



## Appeal Decision

Inquiry Held on 21 November 2017

Site visit made on 24 November 2017

**by Robert Mellor BSc DipTRP DipDesBEnv DMS MRICS MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 20 December 2017**

---

**Appeal Ref: APP/V2004/W/17/3171115**

**Land North of Ashcombe Road and Barnes Way, Kingswood, Hull HU7 3JX**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Kingswood Devco LLP against the decision of Kingston-upon-Hull City Council.
  - The application Ref 16/00832/FULL, dated 7 June 2016, was refused by notice dated 2 November 2016.
  - The development proposed is the erection of Class A1 and Class A3/A5 units totalling 11,148sqm gross internal area (GIA); provision of highway works and alterations to access; parking; landscaping; service infrastructure and associated works and improvements.
- 

### **DECISION**

1. The appeal is dismissed.

### **POLICY CONTEXT**

2. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that the appeal be determined in accordance with the provisions of the development plan unless material considerations indicate otherwise. Section 38(5) provides that if to any extent a policy in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy in the last document to be adopted.
3. The development plan here includes the Kingswood Area Action Plan (2016) (the KAAP) and the Hull Local Plan 2016-2032 (the LP). The LP was adopted during the Inquiry on 23 November 2017 and policies in the previous Local Plan that were referred to in the Council's decision and the evidence are no longer in effect.
4. Other material considerations include the National Planning Policy Framework (2012) (the Framework) and Chapter 2B of the supporting national Planning Practice Guidance entitled '*Ensuring the vitality of town centres*' (2014) (the PPG). These documents both pre-date the adopted development plan which has been examined for soundness including in respect of its consistency with national policy.

### **PLANNING HISTORY AND POLICY CONTEXT**

5. Kingswood is an established urban extension on the northern edge of Hull. It includes a large residential area, a shopping area, a leisure area and

employment areas. Much of the housing and most of the employment areas have yet to be developed. The KAAP was prepared to guide the completion of the development.

6. The appeal site has an area of about 2.98ha gross (including adjoining access roads). It is on the edge of the shopping area but is part of a larger area that was originally permitted for employment development. In the draft KAAP submitted for examination the shopping area was to be designated as a '*District Centre*' and thus a '*town centre*' for the purposes of national planning policy. At the same time the appeal site land was proposed as part of a larger extension to that District Centre which would have approximately doubled the size of the shopping area.
7. The KAAP Examination Inspector supported the District Centre designation but not its doubling in size because:
  - there was no evidence before him of a need for the larger development;
  - a sequential test had not been carried out; and
  - that there was evidence that development of that type and scale would have a harmful effect in both qualitative and quantitative terms on the vitality and viability of Hull city centre, contrary to national policy, and would also draw significant trade from the rest of Kingswood Centre as well as from North Point Shopping Centre.

The Inspector concluded that the KAAP would not be '*sound*' with the inclusion of this larger allocation and he therefore recommended main modifications that are now part of the adopted KAAP. Nevertheless he supported a more modest enlargement of its area which includes the previously-permitted 6,500sqm Next store and additional parking. Policy KAAP3(D) now provides that land including the appeal site '*will be devoted to employment and community uses*'. Policy KAAP10(B)(ii) supports employment and/or community facilities on the appeal site and other plots. KAAP10(B)(iii) provides that any development '*on these sites*' which constitutes a main town centre use must comply with KAAP3(B). Main town centre uses are defined in the glossary as those listed in the Framework.

8. The draft Hull Local Plan 2016-2032 as submitted for examination did not propose any relevant changes to the land designations or policies in the KAAP. However the current Appellants made representations which did then seek such changes in order to permit the development of the appeal site for retail purposes. Consistent with PPG guidance on plan-making at ID 2b-009-20140306, the LP Examination Inspector considered both whether there was a need for additional floorspace and, if so, whether that could be accommodated in existing town centres. He concluded that 40,000sqm of additional net floorspace for main town centre uses could be accommodated in the city centre and other town centres against an identified need for 20,000sqm of floorspace for comparison goods and food and drink by 2027, by which time he expected the Plan to have been reviewed. That supported his conclusion that an enlargement of Kingswood Centre to include development of the appeal land was not justified and the LP was not modified in that regard.
9. The supply of sites and the reoccupation of vacant premises in Hull City Centre and elsewhere to meet the identified needs for comparison goods floorspace is

summarised at Table 6.1. This includes net retail sales floorspace capacity for each site or source of supply. LP Policy 10 includes relevant site allocations for development in the City Centre.

## MAIN ISSUES

10. The Council refused planning permission on the basis that the proposal fails the sequential and impact tests set out in local and national policy. Other interested persons also contend in written representations that the proposal contravenes development plan policies to protect the appeal site for employment and community use. The Appellants have responded with written evidence in these regards.
11. Having regard to national and local planning policy the main issues are now considered to be:
  - whether there would be a sequentially preferable location for the development;
  - what impact the development would have on the vitality and viability of the city centre and identified district centres; and
  - whether or not the proposal would otherwise accord with the development plan and national policy including with regard to its designation in the development plan for employment and community use.

## REASONS

### The Sequential Test

#### *Relevant Policy*

12. Policy KAAP3(B) provides amongst other things that: any proposal involving a main town centre use outside of the defined district centre should demonstrate through a sequential assessment that it: *'by reason of its scale and nature could not be accommodated in more appropriate locations in or on the edge of a designated Town Centre in the city'*.
13. The policy wording does not define what is meant by the *'nature'* of development. In a retail context this could refer either to the type of retail premises or to the type and range of goods, or both. Neither does it refer to flexibility on issues such as scale or format which is a feature of national policy in the Framework.
14. When considering the capacity of the city centre and other town centres to accommodate the identified need for retail development, the PPG advice is that the plan maker (and LP Examination Inspector) should have regard to the *'suitability, availability and viability'* of the site in question *'with particular regard to the nature of the need that is to be addressed'*.
15. The newly adopted LP Policy 9 defines the role of the city centre as the *'primary location for all town centre uses'* and also sets out a need for a sequential test but without elaborating on the method. LP Policy 12 amongst other things requires the sequential test to take full account of the role of the city centre and then other centres. These policies thus require consideration of the city centre as the preferred location for retail development.

16. The KAAP3(B) wording for the sequential test does not clearly distinguish between in-centre and edge-of-centre locations, however the sequential priority to in-centre over edge-of-centre locations is clear in national policy. Paragraph 23 of the Framework provides that main town centre uses should be required: *'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'*.
17. In this case the only alternative locations for the proposed development that have been suggested by the Council are within the city centre, with the focus on the LP Policy 10 Mixed Use site allocations at Albion Square and Myton Street in the city centre. Both locations are within the Primary Shopping Area which is defined as the town centre for the purposes of retail development. It includes locations that the retail market would describe as both primary and secondary shopping. No sites on the edge of the primary shopping area have been suggested.
18. In the sequential test, Kingswood District Centre and the other District Centres would follow the priority consideration of the City Centre as a location. If there are no suitable and available district centres locations then edge-of-centre locations may be considered. It is not disputed that the appeal site qualifies as an edge-of-centre site to Kingswood District Centre and that it would be readily accessible from that centre. There are also public transport connections to the city centre, 8km away.

