
Appeal Decisions

Inquiry opened on 30 March 2021

Unaccompanied site visit made on 29 March 2021

by Philip Major BA(Hons) DipTP MRTPI

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

Decision date: 13 April 2021

Appeal Ref: APP/W3005/W/18/3204132 (Appeal 1)

Land off Mansfield Road/Eastfield Side, Sutton in Ashfield NG17 4HH

- 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 Lidl UK GmbH against the decision of Ashfield District Council.
 - The application Ref: V/2017/0318, dated 26 May 2017, was refused by notice dated 6 December 2017.
 - The development proposed is the erection of a retail store with car parking and landscaping.
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Appeal Ref: APP/W3005/W/20/3265806 (Appeal 2)

Land off Mansfield Road/Eastfield Side, Sutton in Ashfield NG17 4HH

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Lidl UK GmbH against Ashfield District Council.
 - The application Ref: V/2018/0221 is dated 29 March 2018. The development proposed is the erection of a retail store with car parking and landscaping.
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Preliminary Matters

1. These developments are alternative schemes for the development of a retail store on the same site. The applications submitted describe the development as being for a Lidl store in each case. However, in light of the fact that the use would be for general retailing it is not necessary to include the name of the putative operator since any permission granted would run with the land and not be specific to a particular retailer.
2. Appeal 2 was the subject of a resolution to grant planning permission taken by the Council (and indeed a decision was issued). However, this was quashed by the High Court because of inadequate reasoning being given for the decision, and was remitted for a further decision by the Council. No decision has subsequently been taken, hence the second appeal is against the non-determination of the application.

Decisions

3. Appeal 1. The appeal is dismissed.
4. Appeal 2. The appeal is dismissed and planning permission for the erection of a retail store with car parking and landscaping is refused.

Application for costs

5. At the inquiry applications for costs were made by Ashfield District Council and by Asda Stores Ltd against Lidl UK GmbH. These applications are the subject of separate decisions.

Main Issues

6. The main issues are as follows:

Appeal 1

- a) Whether a satisfactory sequential test has been carried out, and whether an impact test is necessary in this case;
- b) The effect of the proposal on the street scene;
- c) The effect of the proposal on the living conditions of nearby residents.

Appeal 2

- a) Whether a satisfactory sequential test has been carried out, and whether an impact test is necessary in this case.

7. Issues b) and c) of Appeal 1 were discussed in the format of a virtual round table. Issue a) in both appeals was the subject of formal evidence and questioning. I deal with both issues a) together in my reasoning below.

Reasons

Whether a satisfactory sequential test has been carried out, and whether an impact test is necessary (both appeals)

8. It is not disputed that the appeal site is located out of centre. It is also not disputed that there is only one sequentially preferable site which has been identified in the agreed search area. The question remaining is whether that site, known as the Northern Bridge Road (NBR) site, is suitable and available (or expected to become so within a reasonable period). It is accepted that in principle the NBR site would be capable of accommodating the development proposed.
9. The suitability strand of the sequential test in this case centres on whether the proposed development would run counter to the intentions of the Sutton Town Centre Spatial Masterplan (the Masterplan) of March 2019. The Masterplan includes the NBR site as part of the Northern Bridge Gateway to the town centre, where the stated aspiration is for, amongst other things, mixed use sustainable development. It is argued on behalf of the Appellant that the aspirations of the Masterplan renders the NBR site unsuitable for the proposed development. I note here that the site is allocated for retail and other development¹ in the adopted development plan (the Ashfield Local Plan Review of 2002) and despite the age of the Local Plan nothing in the Masterplan seeks to change that allocation.

