The Planning Inspectorate

# Appeal Decision

Inquiry Held on 19 January 2021

Site visit made on 23 January 2021

**by Roger Catchpole BSc (hons) PhD MCIEEM IHBC**

**an Inspector appointed by the Secretary of State**

**Decision date: 3 March 2021**

**Appeal Ref: APP/W3005/W/20/3257847**
**Plots 6A, 6B and 6C, Castlewood Grange Business Park, Sutton in Ashfield, Nottinghamshire NG17 1JF**

- 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 Mr James Richards (Clowes Developments (UK) Ltd) against the decision of Ashfield District Council.
- The application Ref: V/2019/0705, dated 25 October 2019, was refused by notice dated 27 February 2019.
- The development proposed is a mixed-use development comprising a drive through restaurant (A3/A5), 3 retail units (A1/A3/A5) and lorry fuelling and EV station (Sui Generis).

## Decision

1. The appeal is dismissed.

## Preliminary Matter

2. On 1 September 2020, the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987. These Regulations have revoked Class A which has largely been replaced with a broader 'Commercial, business and service' use class (E). This incorporates the previous shops (A1) and restaurants and cafes (A3) use classes. Hot food takeaways (A5) no longer have a use class and are now Sui Generis. This is the basis upon which this appeal has been determined.

## Main Issues

3. The main issues are:

    - whether the site is suitable for non-employment uses having regard to local and national policy;
    - whether there are more suitable alternative sites having regard to retail suitability;
    - the effect of the proposal on the safe and efficient operation of the local highway network; and
    - whether the policies most important for the determination of the application are out-of-date.

## Reasons

4. The appeal site covers an area of approximately 0.85 hectares and is part of a much larger employment site known as the Castlewood Grange Business Park (the Business Park). The Business Park is situated just off the A38, approximately 2 km to the east of Junction 28 of the M1. The nearest settlements are Sutton-in-Ashfield, some 2.5 km south west and Kirkby-in-Ashfield, some 3.5 km north west. The Business Park sits within a wider employment zone characterised by a large number of industrial units distributed across several industrial estates.

5. The Business Park has been developed over the last 13 years on an *ad hoc* basis with around 77% of its area currently being developed. It provides a range of employment opportunities for Ashfield District as well as the adjacent Bolsover District. Whilst the site is allocated for employment use, part of the original Plot 6 was developed as a petrol filling station (the PFS) with retail outlets and a drive-through coffee outlet (Ref: V/2016/0439). The access road for this development bisects the appeal site which currently comprises two contiguous areas of unmanaged, vacant land. The appeal site is situated at the easternmost extremity of the Business Park, in close proximity to the main access point leading from the A38.

*Non-Employment Use*

6. The site is allocated as protected employment land under saved policies EM1(Sa) and EM4 of the Ashfield Local Plan Review 2002 (ALPR). EM1(Sa) allocates the Business Park for employment uses which are defined in the glossary as B1-B8 uses which are subject to the changes outlined above. Whilst class B1 has been revoked and is now incorporated into Class E, Class B2 and B8 nevertheless remain applicable.

7. The allocated site (Pinxton Lane) is described as a 'prestige employment site' that is located to take advantage of fast road links to the M1 and that it is 'suitable for road-related development' with other sites being clearly identified for this purpose in the development plan [CD 5.1.1]. Whilst linked to policy EM4, I do not find it inconsistent with the National Planning Policy Framework 2019 (the Framework) which encourages the identification of strategic sites for local and inward investment as well as a planning system that is genuinely plan-led, i.e. the right development in the right place. Even though paragraph 81(d) requires policies that are flexible enough to accommodate unanticipated needs, such as lorry refuelling and EV charging stations, the development plan does not prohibit such facilities elsewhere. I shall return to the specific locational requirement for these elements at paragraph 19 of my decision.