*Suitability of Alternative Sites (including Flexibility)*

19. Whether an in-centre site is *'suitable'* for the proposed development is not explicitly set out as a requirement in the development plan but it is a term used in paragraph 23 of the Framework. To avoid unrealistic site comparisons it may be inferred that it is necessary to establish suitability in order to apply the sequential test whether one is applying the development plan policies or national policy. Nevertheless there is dispute as to how alike the sites and schemes need to be for the in-centre site or sites to be considered suitable. In particular there is dispute as to the interpretation of the Framework phrase: *'demonstrate flexibility on issues such as format and scale'*, as that wording does not itself explain what degree of flexibility is appropriate.
20. More detailed guidance which accompanied earlier national policy in England has been withdrawn. In the absence of a more explicit test in local or national policy it is appropriate to consider both current national guidance in the PPG and also how the matter has been interpreted in the courts and in other appeal decisions that have been drawn to my attention.
21. The PPG<sup>1</sup> advises as a relevant question: *'...is there scope for flexibility in the format and/or scale of the proposal?'* It continues: *'It is not necessary to demonstrate that a potential town centre or edge-of-centre site can accommodate precisely the scale and form of development being proposed, but rather to consider what contribution more central sites are able to make individually to accommodate the proposal'*. It is self-evident that a

---

<sup>1</sup> ID 2b-010020140306

- requirement to accommodate '*precisely*' the scale and form of development being proposed would not allow for any flexibility at all. However the PPG wording again does not define the degree of flexibility that is appropriate.
22. My attention has been drawn to the conclusion of the Supreme Court in '*Tesco Stores Ltd V Dundee City Council (2012)*' which in a similar context (albeit with different documents) construed the word '*suitable*' to mean '*suitable for the development proposed by the applicant*'. However the Supreme Court went on to identify what it described as '*an inbuilt difficulty with the sequential approach*' whereby the policy could be defeated by developers and retailers taking an inflexible approach to their requirements. In that case there was national guidance (in Scotland) which advised that '*...developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals as regards the format, design and scale of development. As part of their approach they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre*'. Whilst that approach had not been repeated in the relevant development plan in that case, the Supreme Court concluded that it must be implicit; otherwise the policies would in practice be inoperable. It follows that the similar Framework sequential test also risks being rendered inoperable unless similar considerations are applied.
23. The Appellants in the present case have acknowledged in closing that the policy wording in *Tesco v Dundee* was broadly (but not in all respects) the same as that found within the Framework and to be similar in broad intent. It follows that, in the present appeal, and in the absence of a more explicit definition of flexibility in the development plan, the Framework or PPG in England, it would be logical, and even necessary, to follow a similar approach to that in *Tesco v Dundee* if the sequential approach in the development plan and national policy is to be operable. However the Appellants do not follow this approach. The Appellants promote the use of wording which would require the development to be implemented only on one site and which would require the development, in that and other regards, to be '*closely similar*' to the appeal proposal. In effect this could mean seeking to insert a retail park style of development with on-site parking and a main road frontage into only one city centre site.
24. The term '*closely similar*' does not appear in policy or guidance. It is drawn from words used by the Inspector in the recent Tollgate appeal decision<sup>2</sup>. It had apparently been suggested to him by the same advocate for the Appellants as in the present appeal. In that case the Secretary of State agreed with the Inspector that one of the alternative sites suggested by a Rule 6 party would not be '*closely similar*' to the appeal scheme (and moreover was not considered to be available).
25. The Rule 6 party in the Tollgate case subsequently sought to apply for Planning Statutory Review on this interpretation<sup>3</sup> but was refused permission with the judge<sup>4</sup> commenting that the words '*closely similar*' were a fair summary of guidance in another case - *Aldergate Properties Ltd v Mansfield DC EWHC*

---

<sup>2</sup> Appeal Ref APP/A1530/W/16/3147039

<sup>3</sup> *Fenwick Ltd and Lion Walk Property S.A.R.L. v SofSCLG, Tollgate Partnership Ltd and Colchester BC CO/4213/2017*

<sup>4</sup> Hon Mrs Justice Lang DBE



[2016]. I understand that the Rule 6 party may be seeking to take the matter further. But in any event that assessment related to a matter of planning judgement that turned on the particular facts and circumstances. My reading of the Inspector's Report in the Tollgate case suggests that the alternative site in question may have provided only about two thirds as much comparison floorspace as the then appeal proposal and with a notably different development mix with the removal of a cinema and a significant amount of convenience floorspace. Those combined differences indicate that it would not have been at all similar to the appeal scheme, never mind closely similar. Neither is it clear if or where any additional floorspace could have been provided to make up any of the deficit.

26. In any event I do not consider that the term '*closely similar*' provides a useful and readily applicable definition of the limits of flexibility that is capable of wider application. In particular it is difficult to distinguish its meaning from the term '*not precisely similar*' which is the approach that the PPG expressly seeks to exclude. Moreover the strict application of such a term as '*closely similar*' would risk making the sequential approach unworkable for the same reasons as set out in the *Tesco v Dundee* case.
27. Turning to the Aldergate case itself, my attention has been drawn to the judge's interpretation of '*suitable*' and '*available*' as generally meaning: '*suitable and available for the broad type of development which is proposed in the application by approximate size, type, and range of goods. This incorporates the requirement for flexibility in [paragraph] 24 of the [Framework] and excludes, generally, the identity and personal or corporate attitudes of an individual retailer. The area and sites covered by the sequential test search should not vary from applicant to applicant according to their identity but from application to application based on their content. Nothing in *Tesco v Dundee City Council*, properly understood, holds that the application of the sequential test depends on individual corporate personality of the applicant or intended operator.*'
28. The present appeal scheme is a speculative proposal without identified occupiers for its several retail units or its food and beverage units. Thus the question of an individual retailer or corporate personality does not arise. However this situation also allows for greater flexibility in how the accommodation is provided on a town centre site as compared to the situation where all of the retail space was intended for occupation by a single retailer. For example whilst the appeal scheme is for a single terraced building, the Appellants' witnesses did not object to the subdivision of the development into separate buildings and there is no obvious reason why those would not be suitable for the intended occupiers. The Appellants also seek flexibility as to the unit sizes on offer to individual occupiers. The agreed planning conditions would limit the retail units to the sale of comparison goods with a minimum unit size of 929sqm GIA but with no constraint on the combination of retail units into larger stores. But that minimum unit size was only agreed at a later stage as a means of limiting the impact on other centres. It was not a functional requirement of retailers.
29. The broad type of development is that of a number of independent retail units for the sale of comparison goods. The drawings indicate that most of the retail units would have a unit size of 929sqm (10,000sqft) and accommodation on 2

- levels. One unit is indicated to be approximately twice that size. The food and beverage units would be smaller.
30. There is a lack of clear information as to the type and range of goods. During the course of the application the applicants advised the Council that they were targeting fashion retailers that are typically represented in high streets. Most of those listed are already present in a recently opened edge-of-centre development in Beverley at Flemingate which is less than 15 minutes' drive (9km) from the appeal site and only marginally more distant than Hull City Centre. At the Inquiry the Appellants proposed a planning condition which would allow dual representation of retailers already present in the Hull city and district centres as well as occupation on a solo basis by those who are not currently represented there.
  31. In written representations in August 2016 the owners of the Kingswood Retail Park advised that the Appellants were targeting the same retailers that the retail park was seeking for the vacant former Next store there which was of a similar size as an individual unit in the appeal scheme. That unit remained vacant over a year later at the time of the Inquiry. None of the previously targeted operators have been signed up for the appeal scheme and the Appellants now advise an assumption that occupiers are likely to be similar to those already present at Kingswood. These nevertheless already include fashion retailers in the larger stores as well as retailers of other comparison goods.
  32. Flexibility of '*scale*' could refer either to the overall floorspace of the development or to the scale of individual retail units where, as here, the proposal has been designed for multi-occupation by independent firms. The Appellants have maintained that a 10% overall reduction in floorspace would provide adequate flexibility but without providing specific justification for that figure. Neither have they specified how that reduction would be implemented. A reduction of 10% in all units would require a reduction in the proposed minimum floorspace for each unit. Alternatively it might be achieved by deleting at least one unit or by an approximate halving in size of the largest unit.
  33. Flexibility in '*form*' or '*format*' could include: whether the proposal can be provided in one or more buildings; whether space is on one or more levels; how individual units are laid out; and how and where parking and servicing provision is made.
  34. The appeal site is a level greenfield site on the edge of the urban area. It is relatively unconstrained in terms of its size and shape when compared to a typical town centre site. This would allow for relatively large units. That the Appellants' planning application already includes floorspace at mezzanine level in their preferred scheme for the appeal site does not to my mind demonstrate that there has already been flexibility, as the Appellants have claimed. I interpret the Framework reference to flexibility to mean flexibility in relation to the scheme for which planning permission is sought, not in relation some earlier iteration of a different scheme. Mezzanine floors could have been included in the proposal for a variety of reasons, not least the maximising of rental income whilst minimising construction costs.
  35. As an incentive to draw customers to the site there would be provision for ample surface car parking which is likely to be free to use and which would

take up a large proportion of the site. As is the case for the present District Centre (which similarly provides ample free surface parking) most customers are likely to travel by car from across a wide area of the city and from adjoining parts of the East Riding District.

36. The Council and the Appellants have agreed that the only candidate alternative sites to be considered are the Albion Square and Myton Street sites in the city centre. Both are within the Primary Shopping Area in the newly adopted LP and both are allocated for mixed development including retail development.

