



Department for
Communities and
Local Government

Mr Sean McGrath
Indigo Planning Ltd
Swan Court
11 Worple Road
London SW19 4JS

Our Ref: APP/Z1510/A/14/2219101

25 June 2015

Dear Sir

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL BY SAINSBURY'S SUPERMARKET LTD – BROOMHILLS INDUSTRIAL
ESTATE, PODS BROOK ROAD, BRAINTREE CM7 2RW
APPLICATION REF: 12/1000/FUL**

1. I am directed by the Secretary of State to say that consideration has been given to the report of the Inspector, K G Smith BSc(Hons) MRTPI, who held a public local inquiry on 7 days between 9 December 2014 and 7 January 2015 into your client's appeal against the refusal of Braintree District Council ('the Council') to grant outline planning permission for the demolition of existing industrial terrace buildings and redevelopment of the site for a new Sainsbury's superstore (Use Class A1), with ancillary customer restaurant and automatic teller machines, goods on-line service, surface level car parking area, refurbishment/redevelopment of retained industrial building (Use Class B1, B2 and B8) with ancillary trade counters and associated works and associated works and change of use from highway land to private, in accordance with application ref 12/01000/FUL, dated 17 July 2012.
2. On 17 November 2014 the appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990, because the appeal involves proposals which involve any main town centre use or uses where that use or uses comprise(s) over 9,000m² gross floorspace (either as a single proposal or as part of or in combination with other current proposals) and which are proposed on a site in an edge-of-centre or out-of-centre location that is not in accordance with an up-to-date development plan document.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the appeal be dismissed and planning permission refused. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions and his recommendation. A copy of the Inspector's report (IR)

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is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

Matters arising after the close of the inquiry

4. The Secretary of State received a letter from the appellant's consultant, Indigo, dated 16 June concerning the EMD site at Halstead. Issues arising from this letter are considered at paragraphs 10 and 14 below.

Policy considerations

5. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. In this case, the development plan comprises the Saved Policies of the Braintree District Plan Review 2005 (the LPR) and the Braintree Core Strategy 2011 (the CS). The Secretary of State agrees with the Inspector that the most relevant policies to this appeal are those listed at IR418.
6. The superstore part of the proposal would be in conflict with policy RLP33, which defines Employment Policy Areas including the appeal site on the Proposals Map, while Policy CS4 seeks to retain employment sites in sustainable locations for employment use (IR545). However, the main Inquiry parties agreed that redevelopment of the site for B1/B2/B8 employment uses would not be viable in the short or medium term and there would be no conflict with other policies listed at IR420. Nevertheless, there is no dispute that the proposal involves the development of an out-of-centre superstore, that the superstore is a main town centre use and that the proposal would not accord with the adopted development plan overall (IR441).
7. The Secretary of State agrees with the Inspector that the emerging draft Policy ADM37A: Broomhills, Pods Brook Road of the Pre-Submission Draft Braintree District Site Allocations and Development Management Plan - is a material consideration (IR27 & IR419). This policy allocates the site for a variety of uses but they do not include food retailing. The Council has decided not to submit this Draft Plan but to roll forward the work done on it to date into a new Local Plan. As that Plan is still at an early state and is liable to change, the Secretary of State attributes it limited weight.
8. Other material considerations which the Secretary of State has taken into account include the National Planning Policy Framework, March 2012 (The Framework), the associated planning practice guidance issued in March 2014, and the Community Infrastructure Levy (CIL) Regulations 2010 as amended.

Main issues

Sequential Test

9. The Secretary of State agrees with the Inspector's assessment regarding the sequential test at paragraph 24 of the Framework (IR443-467). As the appeal proposal could not be accommodated at Toft's Walk (IR465) and the George Yard site is not available (IR467), he agrees with the Inspector's conclusion that the sequential test has been passed (IR468).

Store sizes, EMD site, on-line sales, comparison turnover efficiencies, clawback, trade diversion from BTC stores

10. The Secretary of State agrees with the Inspector's reasoning and conclusions in regard to the six areas of disagreement covered at IR469-499. As regards the EMD site at Halstead, at IR473 the Inspector noted the disagreement between the

consultants acting for the appellant and the Council about the likely turnover of a store that would occupy this site and its trade diversion from stores in Braintree town centre. The Inspector was aware that there is a difference of about £3m in the capacity analyses of the two consultants, and £1.27m in relation to impact. At the time of the Inquiry it was not known which, if any, retailer would occupy the EMD site and the Inspector guessed it more likely that the site would be occupied by a discounter, in which case there would be a lower impact on the Braintree town centre (IR475 - 476). Indigo's letter shows that the Inspector's guess has proved correct, as Indigo say that the EMD site has now been purchased by a discounter, Lidl.

11. The Secretary of State accepts Indigo's point that the difference between the Council's estimate of trade diversion from Braintree town centre by an Asda store on the EMD site and Indigo's estimate of diversion based on this site being occupied by a discounter has direct implications for the cumulative impact on Braintree town centre. The Council suggested that trade diversion to the EMD site would be £1.4m compared with Indigo's estimate of only £0.13m assuming the site is occupied by a discounter. The difference between these figures is £1.27m, i.e. the figure to which the Inspector referred at IR473. Indigo's letter also says that Lidl's average turnover per sqm is lower than the average turnover they assumed in their inquiry evidence, and as a result their estimated trade diversion figures of £0.13m from Braintree town centre was actually overstated.

Health of the existing town centre

12. For the reasons given at IR500-505, the Secretary of State agrees with the Inspector's conclusion that Braintree town centre is standing up well to the pressures it is facing and not displaying any serious signs of poor health or fragility. However, he also agrees that some of the changes within the town centre that the Inspector considers are relatively recent and will take time to have a noticeable effect (IR506).

Impact on the town centre

13. Paragraph 27 of the Framework states that an application which is likely to have a significant adverse impact on an existing town centre should be refused.
14. The Secretary of State has taken account of Indigo's letter of 16 June in considering the Inspector's reasoning and conclusions at IR507-519. The Inspector's conclusion about the impact on Braintree town centre assumed impact figures between those of the Council and appellant (IR510 and 515). This implies that his conclusion took into account some of the divergence in the assessments identified in Indigo's letter. Moreover, the Inspector looked at convenience turnover in isolation and leaving aside the effect of the commitments at the EMD site (and the Morrisons extension at Witham). In these circumstances the Inspector concluded that the trade lost to the centre as a result of the drop in the centre's convenience turnover in the last few years plus the drop in convenience turnover attributable to the Broomhills store alone would still be approaching £50m, of which about £8m would be due to the Broomhills proposal (IR515 - 516). For these reasons, and because the Secretary of State agrees with the Inspector's conclusions on other impact matters at IR507-519, the Secretary of State does not consider that the divergence in the figures identified in Indigo's letter in relation to the EMD site is large enough to affect the robustness of the Inspector's overall conclusion that the impact on the town centre would likely to be significantly adverse (IR519).

Design

15. The Secretary of State agrees with the Inspector's analysis at IR520-535 and his conclusion that the proposal would secure a substantial improvement to the appearance of the area (IR535).

Conditions

16. The Secretary of State has considered the Inspector's assessment of the proposed planning conditions at IR536-540. He is satisfied that conditions 1-30 proposed by the Inspector and set out in an Annex of the IR meet the tests of paragraph 206 in the Framework. However, for the reasons set out in this decision letter, he does not consider that these conditions overcome his reasons for dismissing the appeal.

Section 106 Planning Obligations

17. The Secretary of State agrees with the Inspector's reasoning and conclusion on the Section 106 Planning Obligations at IR423-433, including that the Obligations pass the three Regulation 122 tests and therefore comply with the CIL Regulations 2010. However, for the reasons set out in this decision letter, he does not consider that these Obligations are sufficient to overcome his reasons for dismissing the appeal.

Overall balance and conclusion

18. As the proposal conflicts with the development plan as a whole the Secretary of State has gone on to consider whether there are any material considerations which indicate that the appeal should be allowed.
19. The Secretary of State has given careful consideration to the Inspector's conclusion at IR541-550. He agrees that the proposal would secure the redevelopment of a largely vacant industrial site and there would be a substantial improvement to the appearance and character of the area through the rejuvenation of a brownfield site (IR541). Other benefits of the scheme are identified at IR542 – 543 and the retention and refurbishment of one of the existing units is another positive factor (IR545).
20. However, when combined with existing retail commitments the impact of the proposal on Braintree town centre would likely be significantly adverse (IR548). For the reasons considered above, the Secretary of State does not consider that the changed circumstances in relation to the future of the EMD site affect the robustness of this conclusion. Paragraphs 26 - 27 of the Framework are clear that where an application is likely to have a significant adverse impact on a town centre, it should be refused.
21. Overall, the Secretary of State considers that the proposal conflicts with the development plan and the Framework, and that its benefits are outweighed by the significant adverse impact on Braintree town centre. He concludes that there are no material circumstances that indicate the proposal should be determined other than in accordance with the development plan.

Formal decision

22. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation and hereby dismisses your client's appeal and refuses full planning permission for the demolition of existing industrial terrace buildings and redevelopment of the site for a new Sainsbury's superstore (Use Class A1), with ancillary customer restaurant and automatic teller machines, goods on-line service, surface level car parking area, refurbishment/redevelopment of retained industrial building (Use Class B1, B2 and B8) with ancillary trade counters and associated works

and associated works and change of use from highway land to private, in accordance with application ref 12/01000/FUL, dated 17 July 2012.

Right to challenge the decision

23. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged by making an application to the High Court within six weeks from the date of this letter.

24. A copy of this letter has been sent to Braintree District Council. A notification e-mail or letter has been sent to all other parties who asked to be informed of the decision.

Yours faithfully

Julian Pitt

JULIAN PITT

Authorised by Secretary of State to sign in that behalf

Report to the Secretary of State for Communities and Local Government

by K G Smith BSc(Hons) MRTPI

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

Date: 26 February 2015

TOWN AND COUNTRY PLANNING ACT 1990

APPEAL BY SAINSBURY'S SUPERMARKETS LTD

BRAINTREE DISTRICT COUNCIL

Inquiry held on 7 days from 9 December 2014 to 7 January 2015

Broomhills Industrial Estate, Pods Brook Road, Braintree CM7 2RW

File Ref(s): APP/Z1510/A/14/2219101

File Ref: APP/Z1510/A/14/2219101

Broomhills Industrial Estate, Pods Brook Road, Braintree CM7 2RW

- 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 Sainsbury's Supermarkets Ltd against the decision of Braintree District Council.
- The application Ref 12/1000/FUL, dated 17 July 2012, was refused by a notice dated 27 November 2013.
- The development proposed is the demolition of existing industrial terrace buildings and redevelopment of the site for a new Sainsbury's superstore (Use Class A1), with ancillary customer restaurant and automatic teller machines, goods on-line service, surface level car parking area, refurbishment/redevelopment of retained industrial building (Use Class B1, B2 and B8) with ancillary trade counters and associated works and associated works and change of use from highway land to private.

Summary of Recommendation: The appeal be dismissed.

