real*’ fall-back will reflect: a) the likelihood of the fall-back occurring and/or b) the level of harm that would result from the fall-back position occurring. These propositions reflect the aforementioned Judgment in Tadcaster and the Judgment in South Buckinghamshire District Council v Secretary of State for the Environment (June 1998).
- 5.9 Thus, in Tadcaster, it is stated that *‘... in a case where the adverse consequences of implementing the fall-back position would be very significant... there would be no reason*

why the Secretary of State could not conclude, as a matter of planning judgement, that even if the risk of implementing the fall-back position was very slight indeed – an outside chance perhaps – the seriousness of the harm that would be done if... the fall-back position was implemented was such that the risk was not acceptable...’.

- 5.10 Similarly, in the South Buckinghamshire case, it was held that weight would reflect the probability of the fall-back use being resumed, but that *‘If the harm that would arise from the resumed use would be very serious, it may well be that a lower degree of probability of its resumption would be sufficient to justify the grant of permission [for the new proposal] than in the case of less serious harm’.*
- 5.11 It is worth noting, at this stage, that a common characteristic of the body of case law, where weight is given to fall-backs, is the fact that the fall-back would have broadly similar planning implications, or cause greater harm than the current development proposal. Thus, in New Forest District Council v SoS for Environment (July 1995), the 48 timber lodges proposed would cause less harm to the Green Belt than the fall-back position for a hotel development; in South Buckinghamshire, the eight houses proposed would cause less harm to the Green Belt than the fall-back re-use of the site as a cattle market; and in Brentwood, the fall-back position of building the out-building five metres from the house would have similar consequences for the Green Belt, compared to building it two metres away.
- 5.12 Our interpretation of the relevant case law, therefore, is that there is a two stage approach in considering the relevance of potential fall-backs and the weight to be given to them. First, it is necessary to decide whether the fall-back is *‘real’*, or merely *‘theoretical’*. If the fall-back is *‘real’*, it is a material consideration.
- 5.13 The second stage involves a planning judgement for the decision-maker as to the relevant weight to be given to the fall-back, which will reflect the likelihood of it occurring and/or the level of planning harm that would arise if the fall-back was implemented, compared to the development proposal for which planning permission is sought.
- 5.14 Having set out our general approach to the consideration of the relevance of the fall-back position created by extant permission ref: 14/01440/FUL, based on case law, we next

consider whether or not such a fall-back position should be deemed to be ‘real’ (i.e. whether there is at least an outside chance, or a slight possibility, that the fall-back will occur) and, if so, the weight that should be given to it.

The Extant Planning Permission at Trimdon Street

- 5.15 It seems clear that Morrisons is no longer interested in operating a foodstore from the premises in Trimdon Street that are subject to extant consent ref: 14/01440/FUL. Our understanding, however, is that Morrisons is paying rent on these premises and is very keen to transfer the lease to a new retailer. The issue, therefore, is the likelihood, or otherwise, of Morrisons being willing to transfer its lease to a competing foodstore, in line with the 2014 permission.
- 5.16 It seems to us that such a decision will reflect a balancing exercise, assessing the rent being paid at Trimdon Street, compared to the loss of profits at the existing Morrisons stores in Seaburn and Doxford Park, if a competing foodstore was to trade at Trimdon Street. If we assume that Morrisons is currently paying rent at a typical level for supermarkets of £15 per square foot, then the annual rent for the vacant floorspace within B&Q would be around £833,000 per annum. In comparison, our Report to the Council of October 2014, in respect of the extant consent to allow Morrisons to trade at Trimdon Street, projected a convenience goods impact on the Morrisons stores at Doxford Park and Seaburn of £2.68m per annum and £1.84m per annum, respectively. Thus, the combined diversion was projected to be £4.52m, which would equate to a loss of profit of approximately £130,000 per annum, under an assumption that Morrisons’ operating profit in these two stores represents 2.87 per cent of its turnover, which was the average operating profit for Morrisons’ overall UK portfolio in the year ending 29th January 2017.³
- 5.17 Obviously, it is difficult to translate trade diversion into loss of operating profit, on the basis of individual stores, but it would seem, in the words of the Zurich Court Judgment,

³ See page 15 of the [Morrisons News Release](#), dated 9th March 2017.

that there is at least '*an outside chance*' that Morrisons would consider transferring its lease to a competing food retailer, so that the fall-back position is '*real*', rather than '*theoretical*' and, therefore, is a material consideration.