#### Albion Square

37. LP Policy 10 allocates the 2.1ha Albion Square site for a retail-led development together with 270 dwellings and at least as much parking as currently exists on the site's surface car park (150 spaces). Although not part of the policy, LP paragraph 6.45 indicates that Albion Square would provide capacity for 17,300sqm gross or 12,000sqm net retail floorspace. That is potentially more retail floorspace than is sought in the appeal scheme.
38. Proposals for the Albion Square site have been reviewed several times. In October 2016 the Council produced a Development Brief to include up to 3 storeys of retail floorspace and an ice arena. In May 2017 the Harris Partnership produced a sketch plan which included 19,045sqm NIA of retail space in a layout on 1-3 floors with 400 car parking spaces and an ice arena above, and 340 apartments in separate buildings. In October 2017 the Council's cabinet considered new proposals for the Albion Square site to include a revised indicative site layout for the retail space (reduced to 12,170sqm on 2 floors), housing, and other development, and a larger car park with 626 spaces.
39. That latter scheme also indicates an ice arena on an upper floor to replace an existing Council facility elsewhere. Policy 10 does not refer explicitly to the inclusion of an ice arena but such a use would qualify as a main town centre use. Policy 10 allows that main town centre uses will be supported on the site where they are ancillary to retail and where they do not prevent this (retail) objective for the site being achieved.
40. The Albion Square site would be directly accessible from the City Centre's extensive pedestrian zone to allow ready access on foot including from the nearby public transport hub. For the purposes of the sequential test the Appellants acknowledged that multi-storey car parking would be suitable on the Albion Square site as part of a mixed development. The Appellants' retail witness also accepted that 5 of the proposed 929sqm GIA units could be accommodated based on the most recent sketch layout. However that would only total to 4,645sqm GIA. This suggests that there would also be room for additional units for comparison retail and for food and beverage out of the total 12,170sqm gross retail. The Appellant's witness was critical of the shape and layout of the retail accommodation in the most recent sketch scheme. However that layout has previously changed and there remains scope for further revision.
41. Overall the local plan allocation and the various sketch layouts indicate that the site would have the capacity to accommodate all, or most, of the retail floorspace and food and beverage units sought in the appeal proposal together with on-site parking. However this would be likely to require some revisions to



the layout in order to create all the large retail units on 2 levels which the appeal scheme proposes and to optimise the scheme's attractiveness to potential occupiers. That in turn could affect how and where the residential and ice arena elements of the Council's most recent proposals are accommodated and how much car parking could be provided. However a city centre site would be attractive to retail occupiers seeking a range of unit sizes. Some flexibility should be expected in unit scale and format. A 929sqm minimum size for all units would not be necessary on a city centre site. The Appellants had previously been satisfied with a smaller minimum unit size at Kingswood.

#### Myton Street

42. Policy 10 also allocates a 3.8ha site at Myton Street for a mixed development including retail space , a conference centre/live music venue, an hotel and a multi-storey car park. This is inside the southern edge of the recently extended primary shopping area in the LP. The Venue conference centre is under construction in a central position in the site together with an adjacent multi-storey car park. Land to the east of that building could only realistically be developed for a hotel and as an extension to the multi-level Prince's Quay shopping centre over a service road. The Council and the Appellants agree that this part of the site is not a suitable or available alternative to the appeal proposal. However they disagree as to whether the land to the west of The Venue is a suitable alternative.
43. The latter site is already mainly occupied by a retail park. The largest unit on the retail park has recently been vacated by Staples. Another former office building on the site is also vacant. There is scope for a more intensive retail redevelopment, particularly if the extensive surface car parking could be reduced or removed in favour of the use of the nearby multi-storey car parks at The Venue and at Prince's Quay.
44. The LP at Table 6.1 indicates a net retail floorspace figure for the Myton Street Retail Park of 7,000sqm. That would be smaller than the appeal scheme but the main landowners have suggested ways in which the retail floorspace could be increased..
45. The existing retail park is almost all in the same ownership as the Princes Quay Shopping Centre and the owners are negotiating to acquire the one remaining small landholding. The remaining buildings are either vacant or are on short term leases that could be readily terminated should possession be required for redevelopment. Several alternative layouts have been suggested for a retail redevelopment. The retail capacity of a redeveloped Myton Street Retail Park would vary according to what provision is made for parking.
46. Drawing 16086-003 Rev A attached to Mr Newton's supplementary proof indicated a total floorspace figure of about 10,000sqm which I take to be a gross figure. About 45% of the floorspace would be at first floor level which is a higher proportion than in the appeal proposal but need not make the units functionally unsuitable for comparison goods sales, especially of clothing or small items.
47. The units shown in this scheme are fewer and larger than in the appeal scheme but a broadly similar scheme could be achieved that divided a similar amount of floorspace into a greater number of smaller units. There is also scope to

- adapt and incorporate the modern existing former Staples unit with significant cost savings compared to an entirely new building.
48. That scheme includes 85 on-site surface parking spaces. These surface spaces are likely to be difficult to manage as free spaces in this location and opposite The Venue. Such provision is below the usual parking standard and must assume additional reliance on off-site parking such in as the nearby multi storey car park now under construction. To achieve more surface parking on-site would require a reduction in retail floor area. Alternatively were the surface parking to be removed entirely (as at Albion Square) with full reliance instead on the nearby multi-storey car parks then there would be scope to further increase the retail floorspace and/or to amend the layout, unit size and servicing arrangements to address some of the Appellant's detailed criticisms.
49. Multi- storey car parking is characteristic of parking provision in the city centre. A new multi-storey car park is already under construction within the Myton Street allocated site close to where the retail units might be located. Importantly the need for car parking provision in the city centre is reduced compared to Kingswood by its greater accessibility by rail, bus and on foot. In that regard the Paragon Transport Interchange is an important public transport node and is only a few minutes' walk to the north of Myton Street. It is even closer to Albion Square. Albion Square also has better pedestrian links to the rest of the Primary Shopping Area than does Myton Street.
50. The Appellants do not consider the Myton Street site suitable for reliance on multi-storey car parking. This is in marked contrast to their position at Albion Square where they would accept multi-storey parking. Both city centre sites would be for a mixed development (including an ice arena and The Venue respectively). However Myton Street is less well-connected on foot to the rest of the Primary Shopping Area compared to Albion Square and some retailers may for that reason prefer to operate from this location if it were a conventional retail park with surface parking as it has been in the past.
51. I conclude that the Myton Street site is not of sufficient size to provide all of the floorspace in the appeal scheme together with full on-site surface parking. It could provide much of the floorspace if reliance were to be placed on use of the adjacent multi-storey car park. However it would then be less attractive to retailers than the Albion Square site due to its weaker pedestrian links to the rest of the Primary Shopping Area.

#### *Disaggregation*

52. The Supreme Court in *Tesco v Dundee* referred amongst other things to consideration of the adjustment or subdivision of large proposals in order to better fit into the town centre as a means of preventing the sequential test from becoming inoperable. That was drawn from Scottish guidance but similar physical and other conditions are to be found in English town centres. The English PPG wording '*to consider what contribution more central sites are able to make individually to accommodate the proposal*' could refer either to the accommodation of the appeal proposal on only one alternative central site or it could allow for the contribution of more than one site towards accommodating parts of the proposal if it is capable of sub-division. The phrase '*to accommodate the proposal*' would seem to favour the former interpretation. That has also been the conclusion in some other appeal decisions that have relied on an interpretation of the Framework and the PPG and which did not