Procedural and Background Matters

1. The post code for the site address on the Council's Decision Notice differs from the code shown on the submitted application form. The Council accepts that the post code on the application form, as shown above, is correct.
2. The inquiry sat for 7 days on 9-12 and 16, 17 December 2014 and 7 January 2015, with a full day of site visits on the preceding day.
3. The submitted proposed layout plans indicate a number of small extensions to some of the domestic gardens which abut the western and north western site boundaries. The description of the appeal proposal makes no reference to the change of use that would be involved from industrial land. Both parties are aware of this but the appellant declined to amend the description of the proposal to be considered.
4. The Core Documents, indeed, all documents, have a prefix letter followed by a number, as identified in the List of Documents near the end of this report. I will give these references where appropriate (for example G5) followed by a page (pg), paragraph (p) and/or table number as necessary. I use some abbreviations, such as JS for Sainsbury's and BDC for Braintree District Council. These are set out in the Glossary near the end of this report, before the Contents list.
5. The appeal was recovered for determination by the Secretary of State (SoS) on 17 November 2014 because "...the appeal involves proposals which involve any main town centre use or uses where that use or uses comprise(s) over 9,000m² gross floorspace (either as a single proposal or as part of or in combination with other current proposals) and which are proposed on a site in an edge-of-centre or out-of-centre location that is not in accordance with an up-to-date development plan document".
6. The appellant's witness, Mr P Shearman, who dealt with the 'health' of Braintree Town Centre (BTC) was unable to attend the inquiry because of illness. The parties agreed that his proof of evidence (G13,

G13a) and the proof (G14) of the Council's opposing witness, Mr R McLeod, would be 'taken as read'.

7. I am indebted to the parties for their work on the Statements of Common Ground which I have no doubt shortened the inquiry considerably.

The Site and Surroundings

8. On 6 January 2015, I made an accompanied inspection of the site, after which I carried out unaccompanied inspections as indicated on the site visit itinerary (H32). Useful photographs of the existing site are found at G11 pg19-22 and G9A pg4 plus others of character areas in the locality at G9A pg6-18.

9. The appeal site is an irregularly-shaped parcel of land of about 3 hectares towards the western edge of the urban area of Braintree (G8 Appx 1). The site, known as the Broomhills Industrial Estate, includes a section of Pods Brook Road (B1258) and three largely disused rectangular buildings which have previously accommodated a range of industrial/storage and distribution businesses. The Estate appears to have been constructed, in stages, during the 1960's. Access is from a service road off Guernsey Way, which follows the southern boundary of the site.

10. The site is about 1km to the west of the heart of Braintree town centre, south of Rayne Road, which links Braintree to destinations to the west. From the town centre, the character of Rayne Road changes from traditional terraced residential frontages to an area where commercial uses start to dominate, with the town's largest industrial area (Springwood Drive) located to the north of the junction with Pods Brook Road.

11. There are residential areas to the south, west and north of the site and it faces a large car showroom and display area on the opposite side of Pods Brook Road (G9A pg7 Photo 15) and, to the south of that, a recreation ground/small park from which views of the site are restricted. The site lies at a lower level than Pods Brook Road and there are falls within it from north to south and east to west. There is little on-site landscaping other than the trees that separate the site from Pods Brook Road near the roundabout with Rayne Road.

12. The site is close to the western edge of Braintree's urban area, as defined by the Town Boundary in the adopted Braintree District Local Plan Review (the LPR) (G8 Appx 2) and the adopted Braintree District Core Strategy (the CS). There is no direct access by a dedicated pedestrian or cycle route from Pods Brook Road. The footway from Rayne Road ends shortly after the roundabout on the western side of Pods Brook Road and extends only about 30m south of the roundabout on the opposite side.

13. The footways accommodate cycle-ways close to the roundabout and breaks in crossings are provided by pedestrian refuges. The most direct route from Braintree Town Centre (BTC) to the site is along Rayne Road. I walked this unattractive and busy route in about 11 minutes from the front of the Morrisons store in BTC to the edge of the site. An alternative pedestrian route (Flitch Way) is available via a path between the houses south of the site and Pods Brook Road and then over the southern

of two pedestrian bridges over that road and along a pleasant dedicated traffic-free route to a link (just before an underpass to London Road) to the south west site of BTC. This unlit route took me 18 minutes to walk from the south side of the site to the Townrow store in the town centre. Other routes are available to the town centre through the intervening housing.

14. Public transport links between the site and BTC are limited (G8 p2.6). Going further afield, I inspected the BTC on an agreed route (H32) (albeit that the inquiry was held in the centre and I had had the opportunity to see much of it, including on three occasions the Wednesday street market).

15. The Museum has a narrow covered passageway that would allow access to School Walk through a small yard and large gates. The opposite/south side of this passageway is used for car parking. There is an Iceland store on Bank Street. The Townrow store in High Street is relatively small for a department store. The Coop Quadrant department store in George Yard near to Morrisons is larger. The entrance to the latter is not visible from the main part of George Yard. The town centre Tesco Market Place (Tesco MP) store has comparison goods at first floor, mainly clothing and electricals. The JS Toft's Walk (TW) store has no first floor sales floorspace. The Lidl on Rayne Road has an in-store bakery. I found the centre to be both attractive and interesting, with main roads passing nearby.

16. The Tesco at Great Notley is a large store in a small centre with some unit shops, a veterinary practice, a dry cleaners and so on (see also G10 p2.52-2.53). Access is from the A131 road. The car park was nearly full on the Tuesday afternoon of my visit. Access to the Tesco at Marks Farm is through a housing area (see also G10 p2.45). There are no other shops adjacent and the car park was about 75% full (Tuesday afternoon).

17. The Freeport Outlet Centre on the south eastern side of Braintree is a large shopping centre; the map on site shows some 80 units. Railway access is from the Braintree Freeport Station. Adjacent to Freeport is the Braintree Retail Park, which includes retail warehouses such as B&Q, Halfords and M&S Simply Food. Adjacent to the Retail Park (and it is not clear on site where the Retail Park ends and Freeport begins), there is a cineworld, a number of restaurants and a swimming baths.

18. The JS at Stanway, Colchester is a large store with a significant emphasis on clothing, crockery, glassware, small electricals and the like. The JS at Springfield, Chelmsford is another large store that includes comparison goods.

19. The disused EMD site at Halstead is not within the centre and it lies adjacent to houses (see also G10 p2.56). The out-of-centre Morrisons at Witham was relatively quiet at the time of my visit at about teatime (Tuesday) (see also G10 p2.55).

The Proposal

20. The proposal (H31 plans; photomontages in G11 pg19-22 and G11A pg20) would remove the two industrial buildings closest to the front

of the site; the land would be remodelled, with some excavation towards the northern end and a foodstore with a convenience: comparison floorspace split of 65:35 would be developed. The industrial building to the rear would be re-clad and up-graded.

21. The proposed JS building would be on stilts above a car parking area. It would have a rectangular plan (123m x 97.5m) with the longest elevations facing to the south and north. The layout would locate the sales area nearer to the southern side of the building with ancillary space (storage, staff rooms etc.) to the north and east. The service yard, which would also be raised above car park level, would be immediately to the north of the store and be linked to it by an oblong loading area above the car park. Pedestrian access to the sales area would be via an escalator and lifts at the southern side of the building.

22. The building would have a shallow pitched roof, with its ridge running east-west. The northern section of the building would have a flat roof and there would be a "tower" with a false pitched roof (to hide refrigeration and other plant) at the north eastern corner. The "front" of the building would be in its southern elevation, with its central section glazed to full height with narrow vertical timber cladding to either end. The eastern frontage, to Pods Brook Road, would contain a similar mix of glazing and cladding although the full height of the building might not be apparent towards the north as Pods Brook Road rises in relation to the site as it ascends towards the roundabout. For this reason, and because of vegetation on its western boundary, views of the building from the recreation ground opposite would be limited other than from its southern end, from the raised land at its south eastern corner and from the northern pedestrian bridge over Pods Brook Road (G8 p2.5).

23. Vehicular access for store customers and staff and for the refurbished industrial building would be from the existing access from Pods Brook Road. This access would be widened, straightened and, in part, realigned (G8 p3.4). The access to the proposed service yard would be over a new access "bridge" from Pods Brook Road. Entrance and exit would be left-in to and left-out of the service yard. Other highway modifications would include traffic light controls on Pods Brook Road at the site access road, a new pedestrian crossing just south of the roundabout and a pedestrian crossing on Guernsey Way to the south of the proposed store.

24. The western leg of the access road to the store would have turnings into rows of parking spaces. Most of the 502 parking spaces would be sited beneath the building and there would be provision for bicycle, motorcycle and disabled parking (G8 p3.5). Provision would be made for a new cycle/pedestrian route along the Pods Brook Road frontage of the site, linking to existing cycle-ways and footways on Rayne Road and Pods Brook Road. Also, a pedestrian link is proposed from Rayne Road, to the west of the roundabout, and then across the store car park to the entrance.

25. Additional landscaping is proposed (G8 p3.7; G16 Appx 1). The store would have a gross external area of 9,366m² and a net retail floor area of 4,765m². The net retail floor area would include 3,097m²

convenience and 1,668m² comparison floorspace. JS anticipates that the new foodstore would support 400 additional jobs (G8 p3.9, 3.10; C10).

Statement of Common Ground (SoCG) (Doc G5)

26. The National Planning Policy Framework (the Framework – paragraphs 24, 26, 27, 56-58, 60, 61 and 64) and the National Planning Policy Guidance (the Guidance) are relevant to the appeal proposal. The three Reasons for Refusal (RfR) are set out (G5 p1.2).

27. The Development Plan includes the Saved Policies of the Braintree District Plan Review 2005 (the LPR) and the Braintree Core Strategy 2011 (the CS). [NB The policies of the LPR all have the prefix RLP.] The Statement of Common Ground (SoCG) lists 27 relevant policies from the LPR and six from the CS (G5 p2.15-2.16). The emerging draft Policy ADM37a – Broomhills, Pods Brook Road of the Pre-Submission Draft Braintree District Site Allocations and Development Management Plan - is a material consideration.

28. There is no objection to the principle of redevelopment of the appeal site. The site history is set out (G5 p2.19). There is no objection to the loss of the industrial units. Redevelopment of the site for Class B1/B2/B8 uses would not be viable in the short or medium term.

29. There are no objections from the Highways Authority subject to conditions, and obligations (G5 p2.23-2.24, 2.29). There would be no conflict with LPR Policies RLP50, 52, 54, 55 and CS Policy CS7.

30. Sustainable design and construction initiatives would be secured by a planning condition; there would be no conflict with LPR Policies RLP 73 and 74. There are no flood risk objections and the site is of low ecological value.

31. The landscape proposals for parts of the site are acceptable. The sketches at G5 Appx 3 can be considered in relation to required landscape details.

32. An Environmental Impact Assessment is not required. A schedule of conditions is included. SoCG Appx 1 shows proposed footway, cycleway and zebra crossings; Appx 2 shows the proposed junction arrangement; Appx 3 shows landscape sketches including a revised Option 1 Plaza sketch at the corner of the junction with Pods Brook Road.

33. The issues in dispute are: impact on planned investment in Braintree Town Centre (BTC); impact on its vitality and viability; and whether the development would create a good quality built environment which would improve the character and quality of the area and the way it functions.

Retail Statement of Common Ground (RSoCG) (Doc G6)

34. BDC has undertaken a new household survey and JS has undertaken a new on-street survey. New retail assessments have been prepared. In doing so, JS (Indigo Planning) and BDC (GVA) agree matters

as outlined below. The Study Area and its six sub-zones are as defined in the plan attached at Appx 1 of the RSoCG.