¹ Allocated site SH2Sa

10. The owner of the NBR land, Asda Stores Ltd, has prepared an illustrative scheme which includes a retail store of approximately the same size as applied for at the appeal site. There would be car parking provision and access taken from an existing entry onto the land. In addition to the store the illustrative scheme indicates a drive through restaurant and other potential uses. This would manifestly allow for a mixed-use scheme, a factor confirmed by the Council. Furthermore, the Northern Bridge Gateway includes a further area of land not attached to the NBR site. This, the Station House site, would also have the potential to enrich the mix of uses at the Northern Bridge Gateway.
11. Despite the Appellant's assertions that the proposed development would run counter to the objectives of the Masterplan I can see little substance in that claim. It has been demonstrated that the site could accommodate a mix of uses including a retail store of the size sought. Although the town centre is identified as having representation by convenience stores which is higher than the national average, there is no imperative in the Masterplan which seeks to actively reduce that representation. Nor is the Masterplan prescriptive. Indeed, it promotes a flexibility of approach and I see no reason why the aspirations for demarcating the town centre from Outram Street, improving the public realm and increasing legibility should not be able to be designed in to a scheme on the NBR site which includes a retail store. In my judgement, therefore, the argument that the NBR site is unsuitable because it would run counter to the aspirations of the Masterplan has not been made out. The inclusion of retailing on the site would in any event follow the lead of the Local Plan allocation.
12. I need deal only briefly with the matter of the potential occupier of the NBR site. The High Court Judgement in *Aldergate*² is quite clear that, except in what would be likely to be specific and limited circumstances, the likely occupier of a site subject to sequential testing should be disregarded. The test should, in effect, be blind to the occupiers of the land. There is nothing in the cases before me which suggests that the occupier of the land here is relevant as a result, for example, of the town centre needing particular store representation such that it would rule out a store of a format such as that followed by Lidl. A further example in *Aldergate* of why a particular site may be set aside surrounds the question of land 'hoarding'. That goes to the matter of availability, to which I turn next.
13. The NBR site is owned by Asda. Much has been made of the letter sent by FHP Property Consultants in February 2018, which indicates that the NBR land was not (at that time) being actively 'pushed' for disposal and would be unlikely to be available to a competitor. However, that letter has been contradicted by Asda and described as unauthorised and not a proper reflection of the situation. Asda maintains that the site is available.
14. I have been provided with recent correspondence (initiated at the behest of the Appellant, though not undertaken by the Appellant) which sought to establish whether the land is available. The response from Asda is clear. The land is available and offers are invited, which would subsequently be taken to board level for approval or otherwise. It is telling that this correspondence was undertaken with a third party and a reasonable interpretation of the situation is that it can only be deemed to be a true reflection of the position of Asda. The

² *Aldergate Properties v Mansfield DC* [2016] EWHC 1670 (Admin)

fact that the Appellant sought, but did not receive, an indication of an asking price does not seem to me to be crucial. Asda in turn did not receive any offer for the land. The lack of any offer made no doubt reflects that Lidl has made it plain that it doesn't want the land in any event as a development at NBR would make its existing town centre site unviable. The question of whether the site is being actively marketed seems to me to be a peripheral matter. Active marketing is not a prerequisite for a site being available through other channels. Lack of current marketing may indicate no hurry to dispose of the land, but not unwillingness.

15. The Appellant has pointed out that in an earlier, 2016, decision relating to an Aldi development near to the appeal site the NBR site was not regarded as being available, and that a consistent approach should be taken. However, that was some years ago and at a time when the Asda fuel station on part of the land was being redeveloped. I am not party to the detail of all the circumstances then, but accept that those circumstances have since changed. Taken in the round I concur with the Inspector at a recently determined appeal³ in that the most recent and persuasive availability evidence indicates that the NBR site is available. I have no substantive evidence that Asda has hoarded the site despite its ownership for many years. In these circumstances I am satisfied that the NBR site should be regarded as being available.
16. In relation to the sequential test required by paragraph 86 of the National Planning Policy Framework (NPPF) I find that the test has not been satisfied. In such circumstances the NPPF indicates (at paragraph 90) that planning permission should be refused. This is not, however, a presumption that planning permission must be refused, and I turn to other considerations in play here.
17. In relation to an impact test there is no defined Local Plan threshold beyond which a retail impact assessment is required. I have, however, been referred to Local Plan Policy SH5. This is permissive of retail development to meet local needs for convenience goods in stores below a net floorspace of 500m². The impact of what in this case must be regarded as more than local needs retailing is not addressed in the Local Plan. The NPPF on the other hand indicates that if there is no locally set threshold a default threshold of 2500m² should apply, and that position was accepted when considering the Aldi case mentioned above. I note the Inspector's findings in the appeal already cited (APP/W3005/W/20/3257847) but in reality whether a particular threshold applies in the appeals before me is a moot point, as impact assessments have been voluntarily carried out in any event and I am bound to consider them.
18. Despite the unexplained differences in population and available expenditure forecasts produced by the Appellant and the Council, there is a high degree of concurrence between them that the impact of either appeal development on Sutton town centre would not reach the point where it should be regarded as significantly adverse. I see no reason to disagree with that position. In relation to the Outram Street local centre, however, there is disagreement about the likely impact.
19. Outram Street is a linear local centre which begins close to the town centre and extends towards the appeals site. It has a range of convenience and comparison traders but is exhibiting stress in the number of vacancies and the