- need to consider the same development plan wording as in the present case. Nevertheless the PPG is not policy but guidance which, whilst material, does not necessarily outweigh the wording of the adopted development plan to which Section 38(6) accords prior consideration.
53. Here the policy wording in Policy KAAP3(B) refers to a single development proposal but the term '*more appropriate locations*' is in the plural. That wording does not exclude the possibility that the development might be split between different buildings or even different locations in order to be accommodated in a town centre. That is also known as disaggregation.
54. Consideration of disaggregation is not explicitly referred to in current national policy but neither is it explicitly excluded. The KAAP Examination Inspector would have been required to consider whether the policy wording is consistent with national policy and did not find the plan unsound in that regard.
55. The Appellants' advocate insists that it is inappropriate to interpret the sequential test by reference to withdrawn guidance. Neither do I do so. But the Framework and guidance have been considerably condensed as compared to earlier policy and guidance. It follows that nothing should be inferred from the omissions of explicit references to disaggregation in the Framework and the PPG especially where, as here, there is more recent development plan wording, and especially if to do so would risk the surviving sequential test policy from becoming '*inoperable*' to use the words of the Supreme Court.
56. I acknowledge that the Inspector concluded in the Rushden appeal report and the Scotch Corner appeal report that there is no requirement in national policy to disaggregate. However the issue was again considered in the very recent Tollgate appeal report. There the Inspector concluded that in the circumstances of that case disaggregation within the sequential test would be justified. He contrasted that scheme with the Rushden and Scotch Corner developments where there were specific reasons why disaggregation would have been more difficult. The Inspector also pointed out that 'sub-division' was also considered in the Dundee case. I acknowledge that the Secretary of State did not himself refer to disaggregation in his Tollgate decision but neither did he explicitly disagree with the Inspector's approach.
57. In this case there is no particular evidence that it would be commercially or functionally necessary to accommodate a variety of individual and as yet unidentified comparison goods retailers either in only one building or on only one site in the City Centre. I therefore conclude that in addition to the option to accommodate all of the appeal proposal on the Albion Square site, they could all be readily accommodated in the city centre, and at the same unit size, if the development were to be sub-divided with approximately half of the floorspace at The Albion Square site and half at the Myton Street site. In that event there would also be the possibility of more generous surface parking provision at Myton Street if that was considered necessary to make that scheme more attractive to some types of retailer.

#### *Availability of Alternative Sites*

58. The development plan does not include specific reference to the availability of alternative sites. Paragraph 24 of the Framework asks whether town centre sites or edge-of-centre sites '*are ... available*'. The PPG also refers to the '*availability*' of sites. Neither document qualifies these terms. The Appellants

prefer an inflexible interpretation of this term to mean available at the date of the assessment and suggests that this was the approach of the Secretary of State in Rushden Lakes. In fact the Inspector there used the term '*currently available*' which is arguably a less precise term. The Secretary of State endorsed his overall reasoning and concluded on the facts of that case that no suitable alternative site was available. But he did not comment further on the definition of availability.

59. I consider it would be unreasonable to exclude sites as non-available where there is a reasonable prospect that they will be both vacant and in single ownership within a matter of months. This applies particularly in Hull where the newly adopted local plan variously identifies the alternative sites for relevant development and identifies little need for new comparison shopping floorspace within the early years of the plan period. If there is an urgent need *by operators for retail floorspace* then there are currently vacant premises of various sizes and types in the city centre, at Kingswood District Centre, at North Point District Centre and at Flemingate in Beverley.

#### Albion Square

60. This site includes a surface car park owned by the Council and 2 large vacant multi-storey retail buildings which the Council is either negotiating to acquire or has already done so with a view to their demolition. The site has long been allocated for redevelopment in a local plan. However a previous scheme including office redevelopment did not proceed following changes in the office market. The short stay surface car park is evidently popular and still producing a revenue stream but the Council is committed to its replacement on site and likely enlargement. BHS has only recently vacated that part of the former Coop building which it occupied, ending the rental stream to the landowners.
61. I consider that the Council's recent actions and declared intentions for the site make it very likely that it will soon be secured in a single ownership. Resources have been identified both for site acquisition and towards demolition. The implementation of the site's redevelopment in accordance with the site's development plan allocation now depends upon the site securing a development partner. The Appellants are critical of the design and layout of the most recent schemes which they consider would be unattractive to retailers and hence to developers. If so then there are likely to be further amendments to the design and development mix in order to secure a partner. Such amendments would provide the opportunity to revise the scheme design to optimise its appeal to retailers and to food and beverage providers. That could include units similar to those in the appeal scheme.
62. On that basis I consider that the site is available for a retail development of adequately similar scale and format to the appeal scheme.

#### Myton Street

63. That the Myton Street site is partially occupied at present does not make it unavailable. The premises are on short lease terms and there is no need for the landowner to give up the income from those units until they are needed for redevelopment. The landowners could secure possession of all of these premises by March 2019. The occupied unit is at present in single ownership. However it occupies only a small part of the site and there is a reasonable prospect that it can either be secured in the same ownership or incorporated

into a redevelopment scheme. Moreover the owner of the majority of the site controls other modern vacant premises in the nearby Prince's Quay Shopping Centre which may suit the existing occupier.

64. I consider that the Myton Street Retail Park can be considered available for retail redevelopment of a type broadly similar to the appeal scheme whilst also having regard to its city centre location. Its location opposite the main entrance to The Venue should also enhance its attractiveness to food and beverage operators.

#### *Viability of Alternative Sites*

65. There is no reference to viability as part of the sequential tests either in the development plan or in paragraph 24 of the Framework. Paragraph 173 of the Framework does refer to viability in the context of plan making. That would have been a consideration for the Council and the Inspector in the recent examinations of the KAAP and the LP including the city centre site allocations. The PPG at ID 2b-009-20140306 refers to viability as a criterion for identifying sites to meet identified needs for main town centre uses, but again only in the context of plan-making, not decision-taking. Nevertheless it is material when applying the sequential test to consider whether alternative sites for the appeal scheme can be viable in the sense that there is a reasonable prospect that they could be delivered.

#### *Albion Square*

66. The Council is taking steps to acquire those parts of the site that it does not already own and has earmarked the resources to do so, with money also said to be available towards demolition works. It is seeking a lead development partner to develop the site, as is common with city centre developments.
67. The Appellants point to the Council's admission that there would be a funding gap as evidence that the scheme would not be deliverable. However there is no evidence before me as to costs or values.
68. The Council's own LP Policy provides that to satisfy the site allocation it is only necessary to replace the on-site parking. The most recent scheme for the Albion Square site includes an apparent quadrupling of on-site parking provision. That would be a considerable enhancement of existing provision that may or may not be necessary and which may be capable of adjustment.
69. The Appellants' witness acknowledged that ice arenas are unlikely to be delivered as commercial projects. However there is nevertheless an apparent commitment by the Council to secure the delivery of an ice arena in its role as a provider of public leisure facilities. That may require additional financial input from the Council. In these circumstances it is inappropriate to use conventional profit models for the delivery of this facility. Moreover providing the ice arena should allow the release of its existing site for other valuable development to offset at least some of the costs.
70. The inclusion of other town centre uses such as the ice arena remains dependent on achieving the retail space in this retail-led mixed development. If the scheme is not viable in its current form there is scope to modify the scheme. In those circumstances a development partner would be likely to seek changes to the design and layout that enhance the financial viability of the scheme. That could mean making it more appealing to retailers. It cannot be



ruled out that the allocated retail floorspace could be rearranged to make the scheme more similar to the appeal scheme with larger units of more regular shape arranged over 2 floors.

71. I conclude that it is premature to conclude that the allocated redevelopment of Myton Street is not viable or that a viable scheme could not be created which included adequate provision of retail floorspace in scale and format that is functionally similar to that of the appeal proposal (including appropriate flexibility) and which would suit the requirements of potential occupiers.

Myton Street

72. The Appellants have claimed that this scheme would not be viable on the basis that costs would exceed the value of the scheme. However they have not supported their arguments with any figures on costs or values. They do not acknowledge that the existing Staples building could most likely be adapted as part of the scheme, reducing construction costs. Rental income from the site is currently low as most of the floorspace is vacant and would only be temporarily reduced during a redevelopment that would provide much more floorspace to rent.
73. The Appellants accept that the site may accommodate a retail/food and beverage redevelopment (what scheme is not defined) but suggest that this would not be '*closely similar*' to the appeal proposal. I comment above on the use of that term and on the site's suitability to physically accommodate development.
74. Whilst rental values per square metre may be affected by the availability of parking, to rely on off-site parking provision that is already under construction on adjacent land within the same LP allocation must mean that more retail space can be provided on the site itself, as the sketch scheme submitted by the owners demonstrates. Additional floorspace creates the potential for higher rental income.
75. In any event it is clear that the more intensive redevelopment of the site for retailing and its recent allocation in the LP for that purpose is supported by the commercial owners of most of the Myton Street Retail Park site and of Prince's Quay Shopping Centre. They would be unlikely to pursue a scheme which is not commercially viable.