8. EM4 is a protective policy that prohibits proposals for alternative uses of allocated employment sites. It reflects the kind of uses that are considered to be acceptable in planning terms which do not comprise retail or mixed uses. The Council accepts that this policy is inconsistent with the Framework because it applies a rigid and inflexible approach to protecting the allocation. Bearing in mind the advice of paragraph 81(d) and the need to support suitable alternatives, as set out in paragraph 120, I agree that this policy is not fully consistent with the Framework. This is a matter that I will revisit in my planning balance.

9. Paragraph 120 of the Framework highlights the fact that planning decisions need to reflect changes in the demand for land and that they should be informed by regular reviews. These reviews include land allocated for development as well as land availability. Where there is 'no reasonable prospect' of an application coming forward for an allocated use then applications for alternative uses should be supported, where the proposed use would contribute to 'meeting an unmet need' for development in an area.

10. The Council applied a more flexible approach to the Business Park when it approved the PFS but it has not maintained this stance in relation to the current application due to changes in the way the site was marketed since 2014. Although the appellant characterises the different approach as 'unsatisfactory and novel', the fact remains that the appeal site has not been marketed for employment use since 2014 and has variously been described as a 'roadside retail & leisure opportunity'[1] and 'business park amenities opportunity'[2]. The appellant accepts that there has never been any specific marketing material published for the appeal site but maintains that business parks are generally marketed in a holistic manner through a combination of marketing boards on individual plots and masterplan brochures.

11. Clearly, a degree of flexibility is needed to maximise the opportunities that may come forward over time and I accept that this may well preclude a finer grained approach. However, I have no evidence before me to suggest that the marketing boards for Plot 6 have ever highlighted potential employment use since the Business Park was first developed. I also note that examples of the advertising boards that are before me are either non-specific or highlight larger plots. One refers to plots between 24,000 ft$^2$ to 470,000 ft$^2$ [3] whilst another highlights plots in excess of 15,000 ft$^2$ [4]. Added to this is the fact that only units up to 12,000 ft$^2$ can now be built on the appeal site since the construction of the PFS.

12. The appellant has stressed the fact that the masterplan brochures encouraged all enquiries and that any plot could potentially be altered to meet the needs of future occupiers. Be this as it may, I do not find it plausible that further enquiries would occur unless a potential occupier had a highly localised geographical requirement that precluded the consideration of alternative sites either in the wider area or further afield along the M1 corridor. If the Business Park marketing is taken at face-value, then there is a possibility that any employment site selection exercise seeking areas up to 12,000 ft$^2$ would screen out the Business Park at an initial stage without any direct enquiry ever occurring.

13. The appellant maintains that market signals indicate that demand at this location is mainly for larger manufacturing distribution warehouses which has remained strong during the Covid19 pandemic and draws parallels with Plot 5 which is suited to buildings of between 6,000 ft$^2$ to 12,000 ft$^2$ but which has remained undeveloped. My attention has also been drawn to the fact that a speculative, 11,000 ft$^2$ building that has been constructed on Plot 11 remains unoccupied. The appellant suggests that it is simply not economically viable to build smaller units at the Business Park and has provided a residual valuation

[1] Appendix 7, Business Park Marketing Brochure for 2014, PoE - Alastair Fearn
[2] Appendix 9, Business Park Marketing Brochure for 2016, PoE - Alastair Fearn
[3] Appendix 14, Image from Google Street View, September 2014, PoE - Alastair Fearn
[4] Appendix 15, Image from Google Street View, June 2016, PoE – Alastair Fearn

to support this position. The Council has also provided a valuation to the contrary showing that 'B1', B2 and B8 uses would be viable.

14. The Inquiry established that the different conclusions reached in these assessments were principally due to differences in how build costs, contingency fees and professional fees were calculated with the appellant acknowledging that the last two were down to professional judgement. Neither party identified fundamental flaws in the way the calculations were carried out or questioned the professional competence of the authors. The Council estimates the build costs as being around £67.45 per ft$^2$ whilst the appellant estimates this as being around £84 per ft$^2$ which gives an overall difference of around £297,900. This was attributed to the use of different values from the Building Cost Information Service (BCIS) with the Council taking median values for Ashfield District whilst the appellant took mean values for Nottinghamshire.