Overall Conclusion in Relation to the Fall-back Position

- 5.18 We consider that there remains '*an outside chance*', or '*slight possibility*', that Morrisons may assign its lease at Trimdon Street to a food superstore competitor, so that a fall-back position exists which is '*real*', rather than being merely '*theoretical*'. This fall-back position is therefore a material consideration in assessing the Section 73 application to vary Condition 3 of the original outline planning consent. However, we consider that Morrisons would prefer to assign its lease to a non-food retailer, so that the probability of the fall-back occurring is low, which diminishes the weight which should be given to it.

6 THE IMPACT TESTS

Requirements of the NPPF

- 6.1 Paragraph 26 of the NPPF sets out the impact tests for applications for retail, leisure and office developments that are located outside town centres and which are not in accordance with an up-to-date Local Plan. For applications of over 2,500 sq.m gross, or over a locally set threshold, these tests require an assessment of:
- a) *‘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*
 - b) *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.’*
- 6.2 The floorspace incorporated within the pink area of the applicant’s drawing 15-165-SK15, of 5,162 sq.m GIA, which is subject to the variation in the condition to allow for any non-food goods and up to 30 per cent (1,549 sq.m) of food/drink goods, is clearly above the 2,500 sq.m threshold set out in Paragraph 26 of the NPPF. Thus, given that the application proposal is in an out-of-centre location, and not in accordance with an up-to-date local plan, it is clear that both of the impact tests set out in Paragraph 26 of the NPPF should be applied.
- 6.3 Paragraph 27 of the NPPF then confirms that *‘Where an application fails to satisfy the sequential test, or is likely to have a significant adverse impact on one or more of the above factors [in Paragraph 26], it should be refused’*. However, it seems clear from the Zurich High Court Judgment, of December 2012, that Paragraph 27 of the NPPF is not necessarily determinative, if there are significant material considerations which displace its presumption for refusal in the event of a failure of the sequential and/or impact tests.

National Planning Policy Guidance

- 6.4 Paragraph ID: 2b-015 of the National Planning Policy Guidance (the NPPG) states that it is for the applicant to demonstrate compliance with the impact test, but that the test should be undertaken in a proportionate and locally appropriate way, drawing on existing information where possible.
- 6.5 Paragraph ID: 2b-016 of the NPPG sets out the key considerations in assessing the likely impact on proposed investment within the town centre that is in progress; these are:
- the policy status of the investment;
 - the progress made towards securing the investment; and
 - the extent to which an application is likely to undermine planned investments based on the effect on forecast turnover, operator demand, and investor confidence.
- 6.6 Paragraph ID: 2b-017 of the NPPG then sets out the key considerations in assessing the likely impact on trading levels and on town centre vitality and viability. The advice states that *‘...a judgment as to whether the likely adverse impacts are significant can only be reached in light of local circumstances’* and that *‘...in areas where there are high levels of vacancy and limited retailer demand, even very modest trade diversion from a new development may lead to a significant adverse impact’*. In instances where the evidence suggests that a *‘significant adverse’* impact on the town centre is unlikely, the Local Planning Authority *‘...must then consider all other material considerations in determining the application, as it would for any other development’*.
- 6.7 Having summarised national policy guidance, we turn to our appraisal of the Section 73 application against the two impact tests set out in Paragraph 26 of the NPPF.

The Appropriate Approach to the Impact Tests

- 6.8 In the introduction to Section 7 of its Retail Impact Assessment, Peacock and Smith notes that the vacant retail floorspace within the application premises could be occupied by a bulky goods retailer, under the terms of the original planning permission of March 1999, or be converted to a foodstore, as allowed by the 2014 consent. We beg to differ,

however, with the statement, in Paragraph 7.04 of Peacock and Smith's Report, to the effect that: *'The test is therefore whether there would be any potential for additional impact by allowing an unrestricted retail use of the vacant floorspace.'* This is because, in line with the *Snowden* Judgment, the decision-maker is under a duty to make a comparison between the relative '*planning evils*' of what is proposed (i.e. the development for which planning permission is sought) and the fall-back position (i.e. what the applicant could do on the application site, based on the planning position as it stands, without that new planning permission).