*Overall conclusions on the sequential test*

76. My overall conclusion is that the Albion Square site is suitable and available to accommodate a quantity and type of comparison retail floorspace and food and beverage units that is adequately similar to the appeal proposal after accounting for flexibility in scale and format and as part of a mixed development. It is also likely that a viable scheme could be devised although that might require some changes to the most recent sketch scheme. The appeal proposal therefore fails the sequential test set out in local and national policy including at Policy KAAP3 and LP Policy 9.
77. The Myton Street site could provide a development that is close in format to the appeal scheme but with a significantly reduced floor area. Deleting the provision of on-site surface parking in favour of full reliance on the nearby multi-storey parking would allow more flexibility in layout and unit size. However the relatively poor connectivity on foot with the rest of the Primary

Shopping Area would make this site less attractive to city centre retailers that rely on footfall.

78. In the alternative a scheme to sub-divide the appeal proposal to provide some of the units at Albion Square and some at Myton Street would be less constrained as to the size and dimensions of each unit or the parking provision. The Myton Street site would then be more attractive to operators who prefer on-site parking. That is likely to be viable alongside other development. That would again mean that the appeal scheme fails the sequential tests in local and national policy.

## **Impact**

### *The Development Plan*

79. Policy KAAP3(B) provides amongst other things that: any proposal involving a main town centre use outside of the defined district centre should demonstrate retail development above a set size threshold<sup>5</sup> will: *'not have a significant adverse impact on a designated Town Centre in the city'*.
80. Amongst other things LP Policy 9(9) will not support development (including that which may pass the sequential test): *'where it ... would be likely to have a significant impact on the city centre or any other centre within its catchment taking into account qualitative as well as quantitative factors and the likely consequences to the vitality and viability of existing centres in light of local circumstances'*.
81. LP Policy 12 amongst other things defines the role of District Centres as serving: *'a significant area of the city and immediately adjoining areas'* but *'would not by their scale or nature, either individually or cumulatively, serve a catchment area including the city as a whole or wider sub-region or region beyond'*.

### *National Policy*

82. Paragraph 26 of the Framework requires an impact assessment to include (in summary:
- the impact of the proposal on existing committed and planned public and private investment in a centre or centres in the catchment; 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 for up to five years (10 years for major schemes).
83. The PPG advises that the effects should not be significantly adverse and it stresses the importance of assessing the impact on all town centres that may be affected, which may be in neighbouring authority areas. The PPG includes a checklist for applying the impact test at ID 2b-017-20140306 and a diagram of key steps at ID 2b-018-20140306.

---

<sup>5</sup> 900sqm

### *Catchment*

84. At the Inquiry the main parties agreed that the development would have the potential for impacts on Hull City Centre and on North Point District Centre but not on Kingswood District Centre itself or on Hull's other District Centres.
85. At my prompting it was also agreed that any impact on Beverley Town Centre in the East Riding should be taken into account. This had not been considered either by the Council or the Appellants prior to the Inquiry in spite of the proximity of Kingswood to Beverley, the representations made by the Beverley & District Chamber of Trade against the proposal, and the comments of the KAAP Inspector that additional main town centre uses at Kingswood could risk harm to town centres in the East Riding.
86. The Retail Assessments have assumed that the development's catchment would match that of the existing Kingswood Retail Park which extends over a significant proportion of the North and West of the city and into adjacent parts of the East Riding. However if the development were to provide a significantly increased choice of goods in a particular sector (eg fashion) or to provide goods which are not available elsewhere, that could affect the catchment and increase the draw.

### *State of Existing Town Centres*

87. The **Kingswood District Centre** is an obviously successful, vital and viable modern centre which includes an Asda superstore, an M&S Simply Food supermarket, and a range of comparison shop units including large units. There are also extensive leisure facilities nearby. The Centre provides free surface parking that attracts car-borne customers from beyond the local neighbourhood. Whilst there are some public transport links serving the local area the District Centre is less accessible by bus from all parts of the city than is the city centre. Neither is it directly accessible by train, unlike the city centre and Beverley Town Centre.
88. The centre does currently have a few vacant units including a large former Next store. That has recently been replaced by a larger 2-storey 6,500sqm Next store adjacent to the appeal site. The centre's owners consider that they would be likely to lose some traders and business to the new units. However the Appellants consider that the development would attract more people to the existing shops within the District Centre.
89. The nearest District Centre to Kingswood is at **North Point District Centre** in Bransholme. Compared to Kingswood this provides a different 'value' offer of discount food and comparison shops (including clothing) as well as an indoor market. I saw a high level of footfall on a mid-morning visit and the Centre appeared to be both vital and viable. Some vacant units are being refurbished and others are expected to be modified but proposals for another extension to the centre have not been carried forward. A small Morrisons supermarket has closed down but has been quickly replaced by a Home Bargains store that sells both food and household goods and there are 2 discount supermarkets within the enclosed mall.
90. **Beverley Town Centre** has not been included in the Appellants' assessments but I saw that it appears to be a busy, vital and viable centre in a relatively prosperous historic town. The attractive town centre and Minster are likely to

attract tourists. It has a variety of comparison and convenience stores including fashion stores. I saw a low level of vacancies. The recent Flemingate edge-of-centre development is a few minutes' walk from the town centre but close enough for linked trips. It is anchored by a Debenhams department store. There is a variety of high street chainstores selling mainly clothing, as well as a cinema, restaurants and a multi-storey car park for which there is a charge. It appeared to have a lower footfall than the town centre and there remain several vacant stores. It would be in direct competition with the appeal development if the latter is occupied by similar retailers. It does not appear to be a protected centre in the development plan hierarchy but would compete for some of the same customers with the Kingswood District Centre and with Hull City Centre.

91. The economic health of **Hull City Centre** is described by the Council as '*fragile*'. This is disputed by the Appellants on the basis that elsewhere the Council have described the centre as performing an '*adequate*' role. I do not consider that these terms are incompatible. A centre may perform adequately now but still be vulnerable to change from external impacts that could harm its performance in the future.
92. It is agreed between the parties that the fortunes of different parts of the City Centre have changed following the successful development in 2007 of the busy St Stephen's Shopping Centre which is adjacent to the Paragon transport interchange on the western edge of the Primary Shopping Area. It is a modern centre in what is now the most readily accessible part of the City Centre by a variety of means. It is anchored by a very large Tesco Extra with extensive free short stay parking. The centre now attracts the highest prime rents in the city. On its own the St Stephen's Centre performs strongly with prime rents above national averages. However it represents only a small part of the city centre with a necessarily limited offer.
93. With the successful development of St Stephen's and the subsequent economic recession there has been a concomitant fall in rents and occupancy levels at what was previously prime space in the Prince's Quay Shopping Centre at the southern end of the Primary Shopping Area. When a new shopping centre is developed in a city centre it is not uncommon for existing prime retailers to move in from elsewhere in the city centre. If the city centre as a whole is performing strongly it can be expected that their old premises would be reoccupied within a matter of months by other firms, likely paying a lower rent. But some 10 years after the completion of St Stephen's, vacancy rates still remain high at Prince's Quay. That as yet has been only partially mitigated by extensive investment by the owners including the conversion of parts of the centre to a cinema, outlet shops, and food and beverage units.
94. There are many other vacant units on traditional shopping streets in other parts of the Primary Shopping Area. In Whitefriargate the presence there of a large Marks and Spencer store has not maintained sufficiently high levels of footfall to prevent high rates of vacancy. Overall vacancy levels in the primary shopping area stand at 18% which is well above national averages and a prime indicator of a town centre's poor health. Moreover some of the premises that are recorded as occupied are in only temporary use and are likely to be benefitting from rent concessions.