³ APP/W3005/W/20/3257847

environmental quality of the locality. It does not have the ambience of a vibrant local centre. In my judgement it would be vulnerable to any trade draw or diversion to other retailers. That said I put some weight on the fact that a Lidl store on the appeal site (and I accept that a Lidl store would be the overwhelming probability in the event of planning permission being granted) would not be likely to attract trade which would otherwise go to Outram Street in any great quantity overall. In particular this is because a significant proportion of the premises in Outram Street are either comparison retailers of a type which would not be in direct competition (such as furnishings and beds) or food takeaways, charity shops or hairdressers or similar. The overlap of such retailing with a Lidl store would seem to me to be limited. In this I agree with the Appellant.

20. However, for the few convenience stores in Outram Street any impact of a store such as Lidl on the appeal site would be likely to be much greater. The figures produced on behalf of the Appellant suggest existing turnover in Outram Street which appears unfeasibly low, and the Council's figures are more likely to be realistic. In light of the proximity of the appeal site to Outram Street it is difficult to accept that the impact of either proposed store would be insignificant. Given the uncertainty of the evidence in this regard (albeit that I am more inclined towards that provided by the Council) my judgement is that the impact on Outram Street would be such as to reach significant adverse levels because of the likely diversion from convenience stores combined with the vulnerability of the centre.
21. Before turning to the planning balance I will briefly address the other main issues which apply only to Appeal 1.

Impact on the Street Scene (Appeal 1)

22. The appeal site is located between existing commercial premises on Mansfield Road, opposite residential properties on the same road, and has been vacant for a number of years. I agree that it would improve the locality if it were to be developed with a satisfactory scheme.
23. The scheme in Appeal 1 would take advantage of the opportunity to incorporate gravity fed drainage systems (amongst other things) but that would entail an element of landfill to achieve the necessary site levels. This would self-evidently lead to the proposed building being more elevated and prominent.
24. However, it is not the height of the property which I regard as the most problematical element in the street scene. In my judgement the forward projection of the building to the footway edge, together with the section of blank and unattractive flank wall facing east, would give the building an incongruous and stark presence which would not sit well with the surroundings. Although there is no consistent building line as such the proposal would be a jarring addition to, and out of character with, the run of commercial properties along this part of Mansfield Road, the majority of which have at least some set-back from the footway edge.
25. I therefore find that the proposal would be in conflict with Local Plan Policy SH8 which, amongst other things, seeks to ensure that retail development includes design which is acceptable in appearance and siting. It would also be in

conflict with Local Plan Policy ST1 in that it would adversely affect the character of the environment.

Living Conditions (Appeal 1)

26. The requirement to raise parts of the appeal site in this appeal leads to an elevated southern elevation, close to the boundary with the adjacent residential area. In addition, the design of the development would lead to deliveries to the store being carried out adjacent to the boundary with the closest dwellings.
27. I have noted that, subject to the imposition of conditions the Council's Environmental Protection team has objection to the proposal. Whether or not that is as a result of considering whether statutory nuisance might occur (as suggested) I do not know. But in any event it seems to me that the juxtaposition of residential uses and the rear delivery bay of a food store would be uncomfortable at best, and potentially a source of distinct noise and disturbance. I have noted the noise assessment and the consideration of potential mitigation being built into the nearest dwellings, but do not know whether this was carried through into construction. The matter of construction noise is relevant but would be short term and is therefore of lesser significance in my deliberations.
28. In any event, whatever mitigation was included, the likelihood of detriment to the amenities of the nearest residents would be high. Deliveries could be controlled by condition to occur only in the period between 7am and 7pm, but this would be unlikely to prevent nuisance (statutory or otherwise) for people who wish to lawfully enjoy their homes or, particularly, their gardens. As recognised by the noise report deliveries do not produce a constant noise but include specific noise episodes and these would have the potential to be disruptive. Furthermore, the elevated nature of the appeal site would be likely to include an over dominant presence for the residents of the nearest dwellings caused by any intervening 3m high fence (as suggested would provide some mitigation from noise and disturbance) with no possibility of intervening relief by landscaping.
29. The design of the scheme is therefore unacceptable in terms of its scale and siting, and consequently in conflict with Local Plan Policy SH8. In addition there would be conflict with Policy ST1 in that it would adversely affect the quality and amenity of the environment and would conflict with an adjoining land use.
30. Taking these latter 2 issues together it is my judgement that Appeal proposal 1 would be harmful to both the street scene and to the living conditions of nearby residents.