- 6.9 In our view, the appropriate approach, therefore, is to assess the likely effects of the 2009 and 2014 fall-back permissions (refs: 99/00084/OUT and 14/01440/FUL), compared to the likely effects of the current Section 73 application (ref: 16/02130/VAR). Indeed, it will be recalled, from the discussion in Section 5 of our Report, that a common characteristic of the body of case law, where weight is given to fall-backs, is the fact that the fall-back would have broadly similar planning implications, or cause greater harm than the current development proposal.

Impact on Existing, Committed and Planned Investment

- 6.10 Peacock and Smith's assessment in relation to the first of the two impact tests is somewhat cursory, to say the least, and merely refers to recent retailer investment by Sports Direct and USC in respect of the former BHS store. Indeed, in Paragraph 7.06, Peacock and Smith makes the statement that it is not aware of any current planned retail investments in any of the defined centres. This is a narrow approach, given that the first of the two impact tests in Paragraph 26 of the NPPF deals with all forms of existing, committed and planned public and private investment. Indeed, in our recent Report to the Council, entitled the Sunderland Retail Needs Assessment 2016, we identify a number of important recent, ongoing and proposed investments, as follows:

- the recent completion of Keel Square;
- the recent completion of Sunderland College's City Centre Campus at Holmeside;

- the recent opening of Flannels on Fawcett Street, which enhances the comparison offer within the City Centre and brings a long term prominent vacant building back into productive use;
- the ongoing construction of Sunderland University's Enterprise and Innovation Hub (which is expected to attract over 120 innovative growth businesses over five years, generating around 250 jobs, with a further 400 created over the longer term);
- the recent hybrid permission for office and residential led mixed-use development at the Vaux Brewery site, the first phase of which is now underway and which is likely to act as a conduit to facilitate further investment and development in the City Centre;
- the ongoing public realm improvement works to High Street West;
- the ongoing redevelopment of the upper floors of Cassaton House and Phoenix House to provide luxury student accommodation;
- the recent approvals for a mixed-use hotel and retail development within the former Joplings building and for a four-star, 120-bed hotel at Keel Square;
- the upcoming Phase 3 extension to the Bridges Shopping Centre, which will involve new development on the demolished part of the former Crowtree Leisure Centre site so as to provide for a much larger store for Next, with Phase 4 involving redevelopment of the remaining part of the former Crowtree Leisure Centre for leisure and food and drink uses;
- the recent approval of a mixed-use development comprising dance/theatre studios, café, bar/restaurant and exhibition space within the former Fire Station (which is to be delivered with the assistance of £2.4m funding from the Heritage Lottery Fund), and which forms part of the proposed Music, Arts and Culture Quarter initiative; and
- the proposed revamp of the Sunderland Railway Station, which will involve co-operation between Sunderland City Council, Nexus and Network Rail.

6.11 Indeed, the amount of existing, committed and planned investment in the City Centre is substantial and is already beginning to have a positive impact on investor confidence

within the City Centre. Moreover, we consider that the type of retailer being targeted by the Section 73 application proposal at Trimdon Street is highly unlikely to have a significant adverse impact on this investment, particularly given that a leading fashion trader has already been identified for the Phase 3 extension to the Bridges Shopping Centre. We should record, also, that our conclusion in relation to the likely impact on investment of the food superstore fall-back at Trimdon Street remains, as set out in our October 2014 Report to the Council. Thus, we consider that neither the current Section 73 application, nor the fall-back food superstore, are likely to have a significant adverse impact on investment in the City Centre.

- 6.12 Nor are we aware of any existing, committed and planned investments in nearby Local Centres at Chester Road and Hylton Road that are likely to be significantly adversely affected by the type of retailer being targeted in the Section 73 application at Trimdon Street. As a consequence, we consider that the Section 73 application proposal passes the first of the two impact tests set out in Paragraph 26 of the NPPF.