95. Whilst the development of St Stephen's in 2007 created new comparison and convenience space it has not prevented between 2003 and 2017 a net loss of comparison goods floorspace in the city centre of about 16,000sqm. Vacancies have risen almost fivefold from about 7,000sqm in 2003 to about 33,500sqm in 2017. There is evidence of a 5% trade draw from the city centre to other parts of Hull between 2013 and 2017, much of which is likely to have gone to Kingswood and the numerous retail parks and to the Flemingate development in Beverley.
96. The Council's strategy to improve the health of the city centre has included extensive high quality public realm works. Further works remain to be done after a pause during 2017. These will have caused temporary disruption to pedestrian flows. There is conflicting evidence from 2 sources on the most recent flows. This investment will have improved the appearance of the streets and the shopping experience for visitors but vacant units still mar the appearance of the streets and may deter shoppers from venturing into some areas. Whilst it is estimated that such works can increase turnover in relevant locations, that can only occur in premises which are trading. In areas with high vacancy levels it will thus depend heavily on the reoccupation of vacant premises or their redevelopment in the case of the former BHS/Coop store. Reoccupation or redevelopment is dependent on investor confidence.
97. The last year as the UK City of Culture will have raised the profile of the city and attracted more visitors to cultural events and to improved facilities such as the art gallery and the extended New Theatre. However this does not appear to have materially arrested a long term decline in footfall. It is too soon to say if the effects of the raised profile will be long-lasting once the City of Culture events cease. The imminent opening of The Venue conference centre/music venue and a future Ice Arena (if implemented) may have positive effects on future visitor numbers, as would continuing regeneration of the Albion Square and Myton Street areas that currently detract from their surroundings.
98. However Hull is not immune to negative external effects. National economic forecasts have recently been downgraded, Brexit is creating uncertain economic conditions, and there is a continuing shift towards internet shopping, all of which risk further harm to activity in the city centre.
99. The Council also points to Hull's slide down a national table of shopping centres from a relatively high position of 10<sup>th</sup> in 2007 (when St Stephens opened) to 32<sup>nd</sup> in 2013 and 37<sup>th</sup> in 2016. It is possible that the 2007 ranking was unusually high and preceded the departures of a number of prime retailers from Prince's Quay. Whilst such tables only provide a snapshot of relative health they can illustrate that other towns and cities are coping better with changing economic conditions, whether that is due to investment in improved facilities or to healthier local economies.
100. In all these circumstances I conclude that the health of the city centre remains fragile and that parts of the city centre are vulnerable to a loss of vitality and viability.

*No Development Scenario*

101. In a no development scenario any significant growth in consumer spending (other than on the internet) would be expected to increase demand from



operators for additional retail floorspace. Meeting that demand would depend upon the availability of suitable premises.

102. At present there are vacant retail units at Kingswood Retail Park, at North Point District Centre (which is undergoing partial refurbishment), and at the modern Flemingate edge-of-centre development in Beverley. In the city centre some turnover of premises is occurring at St Stephen's and there are vacant modern units at Prince's Quay and in some older premises throughout the city centre. That at least a proportion of the vacant space in the city centre space can be adapted to current requirements is demonstrated by the impending move of USC and JD Sports from prime modern space in the St Stephen's Shopping Centre to a larger older vacant building nearby and by the recent reoccupation of parts of the Prince's Quay Shopping Centre by outlet retailers. The Prince's Quay Shopping Centre is also investing to create more accommodation for food and beverage units. That is likely to be attractive to the national chains that would potentially occupy the proposed Kingswood food and beverage units.
103. There is also vacant space on the Albion Square and Myton Street sites. Implementation of the allocated retail redevelopments at these sites would include the demolition and replacement of that space as well as an extension of the Prince's Quay Shopping Centre. That would increase the availability of modern floorspace by 25,000sqm with the design and layout necessarily having regard to current market requirements including new retailing methods.
104. The newly adopted Local Plan strategy is based on forecast need for only 1,650sqm of additional comparison floorspace across the city by 2022 and 5,439sqm by 2027. 9,500sqm of floorspace would also be needed for food and beverage. There was no evidence of a need for additional convenience shopping. The LP prioritises development in the city centre over the other District Centres and anticipated that about 50% of the vacant city centre units and 30% of the units in the District Centres would be reoccupied. It makes allocations for new retail development at Albion Square and Myton Street.
105. Altogether, and without the appeal scheme, the LP strategy and allocations should provide comfortably in excess of the projected need for comparison floorspace and for food and beverage floorspace, whether over a 5 or 10 year period, and in a variety of formats.

#### *Quantitative Impact Including Potential Turnover and Trade Draw*

106. Impact assessments by the Appellants and the Council cover a 5 year period with a base year of 2017 and a design year of 2022. They concentrate on comparison goods. The Council's witness estimates the quantitative impact on the city centre as -4.8% (about £33m trade diversion). The Appellants' witness forecast a -2.7% impact on the city centre (-£18.3m). The Council acknowledges that these appear modest percentages. However for **Hull City Centre** they would be additional to the recent -5% trade draw from the city centre to other parts of Hull since 2013. Moreover the PPG at ID 2b-017-20140306 advises that: '*in areas where there are high levels of vacancy and limited retail demand, even very modest trade diversion from a new development may lead to a significant adverse impact*'. In these local circumstances the City Centre does already have high levels of vacancy and there are signs of limited demand from some national retailers that might have

- been expected to seek representation here. Some, such as Zara, have left prime locations which is indicative of weak demand in some market sectors.
107. The Appellants point out that there is anticipated to be an overall 10% increase in turnover in the city centre during the 5 year study period from £606m to £668m even if the development goes ahead and draws some trade away. However such an increase would in any case be needed in order to support the LP strategy for the reoccupation of vacant premises and the regeneration and redevelopment of new floorspace in the city centre. If a significant part of the extra spending is diverted to the appeal scheme then the increased spending would put the achievement of that strategy at risk. The Appellants estimate that turnover in the city centre would rise to £686m without the appeal scheme.
108. For the **Kingswood District Centre** a -5.1% (Appellants) to -6.8% (Council) trade draw from retailers in the centre could be offset by an overall increase in custom for all businesses as the appeal scheme draws more people to the location. In practice the more successful the appeal scheme is at drawing trade away from the City Centre and Beverley the less likely is it that there would be a significant adverse effect for existing retailers at Kingswood.
109. The impact the appeal proposal may have on **North Point District Centre** would vary according to the type of retailer that occupied the units. The Appellants estimate the trade draw at -5.4% (-£0.51m). A concentration of mid-market or upmarket fashion retailers at Kingswood would have less impact than if the new units were to be marketed to value retailers in direct competition with North Point.
110. For **Beverley** the Appellants' witness estimated the quantitative impact at 1.7%-2.3%. That would appear to be a low figure. However it is not clear what the cumulative impact of the appeal development may be on the town centre given that it has only recently been subject to an impact from the development there of the edge-of-centre Flemingate Centre, particularly in relation to fashion retailing.

#### *Qualitative Impact*

111. The PPG advises that impact should be assessed on a like-for-like basis in respect of that particular sector and that retail uses tend to compete with their most comparable competitive facilities. The number and choice of outlets means that clothing remains a relative strength of the city centre compared to other District Centres and the retail parks. However there is also evidence that the City Centre is weaker in the mid and upper ends of the fashion clothing market.
112. In this case the Appellants have been unable to confirm what type and range of comparison retailing would occupy the proposed units. However, during consideration of the application they indicated that they were seeking prime high street fashion retailers including River Island, H&M, and the Arcadia group, but also an IKEA click and collect store and an unnamed homeware retailer. At the Inquiry the Appellants asked that the IKEA store be discounted from the assessment. The other occupiers are all typically represented in town centre premises of a variety of formats.

113. The Appellants' retail witness refuted that the development would qualify as a 'fashion park' on the basis that he understood that term to apply to much larger developments. However it would appear that units of the proposed size are often occupied by fashion retailers and that they have been targeted here in the marketing efforts. If it is successful in attracting several such occupiers, the development would have scope to significantly enhance the draw of Kingswood for those seeking to purchase clothing, particularly as it would add to existing representation at the adjacent retail park which already includes large Next, Matalan and TK Maxx stores as well as George at Asda and national sportswear retailers. That is likely to be a worst case scenario in terms of trade diversion from the city centre but is also reasonably likely.
114. That such developments outside of city centres are popular with fashion retailers is evidenced by the recently developed 2-storey Next store on their adjacent site, replacing a smaller Next store nearby, and indicating that this is seen as a successful location for clothing as well as some homeware products and a cafe. The recent edge-of-centre Flemingate development in Beverley has also similarly targeted mainly fashion retailers alongside food and beverage.
115. A development that included additional fashion stores would significantly enhance Kingswood's offer and be likely to make it more attractive to customers from across Hull and the adjoining part of the East Riding as a destination for a clothes shopping trip. That would strengthen its offer as an alternative to the St Stephen's Shopping centre, the wider city centre and also Beverley town centre, even if there is dual representation of some of the same retailers.
116. At Kingswood there would be free parking including 450 additional spaces as part of the appeal proposal. The presence of other adjacent comparison and convenience stores such as Boots, WH Smith, M&S Simply Food and Asda would also make it attractive for linked trips such as a weekend trip to buy both clothing and groceries. That has the potential to widen the impact on other sectors that are represented in the city centre such as convenience shopping. The wider the choice of goods available at Kingswood the more viable it would become as an alternative destination for shopping trips to the city centre.
117. There is some anecdotal evidence that those seeking to attract national chains of food and beverage stores to vacant space at the Prince's Quay Shopping Centre have found themselves in direct competition for operators with this proposed scheme at Kingswood. That again places the successful reoccupation of vacant city centre space at risk.