15. Paragraph 57 of the Framework advises that due regard should be had to the Planning Practice Guidance 2016 (as amended) (PPG) and that standardised inputs should be used. The PPG observes that complexity and variance is inherent in viability assessments but that the inputs and findings should be set out in a way that aids clear interpretation by decision makers with any deviation from the figures clearly explained and supported by evidence[5]. Bearing this in mind, I find the assessments to be deficient because of a lack of standardised inputs, *i.e.* divergent BCIS data, as well as relatively small differences in assumptions that are professionally valid but which have nonetheless propagated through the calculation to give diametrically opposed conclusions. Consequently, this evidence does provide an objective basis for my decision-making and I therefore give it limited weight.

16. Another market signal highlighted by the appellant relates to the low demand for office space in the local area. The appellant draws support for this assertion from an employment land forecasting study [CD6.1] as well as anecdotal evidence relating to Sherwood Park and The Village Park. The Council accepted that there is an oversupply of offices in response to a direct question that I put during the course of the Inquiry. Bearing this in mind, as well as the out of centre location of the Business Park and the size of units that can now be accommodated on the appeal site, I accept that a more restricted number of employment uses are possible in comparison to the original allocation. However, the fact remains that the appeal site has been marketed on an entirely different basis since 2014. Although warehouse demand has remained strong during the pandemic, the fact that the vacant building on Plot 11 has remained unoccupied could be the product of the considerable economic uncertainties faced by businesses at the current time.

17. Drawing this together, I find that the appeal site has not been thoroughly marketed for employment use on the basis of the evidence that is before me and that it cannot, therefore, be concluded with any degree of certainty that there is no reasonable prospect of an application coming forward for the allocated employment uses that still remain relevant to the appeal site.

18. Turning to potential unmet need, the appellant maintains that the need to ensure that the Business Park has facilities to attract customers where none have previously been forthcoming is 'obvious'. The appellant also highlights the fact that the need for a dedicated lorry refuelling point and EV charging

[5] Paragraph: 020 Reference ID: 10-020-20180724

station were not anticipated when the site was first allocated and that the creation of EV stations would also contribute to Government objectives for this type of infrastructure. It is suggested that these are clearly 'linked component elements' of the wider scheme.

19. However, I am not persuaded that there is an objective need on the basis of the evidence that is before me. This is because of the facilities associated with the PFS development, namely a Spar convenience store, Greggs bakery, Costa Coffee drive-through and WH Smiths newsagents. During the course of the Inquiry it was also established that the contribution that the scheme might make to the staff retention and welfare of other occupiers of the Business Park was anecdotal and not supported by any systematic, survey-based evidence.

20. Furthermore, I find the need for lorry refuelling and EV charging to be equivocal given the proximity of the appeal site to the strategic road network and the associated, alternative provision that is to be found. The Council also points out that there are already EV charging stations serving the needs of existing occupants as part of the permitted development across the wider site. Whilst these may not be as fast as the ones proposed, I see no reason to doubt the adequacy of the existing provision given that most occupants will be present at their places of employment for extended periods and can therefore utilise slower charging rates.

21. The appellant accepts that the proposed uses would differ from those for which the appeal site was originally allocated but maintains that they would still contribute to the reasons behind the allocation, namely the creation of jobs. The Council acknowledges that it currently has a surplus of employment land, as indicated by the employment land monitoring report [CD6.2]. When questioned, the Council's witness acknowledged that the loss of the appeal site would not fundamentally undermine the need for employment land as set out in the ALPR but that it would lead to the wrong jobs in the wrong location.