Impact on Vitality and Viability

- 6.13 Appendix 5 of Peacock and Smith's Report provides its health check assessment for the City Centre, which is helpful. However, we prefer to rely on our own health check assessment that was undertaken last year for the City Council, in preparing the aforementioned Sunderland Retail Needs Assessment 2016. This study has identified many more positive findings in relation to its current health, compared to negative findings. An extract from the Executive Summary Report is set out below:

'Our review of the current health of Sunderland City Centre is based on the ten health check indicators in the NPPG, a customer satisfaction survey undertaken by NEMS Market Research, analysis of retailer representation, consultations with key stakeholders, and a review of important documents such as the Economic Masterplan and the 3,6,9 Vision.'

Positive Findings

Improved Diversity of Uses

There has been a massive programme of recent and ongoing investment that is improving the diversity of uses within the overall City Centre Boundary, as defined by Policy S2A of UDP Alteration No. 2; these include:

- the recent completion of the City Centre Campus for Sunderland College;*
- the ongoing investment in Sunderland University’s Enterprise and Innovation Hub;*
- the Music, Arts and Culture Quarter Initiative;*
- the recent Hilton Hotel (near the Stadium of Light), the proposed Holiday Inn (near Keel Square) and the proposed hotel-led redevelopment of the former Joplings store;*
- office and residential led mixed-use development at the Vaux site;*
- residential accommodation for students at Phoenix House (Union Street) and at Cassaton House (Fawcett Street); and*
- phases 3 and 4 of the Bridges, which will incorporate retail and food & beverage uses.*

Improved Public Realm

Recent, ongoing and planned investment in improvements to the public realm includes: the creation of Keel Square (completed); improvements to Market Square (completed); further improvements to High Street West (ongoing); and a major revamp of Sunderland Railway Station (planned).

Improvements to Accessibility

Improvements to accessibility include: the realignment of St Marys Way (completed); the new Wear Crossing, as part of phase 2 of the Sunderland Strategic Transport Corridor (ongoing); and improved pedestrian linkages between the Chester Road Campus of Sunderland University and the Primary Shopping

Area, which will require breaking down the barrier caused by St Michaels Way (planned).

The Presence of Key Movers and Shakers

Our consultations revealed that many organisations have a strong interest in promoting the vitality and viability of the City Centre; these include: the Sunderland Business Group Partnership; the Business Improvement District (the BID) that has been operational since April 2014; the Sunderland Enterprise Growth Hub; and the Vibrancy Group, whose members (the Bridges Shopping Centre, Gentoo, Sunderland AFC, Sunderland BID, Sunderland College, Sunderland Live and the University of Sunderland) seek to help promote the City as a vibrant place in which to live, work, study and relax.

We note, also, the role of the Economic Leadership Board in developing the Economic Masterplan, the role of the MAC Trust in developing the MAC Quarter, and the role of Siglion (which is a Joint Venture between Carillion and Sunderland City Council, managed by Igloo) in developing the office and residential led mixed-use development at the Vaux site, the leisure led mixed-use development at Seaburn and the major housing proposed at Chapel Garth. All of these groups are helping to raise Sunderland City Centre's profile and attractiveness, and are having a very positive impact on the City Centre's health.

Negative Findings

Nevertheless, our assessment of the City Centre's health has also identified a number of findings which are usually regarded as negatives, these being:

- a substantial fall in Zone A rents since 2008;*
- a high proportion of vacant floorspace which, at 15.4% in September 2015, was substantially above the UK average of 10.3%;*

- *retailer representation which tends to be focussed on the mid/downmarket sectors, although the recent opening of the high-end Flannel's store is encouraging;*
- *a distinct deficiency in high quality food and beverage establishments that are needed to attract higher spending customers and retain City Centre workers in the evenings;*
- *an entirely inadequate residential population base, which is estimated to amount to less than 2,000 people within the overall City Centre Boundary;*
- *a decline in perceptions of safety and perceived increase in occurrence of crime, although the crime data is inconclusive (hence the underlining);*
- *a scarcity of jobs, which the Economic Masterplan considers has hindered the development of better shopping and leisure facilities;*
- *a decline in the proportion of retained comparison goods expenditure, as a result of a growth in e-commerce and growing levels of expenditure leakage to higher order centres, particularly to Newcastle City Centre and the Metro Centre;* and
- *very high levels of leakage of food and drink expenditure to Newcastle City Centre and a high level of leakage of commercial leisure expenditure to the Metro Centre.*