35. The sample sizes and questionnaires for the household and on-street shopping surveys are agreed and agreed adjustments have been made. The data are in Core Documents (F12, F13, F14) and the results are used as the base for current shopping patterns and store turnover levels in the Study Area. The agreed price base is 2010 to allow comparisons with earlier retail assessments, while 2014 is the relevant base year and the relevant assessment years are 2019 and 2024.

36. Population figures and estimates are agreed for the six zones of the Study Area; the convenience and comparison expenditure per capita data from Experian (at 2010 prices) are used (G6 Tables 2.1.-2.3), extrapolated as necessary.

37. Convenience expenditure is split between main food and top-up shopping on the basis of 75:25%. Agreed inflow estimates are applied for the proposed store and to the town centre (G6 p2.13-2.15).

38. At the time of the original submission, the convenience/comparison split for the proposed store was 70:30% but this was changed later to a 65:35% convenience/comparison split. Net convenience floorspace figures (in m²) for some stores in Braintree are agreed: Tesco, Great Notley 1,953; Tesco, Marks Farm 2,609 and Lidl, Rayne Road 1,157.

39. While the figure for the Morrisons, in the town centre at George Yard, is said to be agreed in the SoCG, BDC later stated that the food/non-food split is 90/10%, giving a net convenience figure of 1,214m²; JS uses an 80/20% split (G12 Appx 4 Table 8) to give a figure of 1,079m².

40. There is disagreement over the sizes of the Tesco MP and the JS TW stores (G6 p2.18-2.20). JS uses 1,676m² net convenience floorspace for Tesco MP while BDC uses 2,096m². For the Tofts Walk store, the net convenience floorspace figure from JS is 1,827m² while BDC uses the figure of 2,237m² from the Planning and Retail Statement (C10 Appx 7 Table 8).

[Inspector's Note: At the end of the inquiry, I was asked to visit the Morrisons and Tesco Market Place stores again, armed with the agreed definitions of convenience and comparison goods (H15 - which had been requested much earlier), to assess the proportions of net floorspace in each of the two categories. However, this was from a visual inspection only, plus a rough approximation of relative floor areas and gondola lengths and widths. It is a difficult exercise. I give the results in my Conclusions.]

41. The RSoCG includes agreed sales densities for convenience and comparison goods for nine retail companies (G6 table 2.6) and information is provided on floorspace efficiencies (G6 pg6; H30). The parties agree that there are two 'commitments' to be considered; the EMD site in Halstead, which has the benefit of a planning permission for retail development, and the Morrisons store at Witham with permission for an extension of some 1,319m² (G12a Appx 4 Table 10; H32).

42. With regard to retail impact, it is agreed that it is appropriate to assess the impact of the appeal proposals on BTC as a whole, including the combined convenience and comparison impact and separate convenience

and comparison goods impacts, at 2019 and at 2024. The proposal would not have a significant adverse impact on Great Notley District Centre and there would not be a significant adverse impact on any specific planned or committed investment in Braintree.

43. There is, however, disagreement on the likely impact on investment in BTC. JS considers that the proposed development would be unlikely to result in significant adverse impact on any planned or committed public or private investment in the centre, including investment at Land East of Town Hall and Land West of George Yard. It is agreed that the Land East of Town Hall (known also as the Henry Boot site) is not a sequentially preferable site.

44. On 22 October 2014, there were 22 vacant units in BTC (G6 Appx2).

45. A '**reconciliation paper**' identifies the reasons for the differences in the retail figures from the consultants (G6a). It concludes by summarising the six key areas of disagreement:

- The sizes of the Tesco, JS and Morrisons stores in BTC;
- The likely turnover of the EMD store in Halstead and its trade diversion from BTC stores;
- The likely trade diversion of the appeal proposal from BTC stores;
- The extent to which the proposed store would claw back any expenditure leaking from the Study Area;
- The turnover efficiencies for JS comparison turnover (H30); and
- the treatment of on-line sales at JS.

THE CASE FOR SAINSBURY'S SUPERMARKETS LTD

The material points are

Introduction

46. The main issues are the sequential test, economic impact, design and mitigation. Many of the third party representations (with the exception of the letters put in on behalf of Morrisons (F17, F17A)), including all of those who spoke at the inquiry, support the proposals (H19). The extent of local public support is striking. In essence, the reasons for this support are twofold: public dissatisfaction with the 'domination' of Braintree's supermarket offer by Tesco and an understandable desire to see the appeal site redeveloped. Both of these reasons go to the heart of the planning considerations in this case; the widespread public support should be given considerable attention and weight.

Development Plan and National Policy and Guidance

47. The Development Plan consists of the saved policies of the BDC Local Plan Review (2005) and the Core Strategy (2011). BDC accepts that the approach to weighing the development plan policies is governed by

Framework p215, such that 'due weight' should be given 'according to their degree of consistency with this Framework'. Ultimately, the proper construction of development plan and Framework policies is a matter of law (A4) but clearly the most recent interpretation by the Secretary of State (SoS) of his own policy is a highly material consideration.

48. The appeal site lies within Braintree's designated urban boundary. The LPR defines it under the terms of Policy RLP33 as an *"Employment Policy Area" where "uses other than those within Use Classes B1, B2 and B8 will be refused"*. The reasoned justification supports the creation of mixed use areas where residential and work uses can co-exist, recognising the sustainability advantages of such relationships. Likewise, Policy CS4 provides that: *"Employment sites in current or recent use in sustainable locations will be retained for employment purposes."*

49. The Council accepts that: there is no market for the existing buildings on the appeal site; modernisation of the two terraces closest to Pods Brook Road would not be efficient as they are at the end of their useful lives; the site layout is poor; and that redevelopment would not be viable for the foreseeable future. BDC had intended to follow its CS with a Site Allocations and Development Management Plan (ADMP) which reached the stage of Further Changes to a Pre-Submission draft before it was decided not to proceed because of concerns about its approach to objectively assessed need for housing.

50. Notwithstanding that decision, BDC made a formal 'Interim Planning Policy Statement' in May 2014 by which it *"adopts the land allocations and development management policies within the ADMP for use within development management decision making"*. Moreover, the Statement confirms that the allocations have been subject to extensive public and stakeholder engagement and a full Sustainability Appraisal/Strategic Environmental Assessment ("SA/SEA").

51. In the light of these matters, it is now proposed that: *"Work will begin immediately on a new Local Plan which will include new strategic policies and site allocations, as well as the non-strategic sites (which include the appeal site) and policies which are contained in the Pre Submission ADMP (unless new evidence or further changes in government policy require changes to be made)"*.

52. The ADMP process and documentation are highly relevant to the land use questions in this inquiry. BDC's claim in its Closing that the Pre Submission Draft Allocations documents (H35 p6 pg3; B3; B4) are of no weight flies in the face of the case put to the inquiry (G8 Appx 3).

53. Chapter 4 of the document (B3; B4), *"Employment"*, affirms in general terms BDC's commitment to economic growth and provision for employment sites. The appeal site does not feature in this chapter. Instead, it is allocated as a Regeneration Site in Chapter 5, *"Retail"*. The draft ADMP states that its contents have been and will be guided by the Framework (B3 pg2 p1.5).

54. Draft Policy ADM37A, Broomhills Regeneration Site, provides a menu of uses by which to achieve redevelopment as follows: *Business (B1), General Industrial (B2), Storage and distribution (B8); display, repair and sale of vehicles, vehicle parts, boats and caravans; indoor sports and recreation uses, which will only be permitted when identified needs for these uses cannot be met within suitable and viable town centre, or edge of centre sites; the sale of non-food retail products of a weighty or bulky nature and associated ancillary goods (subject to a sequential test and impact assessment).*

55. As the BDC witness agrees: (i) the draft policy is a material consideration for development management purposes generally and this appeal in particular; (ii) the Council considers the draft policy to be sound and sustainable and it intends to carry the policy forward into the new Local Plan; (iii) the Council wants to see the appeal site redeveloped and regenerated; (iv) the Council is prepared to countenance and promote uses within and outside the B class in order to achieve such redevelopment; (v) BDC is prepared, in principle, to countenance and promote “*Main Town Centre Uses*”, including retail and indoor leisure, as defined in the Framework (A1 Glossary p53).

56. Point (v) above is qualified because the draft policy includes sequential and impact tests in relation to indoor leisure and bulky goods non-food retail though, interestingly, not in relation the other Main Town Centre uses of offices and sale of vehicles etc. BDC concedes that it will have taken into account Framework policy for the drafting of development plans, specifically p17 which, among other things, requires LPAs to focus significant development in locations which are or can be made sustainable. Also, among other things, p23 requires LPAs, where there are not enough suitable, viable in or edge of centre sites available, to set policies for meeting needs “*in other accessible locations that are well connected to the town centre*”.

57. BDC accepts that the draft policy acknowledges that the appeal site is accessible and “*reachable from the town centre*”; that the non-viability of the site for total Class B redevelopment is significant and, subject to retail matters, there is nothing unsustainable in principle about the location of the site in terms of its accessibility and connections. Appropriate opportunities have been taken in the appeal proposal to regenerate, capitalise upon and improve the sustainability of the site.

58. The Council's position in relation to this draft policy and its application of the sequential test to the appeal proposals is not entirely logical. If, as BDC claims in this case, the land west of George Yard in BTC is sequentially preferable for the appeal proposal, the same ought to apply to the Main Town Centre uses allocated for the site in draft Policy ADM37A, in which case, regeneration of the site would not be achieved.

59. The development of the draft policy has a curious history (G12 p3.41-3.48). The LDF Sub-Committee added a further use option which was: “*The sale of retail goods, including food (subject to a sequential test and impact assessment).*” This was subsequently reversed by Full Council (H36 p2.8). It is not disputed that there was a private briefing before the

Full Council meeting in September 2013, shortly before the appeal application was determined.

60. Whilst different emanations of an Authority reach different conclusions at different times and this is part of *"the rough and tumble of democracy"*, it is undemocratic if decisions are reversed after an undisclosed briefing by officers. When the sub-committee added food retail to the policy; one of the members, on learning of the planning application, saw it as the opportunity for regeneration, reflecting the views of the local people.

61. It is common sense and considerable weight should be given to the following points, derived from adopted and emerging policy:

- the proposal to refurbish employment units for B Class uses is in accordance with relevant adopted and emerging development plan policies;
- adopted and emerging development plan policies recognise the appeal site as a location which is sustainable for B Class uses and the emerging policy has been tested through SA/SEA, a process which includes, as a legal requirement, consideration against reasonable alternatives;
- the emerging allocation policy recognises the appeal site as a location that is sustainable for retail use (Class A) in principle, as well as other Main Town Centre uses and the same points apply in relation to SA/SEA;
- allocation of the appeal site for Main Town Centre uses implies that BDC recognised, in May 2014 at least, that major developments of this type could not be accommodated on sequentially preferable sites and there has been no change of circumstances in relation to the allocated Main Town Centre sites since;
- BDC wishes the appeal site to be redeveloped and regenerated;
- it is agreed that the retail element of the appeal proposal would generate 400 total new jobs (141-181 net Full Time Equivalent). Also, the refurbished B Class units would provide additional jobs to this. These positive employment effects would be in accordance with policy at all levels.