22. The Council also points out that it is too simplistic to say that the EM1(Sa) allocation is merely about job creation because it also reflects the kind of uses that are considered to be acceptable, in planning terms, at a location that notably excludes retail or mixed uses. Whilst the PFS is a glaring exception to this rule, it does not follow that the remaining, vacant plots should be treated in the same manner. This is because there is insufficient information to suggest that they have been appropriately marketed for employment use. Even if this had been the case up to 2014, the site characteristics have changed since the access road for the PFS was constructed. It is not the same site and the availability of suitable employment-related occupants has simply not been tested.

23. Given the above, I find that the proposal would not meet any unmet development needs. Overall, the supporting evidence is thin and not sufficiently well substantiated to justify a more flexible approach in this particular instance. The appellant suggests that the PFS is a material consideration that carries significant weight in this regard. However, each case must be determined on its individual merits, facts and circumstances as embodied by the specific arguments that are placed before decision-makers. Consequently, I find that the proposal would conflict with saved policies EM1(Sa) and EM4 of the ALPR and would be inconsistent with the advice in

paragraph 120 of the Framework. However, the conflict with policy EM4 carries reduced weight due to its inconsistencies with the Framework.

*Alternative Sites*

24. Paragraph 86 of the Framework requires local planning authorities to apply a sequential test to planning applications for main town centre uses. This is intended to guide such uses towards town centre locations first, then, if no town centre locations are available, to edge-of-centre locations. If neither of these are available, then out-of-centre locations with a preference for accessible sites that are well connected to the town centre should be considered. To be clear, this does not translate into a town centre only policy and due consideration should be given to each proposal on its individual merits.

25. Paragraph 87 goes on to advise that flexibility should be shown by both applicants and local planning authorities on issues such as format and scale so that all suitable town centre or edge-of-centre sites are fully explored. Paragraph 90 advises that an application should be refused if it fails to satisfy the sequential test or is likely to have an adverse impact on a town centre. It was established at the Inquiry that only the speculative retail units and drive-through elements of the proposal fall to be considered in this respect.

26. The Supreme Court clarified the meaning of 'suitable' for the purposes of the sequential test in the Tesco Stores judgement[6]. It held that 'suitable' should be interpreted as meaning 'suitable for the development proposed by the applicant'. However, this is not without qualification and Lord Reed observed that developers and retailers should have regard to the circumstances of particular town centres when preparing their proposals in terms of the format, design and scale of the development. He went on to clarify that such an approach should consider the scope for accommodating development in a different built form and that this should include adjusting or sub-dividing larger proposals so that their scale may fit better with existing development in town centres when appropriate.

27. Whether or not something is suitable to an applicant is consequently predicated on the assumption that a thorough assessment of the scope for accommodating a scheme at sequentially preferential locations, including the possibility of sub-division, has been completed. Notwithstanding the updated sequential assessment that was undertaken in September 2020[7], the Council maintains that no such assessment has been undertaken. It suggests that a number of town centre sites are available that could accommodate the retail elements of the scheme in addition to a single site, at Northern Bridge Road (NBR), that could accommodate all elements.

28. The appellant suggests that if an applicant has demonstrated flexibility with regard to format and scale of a proposal, the key question to be answered is whether an alternative site is suitable and not whether the proposed development could be altered or reduced so that it can be made to fit that alternative. There is no dispute between the parties that disaggregation for purposes of applying the sequential test is a matter of planning judgement as exemplified by the decisions of other Inspectors that have cut both ways[8]. The

[6] Tesco Stores Limited (Appellants) v Dundee City Council (Respondents)(Scotland) [2012] UKSC 13
[7] Appendix H, Updated Sequential Test Assessment (September 2020), PoE - Linzi Melrose
[8] A disaggregated approach was considered in 3171115 [CD8.10] and 3147039 [CD8.3] but not in 2190175 [CD8.1] or 3132873/3143678 [CD8.2].

appellant highlights the fact that the current scheme is 'smaller and more holistic' than the developments of the appeal decisions in which disaggregation was found to be appropriate. This is because it is felt that future customers would wish to take advantage of the drive-through and the retail facilities during a single visit.