Prognosis

We consider that there are three key drivers which bode well for the future health of Sunderland City Centre, these being:

- i) the massive level of recent and ongoing investment in projects which will help to diversify and improve the City Centre's performance in the education, office, residential, cultural, community and leisure/tourism sectors;*

- ii) *the strength and range of the business groups and public/private partnership initiatives formed in recent years; and*
- iii) *the anticipated increase in jobs and residents within the wider City Centre, as a result of the ongoing mixed-use development projects at the Vaux and Farringdon Row sites, and as a result of refurbishment/conversion of existing premises.*

As a consequence of these drivers, we anticipate a marked improvement in the provision of facilities and attractions that will:

- entice a higher income demographic to the City Centre, both in terms of visitors and residents;*
- lead to a noticeable improvement in investor, developer and operator confidence;*
- lead to a reduction in the quantum of vacant floorspace; and, ultimately*
- a discernible improvement in Sunderland City Centre’s overall health.*

However, this positive prognosis is heavily dependent on the production of an up-to-date and robust development plan which incorporates a strong and clear vision for the City Centre. Subject to this caveat, we anticipate that the strengths and opportunities within the City Centre can outweigh and overcome existing weaknesses and future threats.

- 6.14 Thus, in light of these very recent health check findings for the City Centre, and our positive prognosis for its future, we consider it highly unlikely that the Section 73 application proposal at Trimdon Street would have a significant adverse impact on the City Centre’s overall vitality and viability, or on local consumer choice, or on trade in the City Centre. Nevertheless, we have reviewed the quantitative analysis prepared by Peacock and Smith.
- 6.15 The first point to make is that we agree that the type of comparison goods retailer being targeted at the Trimdon Street application site is likely to draw the majority of its trade from the residents of the urban area of Sunderland (Zones 1 to 5 in the Sunderland Retail

Needs Assessment 2016). Thus, so far as the Tables in Appendix 7 of the Peacock and Smith report are concerned, we would comment as follows:

- Table 1 sets out the pattern of comparison goods market shares and the estimates of turnover for the various centres, drawing on the telephone survey of shopping patterns that we commissioned to inform our own Sunderland Retail Needs Assessment. This reveals an estimated comparison goods turnover for the City Centre of £272.1m, with the City Centre having a market share in excess of 35 per cent in each of the five zones that make up the inner urban area.
- Table 2 rolls forward the turnover estimates to 2022, based on constant market shares, and reveals an anticipated turnover for the City Centre, in 2022, of £350.8m, reflecting growth in per capita expenditure at 3.7 per cent per annum.
- Table 3 sets out the estimated comparison goods turnover for the type of retailer being targeted, using a sales density of £3,867 per sq.m, which we consider to be reasonable, given that the typical sales density for a bulky goods retail warehouse operator would be around £2,000 to £3,000 per sq.m. Thus, the estimated turnover of the retailer being targeted is £17.97m, as at 2022. In comparison, our estimated convenience goods turnover for the Morrisons store associated with the 2014 permission was £30.57m in 2018, meaning that the total turnover of the foodstore operator fall-back would probably be in the range £35m to £40m.
- Table 4 puts forward Peacock and Smith's assessment of the pattern of trade draw, with the residents of Zones 1, 2 and 3 contributing 75 per cent of the turnover (divided equally between the three Zones), with 10 per cent of turnover being derived from each of Zones 4 and 5, and with 5 per cent from beyond the main urban area.
- Finally, Table 5 presents Peacock and Smith's assessment of likely trade diversions, with the highest absolute diversions being from Sunderland City Centre (£6.55m), Trimdon Street Retail Park (£1.08m) and the ASDA store at Grangetown (£0.61m). However, the percentage impacts on the turnovers of the District and Local Centres

are less than 3 per cent, in each case, with the percentage impact on the City Centre being estimated at just 1.9 per cent.

- 6.16 Thus, given the recent and ongoing improvement to the overall vitality and viability of Sunderland City Centre, we conclude that the Section 73 application proposal is unlikely to have a significant adverse impact on the City Centre, or on any other nearby Local Centre. Indeed, the estimated turnover associated with the food superstore fall-back is more than double the turnover estimate for the type of non-food retailer being targeted as a result of the Section 73 application.