62. As to the adopted development plan retail policy, BDC relies solely on Policy CS6. There are no relevant policies in the LPR. As the CS explains (B1 pg66 p6.28), its function is to set out *"the overall spatial vision and objectives"*. New development management policies are to follow and these *"will be used to determine future planning applications"*.

63. BDC's retail witness agrees that the CS operates "at a higher level", with CS6 *"setting the script for future development plans"*. He also recognised that the CS identifies as the *"main priority"* the need *"to strengthen the comparison goods offer in the town centre"*, for which two opportunities are identified: land to the East of the Town Hall and land to the West of George Yard, as part of *"mixed use developments"* (B1 pg66 p6.28). Policy CS6 promotes Braintree, Halstead and Witham town centres as the *"primary location for retail, office, leisure and cultural provision in the District."* (H36 p2.10).

64. The CS predates the Framework and the Guidance (A1; A2) but CS6 points to national policy for its sequential test and future development management policy for the threshold for undertaking impact assessment. BDC agrees that the Framework should now be taken as the retail policy framework in respect of both tests, with the Guidance assisting in its interpretation.

65. It also accepts that these tests are distinct and exclusive and that the SoS made it clear, in the recent Rushden Lakes (RL) decision (A11 report p8.36-8.38 and DL p14), that one must not 'read across' need, scale and hierarchy requirements from pre Framework development plan policies. Therefore the scale/hierarchy section of Policy CS6 should be disregarded. It is also common ground that there is no requirement in the Framework to demonstrate need (E11A pg15). BDC's submissions on this matter (H35 p5) are disputed (see report p256-262).

Sequential Test

66. The test is set out in the Framework (H36 p2.13.1). Where a proposal fails this test, it should be refused (A1 p27). The Guidance (A2) supplements the policy, pointing out that *"the application of the test should be proportionate and appropriate for the given proposal"* and discussions are advocated between the LPA and developer. In this instance, BDC appointed GVA to advise it because of a lack of in-house retail planning expertise. GVA's then Director, Mr C Goddard, took the lead on the application as it made its way to Committee. The Guidance sets out a checklist of considerations for the sequential test (H36 p2.13.3).

67. Sequential testing has been considered by the courts, the leading case being the Supreme Court decision in Tesco v Dundee (A4). The critical question in this appeal is whether the appellant, in rejecting the possible redevelopment options of land West of George Yard and the site of its own store at Toft's Walk, has failed to have due regard to the requirement to demonstrate flexibility on issues such as format and scale.

68. To answer this question, it is necessary to decide how the word *"precisely"* (in the context of it not being necessary *"to demonstrate that a potential town centre or edge of centre site can accommodate precisely the scale and form of development being proposed"*) in the Guidance is to be interpreted. What degree of deviation from *"the planning application"*, as the Framework states (A1 p24), is to be assumed for the purposes of testing sequentially superior alternatives?

69. Tesco v Dundee (A4) is doubly relevant; firstly, it firmly establishes that policy statements should be interpreted objectively in accordance with the language used, read as always in their proper context; secondly, it establishes that the suitability of potential sequentially preferable sites is to be judged by reference to whether or not they are *"suitable for the development proposed by the applicant"*, rather than something else, specifically, suitable for meeting identified deficiencies in retail provision in the area. It is, therefore, quite clear that the object of the sequential quest is a suitable home for the Appellant's proposal, not the LPA's idea of what the district requires. Lord Reed, in his leading judgment

(using Scottish policy guidance), qualified his ruling on the meaning of “suitable” as set out below.

70. *“28) I said earlier that it was necessary to qualify the statement that the Director and the respondents proceeded, and were correct to proceed, on the basis that ‘suitable’ meant ‘suitable for the development proposed by the applicant’. As paragraph 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers’ and retailers’ taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in R v Teesside Development Corporation, Ex p William Morrison Supermarket plc and Redcar and Cleveland BC [1998] JPL 23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises 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 the development. As part of such an 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. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.*

71. *(29) It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in Lidl UK GmbH v Scottish Ministers [2006] CSOH 165, para 14, whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.”*

72. The national policy context in that case is Scottish. Relevant passages from this are set out at p6 of the Judgment. Paragraph 13 of the policy document dealt with “flexibility and realism” and expressly provided that developers should, as part of their sympathetic appraisal of the town

centre, "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 might offer a better fit with existing development in the town centres".

73. This planning policy is materially different from the Framework and Guidance (A1, A2). Current English policy makes no mention of "adjusting or subdividing large proposals", as the Inspector and SoS made clear in Rushden Lakes (RL) (A11), a case which, unlike Tesco/Dundee (where the development was an Asda superstore) and this case, concerned a proposal comprising several different elements.

74. The Inspector at RL dealt in detail with disaggregation (A11 report p8.47) where he said: *"A related submission concerns the differences between national policy as now stated in the NPPF and as previously stated in PPS4. The last sentence of NPPF [24] states that: 'Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale'. This contrasts strikingly with what was said previously in PPS4 in policy EC15.1 at (d)(9v) and 15.2 which contained an explicit requirement for disaggregation. There is no longer any such requirement stated in the NPPF. It is no answer to this to refer to the words 'such as' in the last sentence of NPPF [24]. These words cannot be read so as to imply that a major, and extremely controversial, part of previously stated national policy lives on by implication in the NPPF. Had the Government intended to retain disaggregation as a requirement it would and should have explicitly stated this in the NPPF. If it had been intended to carry on with the requirement then all that would have been required is the addition of the word 'disaggregation' at the end of NPPF [24]."*

75. Moreover, the SoS agreed that *"there is no requirement to disaggregate"* (A11 DL p16). In the preceding paragraph he stated that: *"the sequential test relates entirely to the application proposal and whether it can be accommodated on an actual alternative site"*. He then went on to note and quote from Guidance p010). To suggest, as BDC did in XX of JS' retail witness, that the words of the Guidance mean that flexibility requires (potentially) dividing a proposal over two or more *"individual sites"* is inconsistent with removal of the previous disaggregation requirement.

76. It also implies that the SoS, who issued the relevant Guidance on 6 March 2014 and held back his decision in RL to enable the parties to comment on the new guidance (A11 DL p5) was setting out in his decision letter a different principle from the one articulated in his own, recently issued, guidance. Tesco/Dundee is of no direct assistance on this point because its policy context was different from that which now obtains in England. The statements of principle in RL DL15 and 16 are not confined to their own facts and, even if they were, the case for disaggregation there must have been stronger than in the case of a stand-alone foodstore.

77. In any event, it has never been suggested that this appeal scheme could be split over two town centre sites as in, for example, Zurich Assurance (A5 p53-64). BDC has, in view of the development plan, never said that the B Class element of the proposal was sequentially

unsatisfactory. Therefore the only conceivable relevance that BDC's point about "*individual sites*" can have is if it is seriously suggested that JS should have been prepared to promote and operate two town centre stores.

78. This suggestion was made by BDC during the course of the application and was rejected firmly as the return on investment would be so poor that neither site would get near Sainsbury's hurdle rates (H36 p2.13.8; C56). Sainsbury's strategy is to operate two stores that complement each other, the one in the town centre providing for linked convenience shopping and other shopping needs and services and the new Broomhills store catering primarily for the weekly food shopping trip. These shoppers currently visit shops elsewhere in Braintree and outside of the District, not BTC (G12 p4.16-4.19, p6.56).

79. The evidence to the Inquiry has corroborated and expanded on this position. Mr Shearman's statement deals with the possibility of a move from Toft's Walk to land West of George Yard (G13 p6.3-6.5), while the JS Head of Property Acquisitions and Development, a Chartered Surveyor, outlines the commercial strategy of providing complementary stores to target different purposes in a competitive retail environment (G12a Appx 9). He outlines a strategy in which the two stores would have different roles: Broomhills would provide a wider product range, aimed at the bulk food trip and full online service, in order to compete with the two Tesco stores at Great Notley and Marks Farm (H32), outside BTC.

80. The final advice from Mr C Goddard of GVA to BDC on 13 September 2013 (D11), recommended that: (i) it should ascertain the position regarding the sites East of the Town Hall and West of George Yard; and (ii) take Counsel's Advice in relation to the legal matters. This advice predated withdrawal of the PPS4 Guide/issue of the Guidance and the decision in RL (where Mr Goddard had been the principal witness for the Consortium of objecting local authorities).

81. As to (i), the position now is that BDC does not pursue the site East of the Town Hall as sequentially relevant (G10 p6.38). The issue concerning availability of the George's Yard site specifically to Sainsbury's has been overtaken as a result of the clear interpretation of the term "*available*" via the RL decision. Paragraphs 26 and 29 of Mr Goddard's advice letter are affected by further points – town centre needs, timescale and scale – which were dealt with subsequently in RL (H36 pg 21 footnote 24).

82. Mr Goddard, who is very experienced in such matters and can see the force of JS' arguments, advised BDC that, "*Sainsbury's has attempted, unsuccessfully, to secure planning permission for redevelopment of its existing (Toft's Walk) store, and would not dispute Sainsbury's conclusion that, as a retailer, it would not be interested in seeking alternative redevelopment opportunities in the town centre, which would not provide a materially larger and improved foodstore.*"

83. Furthermore, he advised that "*If the Applicant's requirement, having regard to Sainsbury's commercial circumstances as suggested in Counsel's Opinion, are taken to represent the proposals, we do not consider*

there to be any suitable, viable or available site within or on the edge of the town centreunless there was some material change of circumstances, e.g. Sainsbury's acquired the Morrisons and wider development opportunity there".

84. There has been no material change of circumstances and, after an initial objection, BDC took Counsel's advice in relation to that submitted on behalf of JS. However, no legal advice was set out in the Committee report (H36 p2.13.10), which contained at least one error of law and of approach (E11A pg25).

85. There were fundamental errors about the relevance of need and application of the sequential test. As stated above, the Supreme Court in Tesco/Dundee held that "*suitable*" did not mean "*suitable for meeting identified deficiencies in retail provision in the area*"; rather "*suitable for the development proposed by the applicant*" (A4 p24). Moreover, it was not common ground in that case that there were identified retail needs (A4 p13 of Lord Reed's judgment).

86. The errors in the report feed into RfR1, as its allegation of lack of flexibility was made in terms of a failure to, as RfR1 states "reflect the retail capacity that the development would serve, particularly having regard to quantitative need" a point that was specifically considered in Tesco/Dundee. Also, impact on planned investment of sequentially preferred sites is relied upon in RfR1 to support a contention that the proposal was contrary to the Framework p24, that it contravened the sequential test). It is noted also that Mr Goddard had not reviewed the report to Committee prior to the meeting.

87. BDC has sought to suggest that JS has been insufficiently clear about the rationale for its proposal. It is no part of national policy or the Tesco/Dundee decision that an applicant is required to set out the details of his commercial strategy or rationale. As Hickinbottom J observed in Zurich (A5 p60), "*It is unrealistic to expect a commercial operator to reveal its precise commercially sensitive and valuable calculations as to why it considers possible alternatives to the development proposal not to be commercially viable; and it is unnecessary for them to do so to enable a planning authority to come to a view on viability.*"

88. Mr Goddard saw the obvious force in JS' points about the commercial viability of proposals on other sites. Indeed, the difficulties faced by the earlier JS proposal to extend its Toft's Walk store in BTC demonstrates that any further application there would have had to be smaller and/or more constrained, despite the commercial competition from extended out-of-centre stores in Braintree and leakage to larger JS stores outside the Study Area (H36 p2.13.12).