Other Considerations

31. The Appellant contends, and Asda's expert witness agrees, that the most important policies for determining the appeals are out of date and that the tilted balance flowing from paragraph 11d) of the NPPF is triggered. The Council does not agree. In this case it seems to me that Policies SH8 and ST1, which are relevant policies for the determination of appeal 1, are in general accordance with the NPPF and can carry significant weight despite their age. Policy SH5 applies to minor shopping centres and single shops below 500m2 net floorspace. I am not persuaded that it is right to seek to apply it to cases

such as those before me (which differ greatly from the case noted above⁴). Policy SH5 clearly is related to the 'town centre first' principle, as set out in its supporting text, and therefore has some synergy with the NPPF. However, in these appeals it should be regarded as being of little if any relevance given its concentration on small stores. There is no policy here which specifically addresses out of centre retail proposals and the sequential test and for that reason alone it is clear that there are no relevant development plan policies which go to the principle, as opposed to the detail, of these appeals. I therefore agree that the tilted balance should be engaged.

32. The Appellant stresses the benefits of this proposal. I accept that the provision of jobs in the proposed store carries weight, but that weight must be tempered by any impact on existing employment. However, given what I agree is likely to be limited impact on existing retail provision in the town centre, this benefit should attract moderate weight. The associated spending power attached to these jobs would be economically beneficial. Economic benefit would also derive from temporary construction employment. I also attach some weight to the fact that the site would be improved by development, and that Lidl would be likely to build out a store quickly. On the other hand any other development (albeit that none is currently proposed) on the land would bring some environmental benefit, so this beneficial impact is of limited weight. I am less persuaded by the argument that there would be social benefit from the proposals since there are other local stores which allow for sustainable patterns of shopping and the wellbeing of local people.

Planning Balance

33. Both appeals are in conflict with the NPPF in failing the sequential test. The proposals are in clear breach of the NPPF objective that planning decisions should support the role of town centres at the heart of their communities. The NPPF indicates that this in itself means that planning permission should be refused. This is a material consideration which carries substantial weight against the proposals. Although it is not a requirement to refuse planning permission when the sequential test is failed, there is nothing in these cases which leads me to conclude that the benefits are an overriding factor here. The adverse impacts of the proposals, including on Outram Street local centre, would significantly and demonstrably outweigh the benefits when assessed against the NPPF taken as a whole.
34. In addition, the scheme in Appeal 1 falls foul of Policies SH8 and ST1 and is therefore in conflict with the development plan. That adds further weight to my judgement that these appeals should not succeed.

Other Matters

35. I mention briefly here the S106 undertaking submitted. I do not intend to deal with the obligation in detail in light of my overall decisions. The obligation makes provision for a sum to be paid to assist in meeting the challenges in existing centres within the catchment of the proposed store. On the face of it this would appear to meet the tests in the CIL Regulations but it seems to me that the sum proposed would be unlikely to make significant inroads into the challenges identified in the town centre Masterplan. A further element of the obligation is to retain the existing Lidl store in Sutton town centre for at least 5

⁴ APP/W3005/W/20/3257847

years. Notwithstanding the recent investment in that store I do agree that there are question marks about the enforceability of the obligation relating to the existing store. Taken in the round, it is my judgement that the obligation does not meet the tests of the CIL Regulations in that it is unlikely to be fairly and reasonably related in scale and kind to the development. In any event, even were I to take a different view and agree that the tests of the Regulations had been met, the obligation would not tip the balance in favour of the proposals before me.

Overall Conclusion

36. For the reasons given above I conclude that the appeals should be dismissed, and in the case of Appeal 2 planning permission be refused.

Philip Major

INSPECTOR

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