Conclusions in Relation to the NPPF Impact Tests

Impact on Existing, Committed and Planned Investment

- 6.17 We conclude that the Section 73 application at Trimdon Street will not have a significant adverse impact on existing, committed and planned investment within the City Centre. Nor are we aware of any committed and planned investments in the Local Centres at Chester Road and Hylton Road that would be in any way harmed by the development proposed at Trimdon Street. As a consequence, we consider that the Section 73 application proposal passes the first of the impact tests set in Paragraph 26 of the NPPF.

Impact on Vitality and Viability

- 6.18 In light of our very recent health check findings for the City Centre, as set out in the Sunderland Retail Needs Assessment Report 2016, and our positive prognosis for the City Centre's future, we consider it highly unlikely that the Section 73 application proposal at Trimdon Street would have a significant adverse impact in the City Centre's overall vitality and viability, or on local consumer choice, or on trade in the City Centre. Similarly, we think it highly unlikely that Chester Road and Hylton Road Local Centres would face a significant adverse impact on their vitality and viability.
- 6.19 Moreover, it is clear that the impacts associated with the fall-back position of a food superstore, in line with the 2014 permission, would have worse consequences (albeit, still acceptable) than the current Section 73 application proposal. Thus, although we think it

unlikely that Morrisons would seek to assign its lease to a competing food retailer, we give some weight to the superstore fall-back in making our recommendations on the current Section 73 application proposal, given that this superstore fall-back remains ‘*real*’, even if there is only an ‘*outside chance*’ of it happening.

- 6.20 However, even if the Council’s judgment was to the effect that the superstore fall-back position was merely ‘*theoretical*’ (i.e. that there is not even an ‘*outside chance*’ of it happening), and therefore not a material consideration, we would not change our recommendation in relation to the Section 73 application. Indeed, we consider that the latter passes the sequential and impact tests set out in Paragraphs 24 and 26 of the NPPF, irrespective of whether any fall-back position exists at the application site. Moreover, the bulky goods fall-back, in line with the 1999 permission, must be considered to be ‘*real*’ and it is possible, depending on the precise type of comparison goods operator involved, that the effects of this bulky goods fall-back would not be too dissimilar to the effects of the type of retailer likely to be secured as a result of the Section 73 application.

7 CONCLUSIONS AND RECOMMENDATION

Conclusion in Relation to the Development Plan

- 7.1 For the reasons set out in Section 4, we consider that the application proposal is consistent with the sequential approach aspects of the UDP's relevant saved Shopping Policy S1 and with the sequential aspect of Policy S2A of UDP Alteration No. 2. Furthermore, for the reasons set out in Section 6, we consider that the application proposal would not cause a '*significant adverse*' impact on Sunderland City Centre's overall vitality and viability, or have a significant adverse impact on the vitality and viability of any nearby Local Centre. Similarly, there is no evidence to suggest that the application proposal will have a significant adverse impact on existing, committed and planned public and private investment in the City Centre, or in any Local Centre.
- 7.2 Thus, whilst there is likely to be some conflict with the town centre enhancement objectives contained in Policies S1, S2 and S3 of the UDP, as a result of trade diversion, and whilst there is some conflict with aspects of Policy S2A of the UDP Alteration No. 2 (including its presumption against retail development outside of the City Centre boundary), we consider that these policies do not address, or are not consistent with, the up-to-date sequential and impact tests for out-of-centre retail development, as set out in Paragraphs 24 and 26 of the NPPF. We give more weight, therefore, to the latter.

Conclusion on the Sequential Test

- 7.3 Our overall conclusion is that the applicant has satisfied the requirements of the sequential approach, and that the Section 73 application at Trimdon Street passes the sequential test set out in Paragraph 24 of the NPPF. There are no sites or premises within, or on the edge of, the City Centre, that are currently available and suitable for meeting the scale and form of retail unit that will be created as a result of the Section 73 application proposal. Furthermore, we accept that it would not be appropriate to seek to accommodate a unit of over 5,000 sq.m GIA within a Local Centre, even if any opportunity for such a scale of development was to arise in the future.