89. Mr Goddard referred in his final letter to opportunities to accommodate further "*appropriately sized foodstores ... over a reasonable timescale*" and that town centre development opportunities remained "*relevant as alternative opportunities to promote a more appropriate scale of town centre development ... however their relevance would be in relation*

to matters of impact, rather than as sequentially preferable sites to accommodate 'the proposal'."

90. It seems, from the Committee report (E11a pg 25, H36 p2.13.10) that officers took this to mean that they were to judge the appropriateness of the scale of the proposal by reference to their retail strategy. Any such approach would be inconsistent with that of the SoS to sequential testing; one cannot 'read across' matters of scale, need and hierarchy requirements from pre-Framework development plan policies (H36 p2.12).

91. Mr Goddard was advising officers, correctly, that the only potential relevance of allocated town centre sites which might come forward within a certain "*timescale*" was in connection with an economic impact argument. But this was ignored by the officers. The question of "*timescale*" is relevant to availability under the Framework (A1 p24). The now cancelled PPS4 Guide gave a detailed definition of "*availability*" as "*whether sites are available now or are likely to become available for redevelopment within a reasonable period of time (determined on the merits of a particular case, having regard to inter alia, the urgency of the need).*"

92. In the Bath Press decision relied on by BDC, the Inspector continued: "*Thus the questions to answer are what is a reasonable period of time to assess potential availability, and is the site available? On this, the (PPS4) Practice Guidance at paragraph 6.39 indicates that the issue of availability and the sequential approach have to be considered together with ... impact ... Thus, whether it is appropriate to assess availability over 3 to 5 years, or a longer time period will depend upon local circumstances. One of the elements of 'local circumstances' is the 'urgency of need' ...*" (A13 pg96 IR p12.27-.28).

93. However, this conflation of need, impact and the sequential test has gone, as the SoS made clear in his RL decision, where the Inspector at RL took a totally different approach: "*... NPPF [24] simply asks whether town centre sites are 'available'. It does not ask whether such sites are likely to become available during the remainder of the plan period or over a period of some years.*" The SoS agreed (A11 DL p17 IR p8.55).

94. BDC argues that this interpretation was confined to its facts but the SoS was endorsing a point of principle after cancelling PPS4. Thus, "*flexibility*" and "*precision*" in current policy and guidance do not include waiting for sequential sites to be assembled, nor do they include the Council deciding that a smaller scale proposal would fit better with its retail strategy.

95. Applying this approach on availability to the Land West of George Yard excludes this site from the frame. Although McLeod's statement for BDC (G14; see p6 above) was produced apparently in response to Mr Shearman's, there was no argument with any of Shearman's evidence as to redevelopment prospects/progress in relation to the Land West of George Yard. James Development Co ("James") owns the Morrisons store at George Yard and the rest of the northern part of the site.

96. The multi-storey car park is owned by the Council and is operated as a town centre income-generating facility. Morrisons' lease is due to expire in November 2018. The company took the premises in 2011 (shortly after JS' first public exhibition in relation to Broomhills). Although Morrisons' agents have written twice (F17, F17a) to object to the appeal proposals, they have never put forward their site as being available and sequentially preferable.

97. Cushman & Wakefield ("C&W"), assessing the site for redevelopment in 2009 (B8), advised BDC that bringing forward development before 2018 might prove to be 'expensive' unless the existing tenants had plans to move and that future parking requirements would be a major element going to viability. They estimated a 2-3 year build-programme, following the grant of planning permission, vacant possession and site assembly. BDC's retail witness, Mr Morris, thought this timescale excessive but had no evidential basis for disputing C&W's independent expert judgment. Mr Shearman, for JS, found that no progress has been made.

98. In June 2010, BDC and James agreed a 'basis of cooperation' but, after a Cabinet report describing the site as currently unviable, the Council issued a press statement in December 2013, noting that James had "not come forward with any concrete plans ... no correspondence with the company since 2012". And the James' website, in September 2014, was still referring to the site as "currently let to Somerfield", who were Morrisons' predecessors but one. There is no evidence that BDC has begun to consider the physical, logistical and town centre viability implications of redeveloping some or all of the multi-storey car park structure.

99. Thus, the site is not available so it is not necessary to consider further questions about operator identity and redeveloped store size. Moreover, the CS proposals for the land (B1 pg66 p6.28) are for comparison retail as part of a mixed use development; the area that might be available for food retailing would be likely to be limited. Mr Morris, does not think that the Council wishes to force Morrisons out of its store but he recognises that, if it were to leave, then a comparison retailer (such as Wilko, as suggested by Mr Shearman) would be a useful addition to the town centre. The representation from Ms Saffell seeks a hardware store (G2a).

100. As to the Farnborough decision relied on by BDC (H35 p11.5; G10a Appx 13), that appeal was by Hobbycraft, a company that does not look at town centre sites. For its part, JS looked in great detail at extending the TW store and would covenant to maintain it as a Sainsbury's store (H20-H23). The Community Infrastructure Regulations (CIL Regs) Regulation 122 applies to every clause in every S106 Obligation. The two-store requirement is not a JS model; it is a requirement specific to Braintree, which Mr Goddard accepted, unlike in the Farnborough case.

101. The draft S106 Unilateral Undertaking was sent to BDC well before the inquiry but there was no response until the inquiry had opened (H21; C63). It was only at that stage that the suggestion was made for the TW store to remain occupied by JS.

102. The only potentially available town centre site is the JS TW, where **two linked questions** arise: what is the “planning application” for the purposes of p24 of the Framework and what are the relevant conclusions to be drawn from the planning history at TW? Having answered these, a judgment must be made about flexibility in the format and/or scale of the proposal.

103. As to the first question, the planning application includes a new Sainsbury’s superstore with ancillary customer restaurant and automatic teller machines, goods on-line (GoL) service, surface level car parking area and refurbishment /redevelopment of retained industrial building. There is no quarrel about the suitability of the Class B element of the proposal, nor is it essential to the operation of the superstore (Further details of the proposal are found at p20-25 above).

104. This is the ‘application’ for the purposes of the policy yet a large part of BDC’s case suggests that JS could or should achieve its commercial objectives by extending its TW store. Mr Morris considered that “quantitative capacity and qualitative indicators” are relevant to flexibility and he sought to bring them into the sequential test (G10 pg36 p5.1).

105. This approach derives from the pre-Tesco/Dundee PPS4 Guide, now cancelled. It is wrong to equate demonstration of flexibility with the detailed articulation of a business case for two stores. The Zurich (A5) and the Lidl (A8) cases, cited with approval by the Supreme Court in Tesco/Dundee, show that it is not a lawful application of the policy for decision makers to arrogate to themselves business decisions in this way. The Court held that the question was whether the alternative central site was suitable for the proposed development, not whether the proposed development could be altered or reduced so as to fit it in.

106. Mr Morris’ approach is inconsistent with Lord Hope’s judgment where he said: *“The words ‘the proposal’ ... serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer ... the issue of suitability is directed to the developer’s proposals, not some alternative scheme which might be suggested by the planning authority...developments of this kind”* (a superstore) *“are generated by the developer’s assessment of the market that he seeks to serve ...”* (A4 p38).

107. By the time that the Broomhills planning application was submitted in 2012, JS had been trying to improve its Braintree retail offer for five years or more. The world in which it is operating is dominated by Tesco, with its two stores outside and one inside BTC (H32), totalling 9,125m² of net floorspace. The fact that each Tesco store individually is smaller than the appeal proposal is legally irrelevant because there is no policy requirement for all foodstore operators to work on the same business model and, because of the need to challenge that dominance, commercially irrelevant. JS cannot compete adequately with the out-of-centre Tesco stores. The Tesco at Great Notley has the highest turnover in the area (£36.56m) (G12a Appx 4 Table 7a). JS needs two stores that complement each other.

108. The JS bulk food shopping offer runs to a minimum 50,000 lines, a bigger range than a Tesco bulk food shopping store (H36 Footnote 39). Also relevant is the opening of a very successful Lidl at Braintree in 2011. Normally a discounter such as Lidl will have 3,000 lines and the 'big four' operators compete on those lines.

109. The JS commercial information from the use of Nectar cards reveals that its customers from Braintree are visiting its larger, bulk-food oriented stores at Springfield, Chelmsford and Stanway, Colchester (H32).

110. On-line shopping has gathered momentum since 2007, when JS embarked on work for the TW application. It has become commercially necessary to move its on-line service out of the limited TW store to enable customers to enjoy a full service. These are obvious commercial requirements which justify a minimum requirement of 50,000ft² so that the full JS 50,000 line offer can be made (G12a Appx 9).

111. Flexibility has been demonstrated in terms of scale and format. Nine schemes and two analysis schemes were worked up by the architects over a period of some 20 months. Whilst none was less than 50,000ft² (say 4,700m²), some were larger, including one at over 70,000ft² (6,541m²). JS would no doubt have liked more floorspace at Braintree as part of its strategy to be 'first for food' (H36 p2.13.21).

112. The proposed design is not the 'standard' superstore set back from the site boundary with a large expanse of highly visible surface parking. Building on stilts is not standard. While the refurbished employment units would not be operationally essential, they are desirable in planning terms because of the employment designation in the development plan, the advantages of the mixed use and their noise and visual screening properties. They also assist the viability of the scheme.

113. Even without the employment units, it would not be possible to provide the essentials of the appeal scheme on the TW site. It would be absurd in viability and sustainability terms to do so. Demolition of the existing store would be wasteful and would necessitate a lengthy closure while the area became a building site, which would be disastrous for JS and damaging to BTC.

114. The only way that the TW site could be seen as sequentially relevant would be if the appeal proposal could be provided by extending the existing store, as in BDC's case. But that it is not the proposal or anything like it. The appeal scheme would complement the TW store.

115. The JS strategy, as expressed in the 2012 application, is for two stores. This was submitted on the basis that there would be a S106 commitment to keep the TW store trading for a period of 10 years. By seeking to force JS into a one-store strategy, BDC steps beyond the legitimate boundaries of the sequential test into an impermissible alteration or reduction of the proposal and the taking of an entirely inappropriate business decision (A4 p28, 29, 38).

116. To interpret "precision" and "flexibility" in this way would be unlawful. It does not signify that in 2009, JS decided that it could meet its

commercial objectives, as it then saw them, by means of an extension at TW (G10a Appx7).

117. The answer to the second question posed above (on the planning history of the Toft's Walk store extension application), is that the evidence demonstrates the hard work put in by the JS team to try to gain permission to extend the TW store on a constrained site. Pre-application meetings were held in 2007 and 2008 and the application was submitted on 19 January 2009. Mr McGrath is the only witness who was involved throughout that process. Council officers were initially prepared to be flexible but their hands were tied by important external consultees (G12a Appx 6).

118. The proposal included mezzanine floorspace and a decked car park - neither of which is ideal for JS – and entry to the building at that level. The existing car park is shared between store customers and other town centre users, such that parking is even more than usually at a premium (G10a Appx 8; D1). The site is within a Conservation Area and within the setting of other designated and undesignated heritage assets. Trees on the boundary are protected by a Tree Preservation Order and there are likely to be archaeological deposits. There would be a powerful commercial and planning incentive to minimise disruption to the store's trading during building works.