29. However, I find this unsubstantiated given the lack of objective evidence establishing an economic co-dependency between these elements. Whilst there may well be synergies with complimentary retail offers if a location were to become a destination in its own right, it would seem that a drive-through takeaway has an innate capacity to operate independently given the ease with which it can be accessed from the road network at minimal effort on the part of the customer. Although the Council maintains that a walk-in alternative might be possible elsewhere, this would not reflect the requirements of the future occupant, as confirmed during the course of the Inquiry.

30. Whilst the more flexible nature of the speculative retail units lend themselves to a disaggregated approach, I find it unnecessary in this particular instance because there is an alternative site that would be capable of accommodating all elements, namely the NBR site. This site is approximately 1.3 ha in size, lies within the Sutton-in-Ashfield town centre boundary and is allocated under saved policy SH2(Sa) of the ALPR for 'convenience, durable retail or other commercial purposes'. The site has an irregular shape and is bounded by a PFS to the northwest. It contains an overspill supermarket car park to the southwest of an undeveloped area, all of which is owned by Asda. Outram Road lies immediately to the southeast and provides a short, roadside frontage. Terraced, residential properties are located along the north-eastern boundary. Part of the undeveloped part of the site currently serves as an informal, secure staff car park for Asda employees.

31. The appellant maintains that because the proposal is specifically intended to provide facilities for visitors and occupiers of the Business Park, there cannot be any sequentially superior sites. However, I give this assertion limited weight because the unmet need for such facilities was not substantiated in the evidence before me. I also find it hard to believe that a drive-through takeaway would be profitable if it were to operate on that basis, as well as the fact that its frontage would only be capable of directly attracting the users of the Pinxton Lane which is a narrow, rural road. Turning to the NBR site, the appellant maintains that it is unsuitable because it is not available, too large, near a residential area, has limited roadside prominence and has a degree of severance from the core of the town centre.

32. I observed during my site visit that it has a greater degree of roadside prominence in comparison to the appeal site given the multiple views from the nearby roads, Northern Bridge Road and Outram Road, as well as the flanking pedestrian walkways that are present along these routes. Moreover, it has a boundary that abuts the latter which would provide an opportunity for prominent, roadside signage. Two pedestrian crossing points, with refugia, along Northern Bridge Road give ready access to the town centre and I find that the location is likely to benefit from existing users of the adjacent PFS and overspill car park that serves the supermarket. Consequently, I do not find its geographical separation from the core of the town centre or the set-back of the southwestern boundary weighs significantly against the site as a potential alternative.

33. In terms of the nearby residential properties, I do not find any fundamental incompatibility given that they were present when the site was first allocated and that the living conditions of current and future occupants would, in any event, be considered as part of any planning application process. As far as the viability of the proposal is concerned, I have no financial evidence before me to substantiate the claim that this site would be unsuitable. Given the speculative nature of the retail units, I see no reason why the format and scale of the proposal could not be altered to make best use of this land.

34. Turning to the availability of the site, the appellant highlights the presence of the overspill car park which I note amounts to around 33% (0.43 ha) of the total area[9]. Although the PFS is also highlighted, this is not part of the SH2(Sa) allocation. The appellant contends that Asda indicated that it would not sell the land to Lidl supermarket in 2018[10] and that this precludes it from being available for the only identified use in this scheme, namely the drive-through takeaway.

35. However, the Inquiry established that a letter from Asda indicating a willingness to dispose of the site was issued in July 2020 [CD7.4]. I accept that a different context applies but it nevertheless indicates a willingness to dispose of the site and represents the most up-to-date position of Asda in relation to this land. I also find that this carries more weight as a primary source of evidence unlike the views of the property consultant that the appellant has chosen to rely upon.