Overall Conclusion in Relation to the Fall-back Position

- 7.4 We consider that there remains ‘*an outside chance*’, or ‘*slight possibility*’, that Morrisons may assign its lease at Trimdon Street to a food superstore competitor, so that a fall-back position exists which is ‘*real*’, rather than being merely ‘*theoretical*’. This fall-back position is therefore a material consideration in assessing the Section 73 application to vary Condition 3 of the original outline planning consent. However, we consider that Morrisons would prefer to assign its lease to a non-food retailer, so that the probability of the fall-back occurring is low, which diminishes the weight which should be given to it.

Conclusions in Relation to the NPPF Impact Tests

Impact on Existing, Committed and Planned Investment

- 7.5 We conclude that the Section 73 application at Trimdon Street will not have a significant adverse impact on existing, committed and planned investment within the City Centre. Nor are we aware of any committed and planned investments in the Local Centres at Chester Road and Hylton Road that would be in any way harmed by the development proposed at Trimdon Street. As a consequence, we consider that the Section 73 application proposal passes the first of the impact tests set in Paragraph 26 of the NPPF.

Impact on Vitality and Viability

- 7.6 In light of our very recent health check findings for the City Centre, as set out in the Sunderland Retail Needs Assessment Report 2016, and our positive prognosis for the City Centre’s future, we consider it highly unlikely that the Section 73 application proposal at Trimdon Street would have a significant adverse impact in the City Centre’s overall vitality and viability, or on local consumer choice, or on trade in the City Centre. Similarly, we think it highly unlikely that Chester Road and Hylton Road Local Centres would face a significant adverse impact on their vitality and viability.
- 7.7 Moreover, it is clear that the impacts associated with the fall-back position of a food superstore, in line with the 2014 permission, would have worse consequences (albeit, still acceptable) than the current Section 73 application proposal. Thus, although we think it unlikely that Morrisons would seek to assign its lease to a competing food retailer, we

give some weight to the superstore fall-back in making our recommendations on the current Section 73 application proposal, given that this superstore fall-back remains ‘real’, even if there is only an ‘outside chance’ of it happening.

- 7.8 However, even if the Council’s judgment was to the effect that the superstore fall-back position was merely ‘theoretical’ (i.e. that there is not even an ‘outside chance’ of it happening), and therefore not a material consideration, we would not change our recommendation in relation to the Section 73 application. Indeed, we consider that the latter passes the sequential and impact tests set out in Paragraphs 24 and 26 of the NPPF, irrespective of whether any fall-back position exists at the application site. Moreover, the bulky goods fall-back, in line with the 1999 permission, must be considered to be ‘real’ and it is possible, depending on the precise type of comparison goods operator involved, that the effects of this bulky goods fall-back would not be too dissimilar to the effects of the type of retailer likely to be secured as a result of the Section 73 application.

Recommendation

- 7.9 We recommend that the Council is minded to grant the Section 73 application proposal, with Condition 3 of the original outline revised to that set out below, which is as proposed by Peacock and Smith in its letter to the Council of 17th March 2017, but with the words ‘total sales area’ changed to ‘Gross Internal Area’ and having corrected for a couple of typographical and punctuation errors:

The Class A1 development hereby permitted shall not be used for the retailing of any of the following goods without the prior consent of the local planning authority: (a) food and drink (excluding the sale of food and drink for consumption on the premises); (b) fashion clothing (excluding gardening/DIY overalls and protective clothing); (c) fashion accessories; (d) footwear (excluding gardening/DIY protective footwear); (e) jewellery; (f) cosmetics and toiletries; (g) pharmaceutical products; (h) books and magazines (excluding gardening/DIY books and magazines); (i) toys (excluding garden toys and play equipment); (j) sports goods (including walking and climbing equipment); and, (k) camping equipment, in order that the local planning authority may retain control over the development. However, the area shown in pink on drawing ref. 15165-SK-05, with a gross internal area of no more than 5,162 sq. m shall be used for the sale of any non-food goods and up to 30% (1,549 sq. m) of food and drink goods’.

- 7.10 However, given that an approval under Section 73 would create an entirely new planning permission, we consider it important, in the event that the Council wishes to pass a minded to approve resolution, that the resolution should include all of the other conditions associated with the outline consent (ref: 99/00084/OUT) that have yet to be addressed and which remain relevant to the Section 73 permission.



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