119. These are challenging constraints. The consultation responses from Essex CC (ECC) and English Heritage (EH) include serious concerns about the details and the principle of the development (G10a Appx 8; see also Appx 9, 11 and 12), the settings of the Conservation Area and of several listed buildings. Footprint, massing, bulk, design and silhouette were criticised by EH, which saw "serious problems in assimilating these new forms into the existing townscape". Its suggested remedy was underground parking but the implications of this for continued trading are self-evident.

120. ECC made similar points about footprint and urban grain and objected to the space for landscaping and to the lightweight, open decking for the parking which had been proposed for ease and economy of construction and because of customer antipathy to enclosed car parks. ECC appeared to object to the amount of parking and proposed a scheme with multi-layered parking edged by buildings, not simply the facades of buildings. This would have produced fewer spaces and a greater parking requirement. ECC's ideas were impractical (C10 Appx 8). BDC's objections in the report to Committee included design, bulk, massing, loss of views of the original building, street-scenes of Coggeshall Road and views from nearby, impact on the Conservation Area and on listed buildings, insufficient space for landscaping; and 'significant weight should be given to the consultation responses of' EH and ECC.

121. Although the officers' report on the TW application claimed that there was no objection in principle to the proposals, there were fundamental impediments to finding a mutually acceptable solution. Moreover, instead of responding to JS's request to defer consideration of the application when presented with requests for extensive information

seven days before the report deadline, officers refused to do so (G12a Appx 6). The recommendation was that permission be refused (G10a Appx 8).

122. Substantial alteration to the scheme would have been required to overcome the above concerns. JS had spent a great deal of time, money (including £300,000 on fees for consultants) and effort and was no further forward. The situation now would be likely to be worse because of the completion and residential occupation of the adjacent Water Tower (H32). Early service deliveries now have to be made through the main entrance rather than the service yard to protect residential amenity. There is also a greater awareness of heritage constraints following the Court of Appeal decision in Barnwell Manor (H1).

123. In summary, the constraints are: the need to keep trading; the Conservation Area; settings of various listed buildings; buildings of local interest; two water towers, one of which is now in residential use; need to record archaeological finds; tree; parking to serve the store and the town centre; EH and ECC not keen on open decked parking, although BDC had agreed that this would be acceptable; highways issues (G10a Appx 8 Committee Report).

124. This saga demonstrates JS' commitment to testing its town centre store to the limit. It has proved to be impossible even to improve that store to any substantial degree, let alone achieve the step change in service which it now needs to provide. JS demonstrated flexibility on a difficult site but failed to gain approval. Since then, its commercial imperatives have intensified and it has had to adapt.

125. Mr Templeman, JS's Head of Property, Acquisitions and Development, sets out the case for the out-of-centre store (G12a Appx9). BDC seeks a flexible approach by JS (H35 pg10) but it could not match that flexibility. Also, JS is accused of showing a lack of flexibility by not appealing against a failure to determine the TW application but planning policy does not even require that an application be made to show flexibility. BDC wants an unlawfully super-objective approach because JS has not divulged commercially sensitive information. This was rejected by Hickinbottom J in the Zurich case (A5). Moreover, BDC suggests that the Inspector and the SoS speculate on JS' motives (H35 pg15).

126. BDC accepts that the appeal proposal could not be accommodated at TW but, rather than seriously suggesting that design changes could have been considered in order to make it fit at TW, BDC argues for a one-store strategy with an extension which would produce less floorspace and/or parking than the failed 2009 scheme. This approach goes well beyond a lawful interpretation of "flexibility" and "precision." The obvious conclusion is that the sequential test has been passed.

Economic Impact

127. It is not the function of the planning system to regulate competition. The Framework, however, requires consideration of two types of economic impact: firstly, impact on existing, committed and planned public and private investment in a centre and, secondly, impact on town

centre vitality and viability, including local consumer choice and trade in the town centre and wider area, up to 5 years from when the application is made. For economic impact to justify refusal, it must be likely to be significantly adverse (A1 p27).

128. RfR2 alleges both kinds of impact. It is now agreed that there would not be a significant adverse impact on any specific planned or committed investment in BTC (G6 p2.28). The remaining complaint in relation to investment is generalised. Mr Morris does not attempt to quantify or clearly identify what the alleged impact on investment would be, beyond a suggestion that Morrisons “could” close and that JS TW and Tesco MP would have “a diminishing role”.

129. These are simply restatements of BDC’s case on general town centre vitality and viability. Smaller turnovers for those named stores are not, in themselves, of planning significance unless there is clear evidence of an existing investment project being significantly impaired (A2 p016). The key considerations in the Guidance only make sense in the context of specific investments. The SoS adopted this approach at RL (A11 DL p18-21).

130. The reconciliation paper (G6a) highlights the main areas of difference in assumptions/judgments between the retail consultants (as outlined in p45 above). A vitally important issue is the likely effect of trade diversion on the vitality and viability of BTC and, particularly, whether it would be significantly adverse.

On-line Sales

131. Despite the inclusion within the application of a goods on-line (GoL) service, Mr Morris made no allowance for on-line sales in his calculations. He was treating TW as not doing such sales (G10 p2.27). He accepts that on-line customers do not contribute directly to the vitality and viability of BTC, for example by making linked trips (which was the essence of Ms Lambert’s objection to the sustainability of the appeal scheme in locational terms, after she had had to accept the sustainability of the location itself (H36 p2.6)). Mr Morris asserted that on-line sales contribute to the viability of the particular store but recognised that JS could transfer them elsewhere at any time and the fact that the money would then appear differently in the accounts was of no planning significance. Moreover, he agreed that moving the on-line service away from TW could be beneficial as a result of freeing up space (G12c Appx 3).

132. Mr McGrath reduced the diversion from JS TW to Broomhills by £3.18m to reflect the fact that that money does not ‘belong’ to BTC. This is logical, as the transfer of that money (which is likely to happen anyway to Springfield or Stanway H32) is not an impact of planning significance.

133. Convenience turnover of the new store is agreed at £33.1m, albeit that JS includes on-line service in this and the Council does not. JS expects 20% of that (£6.62m) to be from on-line sales, as included in the company average turnover figure. The 20% figure was not disputed by Mr Morris for BDC. The TW store derives 15% of its turnover from goods on-

line, notwithstanding the limitations of a retrofitted facility, the constrained delivery arrangements and, as the on-line goods are picked from the shelves in the store, the limited range in what is not one of JS' larger stores (G12 p6.50). Thus, 20% (of a bigger turnover) for the new, purpose-built on-line facility at Broomhills would be reasonable.

134. It is also right to strip out on-line expenditure from the benchmark turnover conventionally used for new stores because the Experian/Verdict benchmark turnover data, based on company averages, include sales on-line. Note also the total of £24.5m in the Study Area attributable to on-line sales, of which the £8.97m from Zone 1 will be largely attributable to the two Tesco stores outside BTC plus the JS at Toft's Walk (G12a Appx 4 Table 7b turnovers at 2019; see also Table 7a for 2014 figures). When seen in this context, the £6.62m of on-line sales from the new store appears reasonable

135. The effect of Mr Morris not deducting internet sales from the Broomhills turnover is to inflate trade diversion, and hence impact, by 20% across the board.

Sizes of BTC Supermarkets

136. Mr McGrath's figures in evidence are derived from and/or consistent with BDC's most recently published retail evidence base, NLP's Retail Study Update of October 2012 (the RSU) (B6 Appx 2, pg11 Tab 2.1 – see footnotes which set out the basis for their figures, including their site visits to inform the convenience floorspace split). This Study was published after submission of the planning application. It replaced the earlier GVA Study which Mr McGrath had consulted at the application stage (B7 Appx2 Tab 16). Mr Morris used the older GVA study figures.

137. McGrath's figures for Tesco MP and Morrisons are identical to NLP's and accorded with his own judgment on site. The position on Sainsbury's TW is more complicated but it is now agreed that Mr McGrath's figure is to be preferred (H36 p2.14.9).

138. These figures form one part of the calculation of benchmark turnovers, used by the witnesses for their respective capacity calculations and as one indicator of the significance of impact on BTC. The other factor is an "efficiency" allowance which Mr Morris agrees is a negative figure in this case (G6a notes on Table 8).

Halstead EMD Commitment

139. The difference between witnesses here amounts to about £3m in their respective capacity analyses and £1.27m in relation to impact. Mr Morris assumes an Asda store with a much higher turnover than Mr McGrath's "average discounter" turnover. Planning permission was granted for A1 retail development at this site in November 2012; the net retail floorspace in the permission is 1,474m², with 114 parking spaces (G12a Appx 4 Table 10). NLP was advising BDC on a contingent basis, since no operator was associated with the application (F1 p2.14-2.16). Asda was reported in the local press to be interested at that time but

nothing has happened since. No action has been taken to discharge the conditions.

140. Mr McGrath considers the site too small to appeal to Asda as the location for a new store and Mr Morris (who lists Asda among his clients) (G10 p1.3) could not point to an example of a new Asda building on a similar sized site, although it does occupy stores of this size that it has taken over. Mr Morris agrees that there are differences between Asda and discounters in terms of delivery/servicing requirements, reflecting the former's greater range of fresh products. The permission does not permit deliveries on Sundays or Bank Holidays. Mr McGrath's approach is more realistic.

Clawback

141. The difference attributable to clawback in the capacity analyses is some £3.31m. Mr Morris makes no allowance for clawback in his 'capacity' analysis (of the convenience goods expenditure capacity in Braintree) but allows £2.1m for it in his trade diversion calculation (G6a Appx6 Tables 9 and 12c). He could not explain this discrepancy. As to the remaining £1.21m difference, his judgments seem unduly conservative given the overall leakage out of the Study Area to Stanway (convenience turnover increased from £12.36m in C10 Table 8 to £19.39m in G12a Appx 4 Table 8; see also tables 7a-7c) and Springfield (from £9.19m to £10.75m), the good road connections along the A120 and A131 from the parts of Zones 3, 4, 5 and 6 closest to Braintree, and the strong brand loyalty to JS. Residents have confirmed that leakage occurs. There is no JS store in Zones 5, 4 and 3 and only a small one in Zone 2 at Halstead (G12a Appx 1 zone and store plans). The Stanway and Springfield JS stores, just outside the study area, are each bigger than the appeal proposal. The Stanway store opened after the 2009 application.

142. The 20% on-line point is also relevant to capacity. The turnover of the proposed store is a benchmark figure and this takes account of the JS company average 20% on-line figure.

Likely Trade Diversion of the appeal proposal from BTC Stores

143. The degree of clawback is relevant here too. Mr Morris agreed that the Stanway and Springfield stores are both fulfilling a bulk food shopping purpose, as some of the local witnesses at the Inquiry confirmed. He made some allowance but, for reasons set out above, this seems small.

144. It is agreed that the like-on-like principle is relevant; the Guidance continues to advise that this is so (A2 p016) and it applies to the Tesco stores at Marks Farm and Great Notley, which were extended in 2010 and late 2011 and are both overtrading (G12 p6.47; G12a Appx 4 Table 8). Great Notley store has the highest turnover in the area (£36.56m – same ref). Mr McGrath allows for greater diversion from the Lidl on Rayne Road for a number of reasons: it is overtrading massively (G12a Appx 4 Table 8 at 397% of company average), it is the closest store to the appeal site and partly because of the 'promiscuity' of convenience shoppers and the budget line responses by the 'Big Four' supermarkets, including Sainsbury's.