36. Both parties have considered the potential retail impact in relation to saved policy SH5 of the ALPR. This is permissive of retail development proposals that meet local needs outside town centre locations provided the net retail floorspace is under 500 $m^2$. The appellant accepts that the appeal scheme conflicts with this policy but maintains that an additional 18 $m^2$ of floorspace would not have a material impact on the vitality and viability of the nearby town centres. It is suggested that even if I were to consider the entire net retail space of 518 $m^2$ then this would be 'nowhere near' the 'default threshold' of 2,500 $m^2$ of gross retail floorspace, as set out in paragraph 89 of the Framework.

37. However, this threshold is only a broad rule of thumb intended to trigger the need for a retail impact assessment where no locally defined thresholds exist. To assume that anything under this value would simply have no impact would be overly simplistic given the highly variable economic circumstances of different town centres and the existence of a defined local threshold that seeks to ensure that only 'local facilities' are provided outside established district and local shopping centres, as set out in the explanatory text for this policy.

38. Indeed, the Ashfield District Retail and Leisure Study 2016 [CD7.5] indicates that a lower threshold of 300 $m^2$ net retail space would be more appropriate given the established vulnerability of its town centres to edge-of-centre and out-of-centre development. Whilst the appellant suggests that this evidence was not tested through a local plan examination and cannot be relied upon, when I asked whether the conclusions were still valid, the appellant's own

[9] Appendix H, Updated Sequential Test Assessment (September 2020), PoE – Linzi Melrose
[10] Appendix 2, Correspondence from Phil Daniels to Alastair Fearn and Appendix 3, Correspondence from Phil Daniels to Jo Hawley, PoE – Alastair Fearn

witness stated that study remained the best available evidence and that there was no evidence to the contrary.

39. Bearing this in mind, as well as the speculative nature of the retail units that would be created, I cannot rule out an adverse impact on the viability of Sutton-in-Ashfield or Kirby-in-Ashfield town centres especially given the increased pressures they are facing from the Covid19 pandemic. I find that there is no guarantee that the proposal would remain ancillary to the wider Business Park employment uses because it risks becoming a destination in its own right. This is because of the 24-hour operation of the drive-through takeaway as well as the fact that potential retail uses would most likely need to go beyond the sale of convenience goods that is already well established at the adjacent PFS development. Consequently, the proposal risks diverting individuals away from the nearest town centres.

40. Given the above, I find that the proposal has failed the sequential test and that an adverse effect on town centre viability cannot be ruled out. This would be contrary to saved policy SH5 of the ALPR and paragraph 90 of the Framework.

*Highways*

41. Three main areas of dispute remained unresolved at the end of the Inquiry. These are the absence of an agreed study area, HGV parking provision and whether a safe access for HGVs could be created. I shall consider each of these in turn.

42. Turning to the first issue, the appellant has based the study area for this application on the one that was approved by the Highways Authority (HA) as part of the transport assessment submitted with the outline application for development of the Business Park in 2006 [CD7.10]. The Inquiry established that the agreed trip rates would exceed a 30 two-way, peak hour threshold at the A38/Common Road and A38/Alfreton Road junctions. It was confirmed that this threshold has been incorporated into a recently adopted highway design guide for Nottinghamshire[11] that requires the inclusion of all junctions that exceed this threshold to be within the scope of an assessment, *i.e.* within the study area.

43. The appellant does not accept this standard and has consequently chosen to limit the scope of the transport assessment to the site access, Pinxton Lane/Farmwell Lane junction and the A38/Pinxton Lane junction [CD1.13]. The appellant maintains that the scope of the assessment is correct because the additional junctions have been assessed and found to have significant spare capacity through assessments associated with previous planning applications. The appellant also points out that base flows on the A38 have decreased significantly compared to the forecast volume of these assessments which further nullifies any potential for congestion.

44. This has led the appellant to conclude that a severe cumulative impact on the highway network as well as an adverse effect on highway safety would simply not occur. I accept that this evidence is broadly indicative but not that it is conclusive. This is because it relates to development that is not the same in all respects in terms of differences in the use classes, numbers of trips and turning movements. The Council's highway witness confirmed that turning movements

[11] Appendix E, Extract from Nottingham Design Guide (2021 Version), PoE – Sarah Hancock

into and out of junctions make a 'big difference to traffic flow' although I also note the view of the appellant's witness that no significant impact would be likely on the basis of the 'ahead flows' defined in Table 4.2[12] of his evidence. The Council's witness took the view that any reliance on the ahead flows, in the absence of a turning movement assessment, would not provide an accurate projection of future capacity.