#### *Impact on Investment*

118. The Framework at paragraph 26 provides that an impact assessment 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.
119. The PPG provides further advice on key considerations including 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 developments or investments based on effects on current/forecast turnovers, operator demand and investor confidence.

120. In relation to **existing investment** the Council points mainly to the substantial recent investment in public realm works in the city as well as public investment in The Venue. An important aim of the public realm works has been to stimulate private investment including in the delivery of the Albion Square regeneration. That is a development allocation in the newly adopted LP. The public realm works are also intended to improve the attractiveness of existing city centre streets and support the reoccupation for retailing of some of the vacant space in line with the LP strategy. However such reoccupation would also be affected by whether the various regeneration projects go ahead in order to stimulate footfall along those streets and whether there is sufficient growth in consumer spending in the city centre.
121. The development of The Venue and its multi storey car park is also intended to encourage private investment in the regeneration for retail, leisure and hotel purposes of the adjoining land on both sides which is the subject of a development allocation in the newly adopted LP.
122. That investment risks being made partially ineffective should the appeal scheme divert a substantial part of the demand for modern comparison retail floorspace by attracting operators who would otherwise have occupied these city centre sites. A consequent lack of demand for retail space in these city centre sites also risks the delivery of other regeneration benefits such as the ice arena and parking on the Albion Square site.
123. There has also been private investment in the city centre, especially at the Prince's Quay Shopping Centre which may also be unsuccessful at attracting retailers or food and beverage operators to its vacant space if they opt to locate instead at the appeal development and also draw custom away from the city centre.
124. **Committed investment** includes the resources identified by the Council to acquire the remaining landholdings at Albion Square and otherwise to invest in the marketing of that scheme and site preparation as well as the remaining public realm works in that area. The appeal scheme would itself compete for investment and occupation with that scheme and could deter the involvement of a private partner in Albion Square due to the increased risk, in which case the Council's investment could be wasted.
125. The status of **planned investment** is not defined in the Framework or the PPG. The Appellants prefer to exclude that investment which is not '*at a very advanced stage*' by reference to the Tollgate and Scotch Corner decisions. Although he did generally endorse the reasoning of the Inspectors in neither case did the Secretary of State use or define that phrase.
126. The use of that phrase by the Inspector in the Scotch Corner report at IR11.16 was his interpretation of PPG paragraph 16. However it does not distinguish between the different types of investment. Signing a contract is given as an example and would usually come at a late stage in the process when it would qualify as '*very advanced*'. But it would then qualify as '*committed*' rather than only '*planned*' investment. Planned investment must necessarily come at an earlier stage than committed investment and cannot be equally advanced. On the other hand if a scheme has specific policy support in a development plan and there is some evidence of landowners support and intention to implement the scheme then it may qualify as planned investment.

127. The Tollgate Inspector referred to the Scotch Corner reasoning but sought to apply the *'very advanced stage'* test specifically to planned investment, commenting that a site in question had no contract, no overall land ownership, no developer, amongst other things and was *'many years away.'* Its policy support was long-standing.
128. As ever much depends on local facts and circumstances. However in this case the Myton Street and Albion Square sites are newly allocated or reallocated in the LP, there is evidence of active land assembly, there is existing and committed public investment relevant to both sites, and an evident intention of the landowners on both sites to implement the scheme. Whilst I do not agree that the *'very advanced stage'* test is an appropriate way to distinguish planned investment from other types of investment, I consider in this case that there is planned investment on both sites with up-to-date policy support as part of an adopted local strategy for the supply of retail floorspace. That strategy would be undermined with an associated loss of investor confidence if the appeal scheme were to proceed to absorb a substantial part of the forecast need for both comparison floorspace and food and drink floorspace in the years up to 2022 and 2027 that would otherwise have gone to the City Centre.
129. The newly adopted Local Plan provides at paragraph 6.14 that there is an identified need for 28,000sqm of new net comparison floorspace across the city by the end of the plan period in 2031. This was a significant reduction from previous forecasts. Only 1,650sqm of floorspace is expected to be needed by 2022 and only 14,500sqm by 2027. The plan therefore provides that a cautious approach should be taken to the release of sites. The LP at page 101 also identifies a need for 9,500sqm of net floorspace for food and drink across the whole city.
130. By providing 11,148sqm (GIA) of floorspace, mainly for comparison goods, the appeal proposal would provide for most of that identified city-wide need for such space up to 2027. Without an unanticipated upsurge in consumer spending that would likely deter investment in other retail development, especially in the city centre, contrary to the LP strategy.
131. It is also evident from representations from interested persons at the application and appeal stages that to permit an extension to Kingswood District Centre that has been rejected as an allocation during 2 development plan examinations within the last 2 years would undermine public confidence in the plan-led system, including amongst prospective investors in the city centre, whether as developers or as individual retailers.

#### *Conclusions on the Impact Test*

132. Overall I conclude that the appeal scheme would be likely to have a significant adverse impact on the vitality and viability of the economically fragile City Centre, in part by reason of direct trade draw that would further weaken demand for city centre retail premises after a recent cumulative quantitative loss of trade and likely qualitative impacts by direct competition that risks weakening consumer choice for most residents of Hull and the wider area by drawing trade in some sectors such as fashion away from the city centre to a District Centre. Those impacts would damage investor confidence in city centre regeneration with an associated waste of existing and committed investment as well as a likely loss of planned investment.



133. The proposal would also have an adverse quantitative impact on trade at the Northpoint District Centre in particular and in Beverley Town Centre, the extent of which would vary according to the tenant mix. Whilst these effects may not be individually significantly adverse, they would be additional to the significant adverse effect on the City Centre.

134. The proposal therefore fails the impacts tests in the development plan and national policy including at Policy KAAP3, LP Policy 9 and LP Policy 12.

### **COMPLIANCE WITH THE DEVELOPMENT PLAN DESIGNATION**

135. Paragraph 27 of the Framework provides that where a proposal fails to satisfy the sequential test it should be refused. The PPG advises at ID-2b-010-20140306 that compliance with the sequential and impact tests does not guarantee permission will be granted as all material considerations must be considered.

#### *Site Allocation in the Development Plan*

136. The Council acknowledged in the officer report on the application that the proposed development would be a departure from the site's allocation in the KAAP but did not include that as a reason for refusal. The Report did not refer to policies in the then emerging LP for the protection of employment land.

137. Nevertheless many of those making representations on the proposal consider that the development would be contrary to the development plan whether or not it passes the sequential and impact tests. The wording of the relevant policies is a matter for legal interpretation and there are opposing legal views on this point.

138. Mr Hicks QC was not at the Inquiry but he drafted a written submission for lawyers representing a consortium of city centre landowners (Document 8). That points out amongst other things that Policy KAAP10(A) requires development in Kingswood Centre (which includes the appeal site) to comply with the Policies Map and KAAP3. The Policies Map shows the appeal site as falling within an area for employment and community uses. Policy KAAP10(B)(ii) 'supports' employment and/or community facilities on the appeal site and other plots without explicitly excluding other uses.

139. Mr Katkowski QC argues for the Appellants that because KAAP10(B)(iii) provides that any development 'on these sites' which constitutes a main town centre use must comply with KAAP3(B) then main town centre uses including retailing are permissible provided that they pass the sequential and impact tests required by KAAP3(B). Main town centre uses are defined in the glossary as those listed in the Framework. They can include retailing and office uses.

140. Policy KAAP3(D) was not referred to in the submissions from either side but it provides that land including the appeal site: '*will be devoted to employment and community uses*'. With the added support of KAAP10(A) and the Policies Map that indicates that uses other than employment and community uses are to be excluded.

141. Class A class retail development would provide employment but it does not qualify as an employment use in the development plan because LP Policy 1(4)(A) provides that development on allocated employment sites for other than a Class B business use will not be allowed unless a series of criteria are

satisfied, chief amongst which is that: *'it is demonstrated that the use of the site for other than B class use would not lead to a shortfall of land available to meet identified economic development B class needs within the relevant market area of the city and it is demonstrated that there is not reasonable prospect of the site being used for a B class purpose'*.