145. To be able to apply the like-on-like principle to BTC, it is necessary to know the kind of food shopping that it is mainly attracting. The Household Survey asked: "At which ONE store do you do most of your MAIN food shopping?" However, no definition of main food shopping was given and it was evident from what third parties said that people are likely to understand that question in very different ways, as Mr Morris agreed (F10-F14 surveys).

146. Hence, this led to the October 2014 On-Street survey in order to understand better how the town centre stores are being used. This survey asked (F14 pg5 Q3) not only the main purpose of the visit but also, of those who answered "food shopping", whether they were doing a full or half trolley or a basket (top up) shop. The majority, 19.1%, said basket, 7.8% half trolley and 4.2% full trolley. Cross tabulation revealed that only full trolley shoppers spent in the £81 - £100 plus bracket (F14 pg24), which was the only category that Mr McGrath would classify as bulk food shopping. While respondents might describe half trolley or basket trips costing less than £81 as 'main food shopping,' it is a different kind of main food shopping from that at which the new store would be mainly directed.

147. Mr McGrath's analysis is more sophisticated than simply regarding the BTC stores as fulfilling the same role as the new store. His Table 4.10 (G12 pg24) demonstrates that there is already a greater incidence of main food shopping occurring outside BTC and this is the 'target' for the new store (G12 p4.49 and Table 4.4). The usual destination for the main food shop has fallen from 48.2% in 2011 to 23.3% for Tesco MP in 2014; comparable figures for JS TW are down from 33.8% to 26.2%, while Marks Farm rose from 2.6% to 10.7% and Great Notley from 3.1 to 11.7%, indicating a shift from reliance on town centre stores. His Table 4.8 similarly shows a fall from 73.8% in 2011 to 31.1% for food shopping in 2014 for the 'Main purposes for visiting BTC'. However, as shown in the same table, non-food shopping rose from 7.2% to 19.7% and 'Using Services' rose from 1.5% to 18.2%.

148. Therefore his lower figure for impact on Tesco MP is right, as Tesco shoppers wanting a bulk food offer will already have left Tesco MP and be using its stores at Marks Farm or Great Notley. This is the principal explanation (along with the success of the newish Lidl on Rayne Road) for the fall in BTC turnover.

149. Clearly, there is likely to be some shift in JS's customers, although the evidence of the locals was interesting. They said that, while they would visit the new store in preference to the more limited Tesco at Mark's Farm and Great Notley or the larger JS's at Springfield and Stanway, they would still visit BTC for many reasons, including trips to the JS TW with its attractive parking, which is effectively free if the ticket is redeemed in store. This anecdotal evidence is consistent with the On-Street survey material.

Turnover Efficiencies for Comparison Goods

150. Mr Morris anticipates that JS's comparison floorspace will increase its turnover by broadly 30% between 2014 and 2019 due to

improvements in floorspace efficiency (G10 pg67 footnote 75; agreed note H30). Mr McGrath does not consider this to be realistic. Nevertheless, both experts agree that the comparison goods impact on BTC would be low: Mr McGrath's figure, with or without on-line sales, is 2.6% at 2019 and Mr Morris' figure is 3% (G12a Appx 4 Tabs 15a, 15b; G12 p11.13-11.17; G10a Appx MM6 Tab 14).

Would the Impact on BTC be significantly adverse?

151. It is wrong to approach this question on the basis of identifying a specific percentage of impact that would be significant. Nevertheless, Mr Morris' figure for overall cumulative impact is still only 10% at 2019 (G10a MM6 Tab 14), even allowing for the disputed assumptions set out above. Mr McGrath's equivalent figure is 7% including online sales or 5.3% excluding them (G12a Tables 15a and 15b).

152. The Guidance (A2 p017) advises that: "A judgment as to whether the likely adverse impacts are significant can only be reached in light of local circumstances". These local circumstances need to be set in context. There must be information about local circumstances but making the judgment about them is not the preserve of local agents (H36 p2.14.18; H35 p16.4). Shopping patterns have changed between 2011 and 2014 and there has been a clear shift in the way that people undertake their food shopping, particularly in town centre stores (G12 pg26-28).

153. A non-expert demonstration of this point came in the slightly conflicting assessments of BTC by local residents. Mr Bignold felt that the centre was in "total decline"; he blamed the development of George Yard, describing it as a "terrible mistake". Mr Cutmore and Mrs Parsons disagreed, the latter saying that many of her visitors comment on how lucky she is to live in Braintree with such a good town centre. All the local speakers were, generally, happy with BTC for what retail experts would call day-to-day or top-up shopping. They criticised the poor supermarket provision for the bulk or specialised food shop, which, according to the anecdotal evidence, is already being undertaken either at the two external Tesco stores (with some dissatisfaction) or further afield at the Springfield or Stanway JS stores.

154. The Guidance (A2 p004) sets out the relevant indicators for assessing the health of town centres and their changes over time. Mr Shearman and Mr McGrath (G13; G12a Appx 2) have assessed BTC in these terms, reaching evidence-based conclusions that the town centre is robust. Mr Morris, however, whilst properly agreeing that adverse impact must be reasonably predicted to be significant in order to justify refusal and that such impact must be upon BTC's vitality and viability as a whole, had not conducted an overall health check of the centre; he had looked at only some of the relevant indicators.

155. Mr Morris agrees that the centre enjoys an attractive appearance and good accessibility but his conclusions of fragility and susceptibility are not borne out by analysis of the vacancies: there are 22 vacant units (G6 pg7 p2.32), a reduction from the 28 shown in his proof which, itself, was below the national average. Mr Shearman demonstrates that most of these

are in peripheral locations (G13 pg10-15, 37) where a high turnover of units is a normal part of a town centre's structure. As he points out (H36 pg49), NLP's 2010 and 2012 Braintree District Retail Study Updates concluded that BTC was performing reasonably well.

156. Mr McLeod (G14) does not dispute Mr Shearman's evidence about vacancy levels. Indeed, he comments that the level of vacant units is low (G14 p7). His complaint, as a local letting agent, is that it has proved harder to let units recently (G14 p5). This is neither surprising nor unique; it is not evidence of a 'fragile' centre (H36 pg49).

157. GVA's November 2014 Chelmsford Retail Capacity Study (G12a Appx 7) gives important evidence about how BTC is perceived in investment terms. It draws on an annual ranking survey, which shows that Braintree rose by 30 places between 2005 and 2014, in the period when the two Tesco extensions at Marks Farm and Great Notley and the Lidl had commenced trading, and during which the convenience turnover of BTC has halved from the household survey derived figure of £83.1m in 2011 to the October 2014 update of £40.89m, albeit that the two figures cannot be directly compared (G12 pg15 Table 4.1). Mr Morris agrees that such town centre rankings are of interest and significance to potential investors.

158. Yet this independent, commercially relevant evidence gives the lie to BDC's concerns about economic impact and disincentives to investment. It supports Mr McGrath's opinion that the reduction in convenience turnover already experienced has made no material difference to the vitality and viability of the town centre as a whole (as distinct from the supermarket operators' individual turnovers). It also supports his confidence that allowing the appeal would not cause an impact of planning significance.

159. Turning to the composition of BTC, Mr Morris agrees that convenience floorspace is above the national average and that, while comparison space is below average, that would be addressed by BDC's plans for the land West of George Yard. Service users are better represented than the national average and Mr Morris agrees that this feature contributes to the diversity of the centre and the numbers of visitors. His concern relates to the possible effects upon Morrisons. This would only be material if there were clear evidence to support likely closure and if there were clear evidence that such closure would be significantly adverse for BTC's vitality and viability as a whole.

160. There are two letters of objection from Morrisons' agents (F17; F17a). Neither states that Morrisons would close its store if the appeal were allowed. Mr Morris thought that there was a real prospect of closure in those circumstances but we cannot infer what they might be and he agrees that such a business decision would be taken on the basis of many factors to which the Inquiry was not privy.

161. Note also that Morrisons took its lease after JS' first public exhibition for the appeal proposal and after the recently opened Tesco extensions and the Lidl store (H36 p2.14.23). The suggestion by BDC that

Morrisons would not want to cause unnecessary anxiety to its staff and customers is speculation (H35 Footnote 34, pg 39).

162. The above chronology does not fit with Mr Morris' approach to impact, which is focussed upon reduction in supermarket turnover as a proxy for town centre resilience. Morrisons' actions in the last few years demonstrate that real-life commercial decisions about representation and investment are complex and not directly related to statistical calculations of trade diversion. The representation suggests that the Portas project indicates town centre weakness but the selection criteria were directed towards the provision of test beds rather than targeting weak centres (G13 p4.25; G13a Appx 5).

163. Even if Morrisons were to choose not to renew its lease in 2018, there is no evidential basis for concluding that BTC's vitality and viability would be damaged. Mr Shearman and Mr McLeod agree that the Morrisons store is not an anchor for George Yard (G14 pg8; G13 p4.7, 4.9). The Household Survey confirms its true position: Mr Morris' Table 5b (G10a Appx 6) reveals that, for food, Morrisons has a higher top-up than main food turnover from zone 1; its out of centre store at Witham derives £0.8m more main food turnover from zone 1 than the poorly located George Yard store, which suggests that that store is not a powerful attractor for main food shopping, even among its own customers.

164. If Morrisons were to vacate its store in BTC, it would be likely to prove attractive to Wilko or Aldi, either of which would be a greater asset to the centre. Mr McLeod states that Lidl would be a more positive benefit to the town centre and George Yard (G14 pg8 bottom para). As noted above, Mr Morris recognises that Wilko would be a useful addition to the comparison shopping provision.

165. BDC fears the loss of linked trips as a result of main food shopping trips to JS TW being diverted to Broomhills, based on its degree of linkage with main food shopping trips revealed by the Household Survey. However, as noted above, "Main Food Shop" terminology must be treated with care. If it is right that much bulk food shopping is already being undertaken outside BTC, the scope for loss of linked trips attendant on a bulk food shopping trip would be much reduced. If the term largely means smaller, more frequent trips, which is what a combination of the Household and On-Street surveys and anecdotal evidence reveals, then anxiety about linked trips should be less. In the 2011 and 2014 on-street surveys, the majority of respondents did not link their main food shopping trip with any other purpose (G12 p4.48).

166. Moreover, the proposed contribution to improving signage and, therefore, linkage between Broomhills and BTC via Flitch Way, and to encourage linkage by car park management (H20 pg5 and Schedule 1 p2 – redemption of parking tickets from the JS TW car park at the new store) must be taken into account. Mr Cutmore describes how readily linkages can be, and already are, made.

167. Concerns about the closure or diminution of the TW store are misplaced. It has always been made clear that it would be protected by a

S106 covenant (H20), and the period is an unusually long 10 years, unlike the Tesco covenants for Marks Farm and Great Notley which are for five years and do not tie Tesco to the Market Place store (H11; H13).

168. At the Inquiry, BDC voiced concerns about the loss of Sainsbury's personal commitment to the store. But, as with Morrisons, it is not the trading personality that is of planning significance, it is the continuance of the retail function. JS has no intention of closing its TW store which is, and which is expected to continue to be, successful. As well as covenanting to maintain a minimum level of convenience and total floorspace, JS would be prepared to be bound to continue to trade there, should the Inspector and/or the SoS consider that this covenant would meet the requirements of Regulation 122 of the CIL Regs.