45. I therefore find that insufficient evidence has been provided as a result of the dispute over the study area. This means that I cannot unequivocally rule out a severe impact on the road network or an adverse effect on road safety. This is because accident data has only been evaluated for the more constrained study area and because it only comprised whole years as opposed to the shorter time intervals of the 'Via East Midlands' data.

46. Turning to the second issue, the Council suggests that the absence of HGV parking on site would encourage parking on the public highway, principally along Pinxton Lane. It maintains that, irrespective of the appellants intentions, the different retail offerings and drive-through would attract a wider range of HGV drivers who might wish to dwell. The appellant accepts that there would be nothing to stop a wider patronage but maintains that other mechanisms are capable of controlling parking on the public highway.

47. It is suggested that if a risk to public safety were to become an issue then the HA can impose and enforce waiting restrictions. The appellant also notes that a Traffic Regulation Order under the Traffic Regulation Act 1984 could be made on any road to which the public has access. Whilst this cost would be met by the HA, it is nevertheless a viable means of control in addition to the controls that have already been implemented within the Business Park. Moreover, there is no evidence of an existing problem despite the potential attractiveness of the existing retail offer to passing HGVs. Consequently, I do not find that a lack of parking would lead to an adverse effect on highway safety.

48. Turning to the third issue, the appellant concedes that a safe HGV swept path access has not been demonstrated and I agree. The Council do not feel that potential adverse effects could be mitigated through a suitable pre-commencement condition because it might lead to a development that 'cannot be delivered'. The PPG advises that conditions can enable development proposals to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects[13]. In this particular instance and bearing in mind the willingness of the appellant to accept a pre-commencement condition, I am satisfied that a suitably worded condition requiring further details of the proposed access could be imposed and that this would satisfy the tests set out in paragraph 55 of the Framework.

49. Given the above, I find that I have insufficient information to be able to determine whether there would be an unacceptable impact on highway safety or that the residual, cumulative impacts on the road network would be severe. The proposal would therefore be contrary to saved policy ST1(c) of the ALPR that seeks to ensure that development does not adversely affect highway safety or the capacity of the wider transport system and that it would also be inconsistent with paragraph 109 of the Framework.

[12] Appendix B, MJM Response to NCC Highways, 2 March 2020, PoE – Tom Murphy
[13] Paragraph: 001 Reference ID: 21a-001-20140306

*Planning Balance*

50. Planning law[14] requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The Framework advises that existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of the Framework. It goes on to state that due weight should be given to them, according to their degree of consistency with the Framework.

51. Bearing in mind the need for greater flexibility, as set out in paragraphs 81(d) and 120 of the Framework, I give the conflict with saved policy EM4 and the potential harm only moderate weight. However, I give full weight to the conflict with saved policy EM1(Sa) because the Framework supports the need to identify strategic sites and the fact that other allocated sites are capable of meeting unanticipated needs, such as the proposed lorry fuelling and EV charging stations. There was no substantiated evidence of an unmet need for the development nor sufficient marketing to suggest there is no reasonable prospect of the allocated uses coming forward. Consequently, the Framework does not support the alternative use of the site. However, I only give the resulting harm moderate weight because of the significant oversupply of employment land within the plan area [CD6.2].

52. The appellant accepts that there is a conflict with policy SH5 because the proposal would exceed the maximum floorspace permitted for development outside town centres. Added to this is the fact that the proposal fails the sequential test, as required by paragraph 86 of the Framework. As I have no retail impact assessment to suggest otherwise, an adverse impact on town centre viability and vitality cannot be ruled out. Under such circumstances the Framework advises that an application should be refused. Bearing this in mind, the policy conflict and potential resulting harm weighs significantly against the proposal.