142. The appeal site is part of a larger area of land originally permitted for employment use. A part of that area was developed for employment but I understand that may have been grant assisted and there is no evidence that such assistance is now available.
143. The Appellants claimed in closing that the proposal complies with Policy 1(4)(A) on the basis of Mr Stephenson's written evidence that there will not be a shortfall of employment land in the city and that there is no reasonable prospect of the site being used for a B class purpose. However his supporting statistical evidence on employment land availability has been disputed in a letter of 15 November from Mr N W Pearce who assisted in the Employment Land Review 2014 on which Mr Stephenson relies in part and he contends that the commercial property market has since changed for reasons including the major Siemens development in the city such that there is now the lowest amount of vacant industrial property in 30 years. Mr Pearce also refers to the conclusions of the recent St Modwen's Appeal decision<sup>6</sup> in the East Riding which also considered the availability of employment land in the sub-region in the context of proposals to develop allocated employment land for housing. In that case it was concluded that there is an overall over-supply of employment land but that the large employment site in question should be protected as one of only four key employment sites in the East Riding and one of only 2 identified for general industrial use.
144. Mr Stephenson has responded to rebut Mr Pearce's challenge with evidence to maintain his view that there is an oversupply of employment land, that this site is not important to that supply and that he considers there is no reasonable prospect of its development. He considers that there is a declining demand for industrial use, that the site is unsuited to warehousing use, and that an office use would need to pass the sequential test for town centre uses. However there is no evidence that the site has recently been offered to the market to demonstrate a lack of demand. Neither is it clear which *'relevant market area'* has been defined for the purpose of assessing supply.
145. It is material that the site is subject to a recent KAAP allocation for employment and community use and this was not changed in the LP which would have been adopted following consideration of overall employment land supply in the city. Neither has there yet been provision for the community uses sought in the KAAP.
146. Because the Council has not opposed the loss of employment land, no witnesses appeared at the Inquiry for cross examination and I have been unable to examine this issue in more detail. However I conclude on the evidence before me that it has not been demonstrated either that there would be no shortfall of employment land in the *'relevant market area'* of the city. The proposal would thus not satisfy LP Policy 1. Neither has it been shown that there is no need for the land for its allocated alternative use for community

---

<sup>6</sup> Appeal Refs APP/E2001/A/13/2200981 & APP/E2001/A/14/2213944

purposes. There would be obvious benefits in co-locating community uses with adjacent main town centre uses in the District Centre.

## **OTHER MATERIAL CONSIDERATIONS**

### *Employment and Investment Benefits*

147. The Appellants claim the provision of 200 to 250 jobs as a significant benefit of the development. However, at the Inquiry the Appellants' witness accepted that this was a gross figure. It depends upon an overall increase in consumer spending which the LP anticipates to be only modest in the early years of the Plan period. Without such an increase there could be overall job losses arising from a diversion of trade from other businesses or loss of the wider employment benefits from the mixed city centre regeneration schemes in the LP which the appeal proposal could place at risk.

148. The development of the scheme would result in an injection of investment locally but that would be at the expense of likely reduced or wasted investment in the city centre where it is more urgently required and would provide wider benefits.

### *Local Support for the Appeal Proposal*

149. I acknowledge that there is some local support for an enhancement of the retail offer available at Kingswood and understand why that would be appealing to those living close to the appeal site. However if local people then switch more of their spending from the city centre or North Point District Centre that would increase the impact on those centres. Moreover if the appeal development included retailers who are not represented elsewhere in Hull then it would be more difficult for other residents from Hull or from elsewhere in its catchment to reach the site by public transport than if the shop were in the city centre.

### *Non Poaching Condition*

150. One concern expressed by the Council and others is that, were the development to proceed, retailers who are currently represented in the city centre may close their stores there and move to the appeal site with greater adverse impacts on city centre trade and on consumer choice.

151. In response, the Appellants point out firstly that most of the existing retailers in Kingswood District Centre also have city centre premises. However they have also suggested a no-poaching condition whereby the appeal premises could not be occupied by retailers who have occupied Hull city centre or district centre premises within the last 6 or 12 months unless they commit (by an agreement) to retaining those premises for a 5 year period. Whilst such a condition has been used previously elsewhere, I consider that it may not be effective here owing to the lack of a clear definition of what retailing firms would be affected and would need to enter such an agreement; in particular, whether the restriction relates to the fascia name over the shop or to the identity of a group which may own multiple retailing brands. I note for example that there does not appear to be an 'Outfit' branded shop in Hull City Centre and yet the Outfit shop at Flemingate retails the clothing from a number of different Arcadia brands that are separately represented in Hull City Centre as well as others that are not.

152. Even if the condition were effective, it would only apply for a limited period, and could still be insufficient to encourage long term investment in the city centre. It would not overcome the identified harm.

### **OVERALL CONCLUSIONS**

153. My overall conclusion is that for the above reasons the appeal proposal fails both the sequential and impact tests in the development plan and national policy and there would be a significant adverse impact on the vitality and viability of the City Centre including adverse consequences for existing and committed investment in the City Centre and for planned investment there as set out in the newly adopted Local Plan.

154. There would be a supplementary adverse impact on the vitality and viability of North Point District Centre and Beverley Town Centre by reason of reduced trade draw which, whilst not significantly adverse in itself, would add to the other identified harm. The proposed development would also contravene the site's allocation for employment and community uses in the KAAP and it has not been adequately demonstrated that the development would satisfy the conditions for the release of such land as set out in the development plan.

155. The proposal is in overall conflict with the development plan and there are no material considerations sufficient to set aside that conflict. Planning permission should therefore be refused.

*Robert Mellor*

INSPECTOR

## APPEARANCES

### FOR THE LOCAL PLANNING AUTHORITY:

Mr Ian Ponter	of Counsel, Kings Chambers, Manchester instructed by Nathan Chester
He called	
Mr Alex Codd	BA(Hons) MSc MA MRTPI City Planning Manager, Hull City Council
Dr Steven Norris	BA(Hons) PhD MRTPI Retail Planning Consultant, Carter Jonas

### FOR THE APPELLANT:

Mr Chris Katkowski	of Queens Counsel, Landmark Chambers, London, instructed by Mr Paul Newton and assisted by Mr Andrew Byass of Counsel, Landmark Chambers
He called	
Mr Paul Newton	BA(Hons) DipTP MRTPI Planning Consultant, Barton Willmore
Mr Michael Prentice	Retail Consultant

### INTERESTED PERSONS:

Mr Dan Mason	Asset Manager, Princes Quay Shopping Centre Realm Ltd,
Ms Kathryn Shillito	HullBID, City Centre Manager
Ms Marion Ring	Proprietor, Tea Shop, Trinity Indoor Market
Mr Nick Diment	Of GL Hearn on behalf of group of city centre landowners and developers

### DOCUMENTS

- 1 Statement of Common Ground dated 20 November 2017
- 2 Hull Ice Rink Feasibility Study Commercial Analysis, Carter Jonas  
– August 2017 (APP)
- 3 Appendix 8 Drawings for Cabinet Report of 23 October 2017 –  
Bond Square Scheme (APP)
- 4 *Fenwick Ltd and Lion Walk Property V SoSCLG, Tollgate  
Partnership and Colchester BC* – Judges Decision on Application to  
apply for Planning Statutory Review 10 November 2017 (Now the  
subject of a further application) (APP)
- 5 PPH letter of 15 November 2017 concerning GMW Employment  
Land Statement of October 2017
- 5A Letter of 20 November 2017 from Grant Mills Wood rebutting  
Document 5 (APP)
- 6 Table 7.1 Updated Norris Table of vacancies in city centre (LPA)
- 7 Plan of Primary Shopping Area in city centre (LPA)
- 8 Letter from Town Legal to Planning Inspectorate dated 8  
November and attachments
- 9 Appendices to Document 5A



- 10 Draft Planning Conditions with change tracking (APP/LPA)
- 11 LDC Research Report Evaluation of Hull etc October 2017 (Mason)
- 12 Draft Planning conditions without change tracking (APP/LPA)
- 13 Comments on Document 11 (Newton)
- 14 Extract from Hull City Plan (2000) showing Albion Street Policy  
CC31 Allocation (APP)
- 15 Town Legal Letter of 22 November 2017 (Diment)
- 16 Document showing HullBID footfall statistics October 2017 (APP)
- 17 Planning of relevant locations in city centre for site visit (LPA)
- 18 LPA Opening Submissions
- 19 Appellant opening submissions
- 20 LPA closing submissions
- 21 Appellant closing submissions
- 22 Planning Conditions with reference to new Local Plan