53. In relation to potential highway impacts, I am unable to unequivocally rule out a conflict with policy ST1(c) because I do not have conclusive evidence before me regarding the potential impact on road safety and the operation of the wider road network. A simple failure to agree a study area and an overreliance on dated transport assessments for other development proposals led to significant uncertainty that could not be assuaged by the professional judgement of the appellant's highway witness. As an adverse effect cannot be ruled out, I also find that the proposal would be inconsistent with paragraph 109 of the Framework. This weighs significantly against the proposal.

54. Turning to the benefits, the appellant suggests that lorry fuelling and EV charging would help to sustain the vitality of the Business Park and contribute towards the shift to electric vehicles as promoted by the Government with a concomitant improvement in air quality. Whilst it might appear to support the Government's efforts to reduce carbon emissions and combat air pollution, I have no carbon budget or air quality calculations before me to suggest that it would offset the significant number of additional trips that the proposal would generate, much less the embodied carbon associated with the materials used in

[14] Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990 (as amended)

construction. Consequently, I give this benefit little weight in favour of the proposal.

55. The appellant maintains that the proposal would sustain the vitality of the Business Park and help to make it a more attractive location for inward investment. However, given the unsubstantiated need for such facilities I give this little weight in favour of the proposal.

56. The appellant claims that a higher number of jobs per square foot of floorspace would be created when compared to a typical employment use and that this would support economic regeneration. The Council highlights the fact that such jobs could and should be created in the town centre. Notwithstanding the town centre first approach of the Council, the proposal would nevertheless support economic growth and take account of wider opportunities for development, as set out in paragraph 80 of the Framework. Bearing in mind the speculative nature of the retail units, I give this moderate weight in favour of the proposal rather than the significant weight suggested by the Framework because the economic benefits are not fully established. This reduced weight is also supported by the other inconsistencies with the Framework that I have identified.

57. Given the above, the harm I have found would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole. Therefore, even if the tilted balance were to apply, permission should not be granted under paragraph 11(d) of the Framework. Consequently, the presumption in favour of sustainable development does not apply and there are no other material considerations that indicate a decision should be reached other than in accordance with the development plan.

58. Taking into account the primacy of development plan policy, it is clear from the above reasoning and conclusions that there is an overall conflict with the plan when taken as a whole. Specifically, the proposal would conflict with saved policies EM1(Sa), EM4, ST1(c) and SH5 of the ALPR. Despite the reduced weight to be ascribed to the conflict that would arise in relation to saved policy EM4, the overall conflict nevertheless weighs significantly against the proposal with none of the benefits amounting to more than moderate weight in favour of the proposal, either individually or collectively.

**Conclusion**

59. For the above reasons and having regard to all other matters raised, I conclude that, on balance, the appeal should be dismissed.

*Roger Catchpole*

INSPECTOR

## APPEARANCES

### For the Appellant

Mr Paul Cairnes QC instructed by Geldards LLP

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### For the Council

Ms Merrow Golden instructed by Ashfield District Council

Ms Sarah Hancock ONC (Nottinghamshire County Council)

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Mr Robbie Steel BA (Hons) MA MRTPI (Ashfield Council)

## DOCUMENTS SUBMITTED

ID1 Agreed Trip Generation Rates

ID2 Satnam Judgement [2019] EWHC 2631 (Admin)

ID3 National Planning Policy Framework 2019 Extract

ID4 Planning Policy Guidance Extract

ID5 BWB Transport Assessment Extract

ID6 MJM Highway Addendum Extract

ID7 Delegated Report (V/2018/0217)

ID8 Solo Judgement [2019] EWHC 489 (Admin)

ID9 Asda Judgement [2021] EWCA Civ 32

ID10 Updated Highways Statement of Common Ground

ID11 Closing Statement – Ms Golden

ID12 Closing Statement – Mr Cairnes