Design

169. RfR2 consists of three allegations: firstly that the proposed layout and orientation would fail to take advantage of the prominent and public-facing site frontage and the scope to add interest to the character of the locality; secondly, an unappealing access route for pedestrians; and, thirdly, that there would be too little landscaping to provide a setting that would enhance the appearance of the development or character of the area.

170. Much of BDC's evidence went well beyond these focussed criticisms in the RfR. To the extent that its witness, Mr Estop, went further – for example on the Design and Access Statement (DAS) - he merely expressed his personal opinions as his evidence had not been approved by committee.

171. Design is not, for planning purposes, a matter of personal taste or aesthetics. Moreover, the policies relied on in RfR2 must now be read in the light of the Framework and the Guidance, especially RLP90 from the pre-Framework 2005 LPR. Therefore "the highest possible standards of design" in terms of pedestrian provision is to be interpreted in the light of the Framework's recognition that priority should be given to pedestrian and cycle movements "where practicable" and that opportunities for sustainable modes should be taken up "depending on the nature and location of the site" (A1 p32 and 35). Its commitments to the re-use of brownfield land and promotion of mixed use developments are also relevant. The Guidance stresses the importance of local character and context.

172. There is no site-specific local design guidance, but draft Policy ADM37A is relevant as an indicator of land uses that are acceptable in principle. BDC might aspire to achieving the highest reasonable standards of design but its promoted uses will, typically, involve orthogonal forms of building with extensive car parking and the scope for a nuanced approach to caravan sales and motor repairs is likely to be limited. The BDC witnesses were surprisingly reluctant to accept the description "unattractive" for the existing site. To the extent that the Council's case rests on allegations that the proposal is not good enough, the yardstick of attractiveness and the Council's policy formulation are relevant baselines.

173. The site is occupied by three terraces of industrial buildings. The easternmost two are past the end of their useful life and are partly occupied for a mix of uses including trade retail. Only the westernmost building is worth refurbishing and this is being proposed. It is agreed that this refurbishment would constitute a regenerative improvement in visual, functional and sustainable construction terms. Retention of the building would also serve as a noise barrier and, together with existing and proposed vegetation and bunding, a visual screen for residential properties to the west and north of the site. All of these features are recognised as positive in design terms.

174. The proposed store has been architect-designed to fit and take advantage of the site's characteristics and opportunities while responding to local constraints, not least the adjacent residential development and variations in level.

175. There is considerable agreement between the witnesses as to the context and the character of the area. Unlike BTC, from where Mr Estop sought to draw 'references', the site is not in a Conservation Area or in the setting of any heritage asset. It is in a transitional area of the town, connected to an area of 20th century commercial development north and south of Rayne Road where the urban grain is coarser than that to the east. The undistinguished buildings currently on site reflect this character, as well as the forecourt parking of the nearby garage that the Council accepts is 'damaging'.

176. It is wrong to suggest that the scale of the building has "dictated" layout and orientation. A variety of layouts, on a N/S and/or an E/W axis, were tested (G11a). The former was preferred because it would keep HGVs out of the site and distant from residents and customers and the service yard would be further from the housing. These features and the landscaping proposals respond to the understandable concerns expressed by neighbours during the public engagement on the project.

177. This layout also allowed vegetation to be retained and supplemented on the NE corner of the site. Overall, the increase in landscaping compared with what exists now would be some 41.9% (G16 p2.1-2.2 and Appx 1 and 2). One alternative option would be to incorporate a plaza to enhance the setting for the SE corner of the site (G16 p2.3 and Appx 2). In addition, locating the restaurant, with its large windows overlooking and visible from the park to the east of Pods Brook Road, would add interest to the locality, both visually and functionally.

178. At present, there are no facilities for comfort or refreshment in the park opposite the site and Mr Estop accepted that the store would assist in these matters. Criticisms were made of materials and the lack of articulation, but the former could be dealt with by condition and the latter failed to take account of variations on the two southern corners and on the eastern elevation.

179. Contrary to Mr Estop's ideas, the height of the proposed building was never the subject of objection by officers or the Council. Prof Tavernor's 'before and after' images (G11 pg19-22) are accepted as

accurate. The development would provide a huge improvement in terms of quality of building, animation and general contribution to the urban form and function at this regeneration site.

180. The layout offers a choice of pedestrian access routes. Two dedicated pedestrian crossing points are provided over the access road to the south of the store, with accessible ramps leading to the atrium and a choice of stairs/travelator or lift. Wider connections are possible via Guernsey Way or the footpath on the east side of the houses southwards to Flitch Way, which is to benefit from a financial contribution towards improved signage (H24 pg5 and pg13 p3.3; G12a Appx10 Figs 3 and 4). The existing Pods Brook Road northern pedestrian bridge, to which the store's southern pedestrian accesses would link, connects with residential areas to the east. A suggested design alteration at the junction of the access and Pods Brook Road could improve accessibility for pedestrians and improve the view for passing traffic (G11A pg19-29).

181. North of the store, a new zebra crossing over Pods Brook Road would be provided, to link with a new footway on the west side of Pods Brook Road (H24 Schedule 3 pg16 p4 and 6). Pedestrian/cycle access would be provided into the site on the NE corner, offering a choice of a stepped or ramped route down to the undercroft car park. Dedicated undercover routes would then run through to the atrium. Despite Mr Estop's oral evidence, there has never been any suggestion that these routes would be unsafe.

182. The Highways Authority does not object to the proposal and has entered into a S106 Agreement (H24, H25) with JS to secure the above pedestrian/cycle features, as well as other sustainable transport measures including a Travel Plan covering the store and the employment units and a contribution to a Sustainable Travel Fund to assist in implementing it.

183. Measures could include additional signage on other local routes such as Clare and Rayne Roads and financial and other incentives to promote walking and cycling by staff. Real time information would be provided at local bus stops and in the new store. All these initiatives are examples of taking up opportunities for sustainable transport modes as advocated by the Framework (A1 p32).

184. RfR2's allegations, that opportunities to improve the character and functioning of the area have not been taken, are unfair, as is the unspecified suggestion that pedestrian routes would be "unappealing". There is no policy requirement for Mr Estop's "social space", on this site which provides no public access at present, nor does the RfR suggest that JR should have provided one. Neither the landscape officer nor Mr Estop has suggested that new trees could not be planted, as proposed, around the site. Details of trees, hedgerows and hard surface treatment could be dealt with by a landscaping condition.

185. There would be a great improvement to the character and functioning of the area. The proposed design responds innovatively to the site and its surroundings, provides a restrained yet sizeable building and utilises levels to place the car park largely out of sight under the store.

Tired old employment units would be removed or be restored for a new lease of life and hard and soft landscaping would be used to assimilate the new store into its surroundings.

Section 106 Contributions

186. All highway and transportation matters have been agreed with the Highways Authority which has entered into a S106 Agreement (H24). All contributions have been justified in the Regulation 122 statement (H25).

187. Policy RLP94 (Public Art) of the 2005 LPR has been superseded by the CIL Regs and the Guidance (A2 p004 Ref ID 236-004-20140306).

188. BDC was unwilling to engage in discussions with JS over the contents of the S106 obligation being made in its favour. Accordingly, it has been produced as a Unilateral Undertaking (UU) (H20). All contributions have been explained and justified in the Regulation 122 Statement of Compliance (H22). The covenants in relation to the JS TW store and promotional parking at Broomhills are dealt with above. Further contributions in cash and in terms of providing promotion and business opportunities for BTC and for new businesses are to be provided, as well as training opportunities within the new store. While BDC criticised the UU, it offered no assistance as to any other contributions or obligations which it would have wished to see.

Conclusions – Planning Balance

189. The RfRs have been tested and shown to be ill-founded. Braintree is a robust and diverse centre. It is capable of withstanding the relatively limited trade diversion from the proposal and there is no evidential basis for finding that any store would close as a result. While the development plan strategy promotes inner sites for retail development, these are either unavailable or unsuitable for accommodating the proposed development.

190. Development would bring many positive impacts:

- an unattractive, underused brownfield site would be regenerated, providing for 141-181 net new FTE jobs in the process;
- refurbishment of the industrial units would accord with the adopted and emerging development plan;
- there would be increased competition and the Braintree public would enjoy a real improvement and greater choice in their opportunities for bulk food and/or online convenience shopping;
- the Toft's Walk store would be tied to the town centre for 10 years and parking would be effectively free with the S106 link to the Broomhills store;
- town centre improvements would be secured;
- the on-line jobs would be retained locally;
- the site would benefit from a greatly enhanced physical appearance and the introduction of vibrant, mixed use development, capable of adding

vitality and useful services to the immediate area, together with enhanced pedestrian/cycle links and bus stops. Many members of the public recognise these benefits and support the proposals.

191. For all these reasons, the Inspector is requested to recommend allowing the appeal and the Secretary of State to grant planning permission.

THE CASE FOR BRAINTREE DISTRICT COUNCIL

The material points are:

Planning Policy Overview

192. BDC assessed the proposal against relevant national planning policy and guidance, in addition to local planning policy which included an up-to-date Local Plan, supplementary planning documents, emerging policy and other material considerations.

193. There is little between the parties as to the planning policies relevant to this appeal, as indicated in the SoCG (G5 p2.13-2.16). It is agreed that in accordance with the Framework (A1 p215), due weight should be given to these policies dependent upon their degree of consistency with the Framework. For the purposes of S38(6) of the Act, this appeal is to be determined in accordance with those policies unless material considerations indicate otherwise.

194. It is agreed that full weight is to be attributed to the CS, in particular policy CS6. Notably, this requires that a sequential approach be applied to the consideration of proposals for retail and town centre uses. Relevant decisions must, therefore, be taken on a "town centre first" basis, which is consistent with the Framework guidance in relation to "ensuring the vitality of town centres".

195. There has also been some consideration of the Pre-Submission ADMP Site Allocations documents (B3 and B4), which have not been examined in public. Given the stage that they have reached, they are of no material weight.

196. Further to the above, JS's contention as to the weight to be attached to historic policy support for food retailing at the site is absurd. Indeed, contrary to Mr McGrath's statement that (G12 p3.50) "members have for a period supported food retailing on the Site", the context of such "support" needs to be understood. Firstly, it was extremely short, a mere two months between 11 July 2013 and 23 September 2013. Secondly, the support manifested itself via a sub-committee, with a membership of ten but an attendance on the material date of a mere six. Thirdly, the support was swiftly and roundly overturned at a meeting of full Council, with some 40+ members in attendance.

197. The views of a small minority of members were not supported by the full Council. The point has no further significance. This short-lived position should not be given any material weight in the decision-making process. It can be cast to one side.

Retail - Sequential Test

198. Notwithstanding Mr McGrath's assertions during XX, the reasons for refusal could not have been clearer on this matter. It states that *"the [Appellant] has failed to demonstrate compliance with the sequential test as contained in paragraph 24 of the NPPF and the emerging NPPG"*. Specific reference is also made to JS's failure to demonstrate *"sufficient flexibility"* for its proposal in terms of both scale and format.

199. Further, there is no dispute that: the proposal involves the development of a retail superstore, which is a main town centre use; the site is outside an existing centre; the proposal would not accord with the adopted (and up-to-date) Local Plan or Core Strategy; the relevant sites to consider for the purposes of this appeal are TW and the Land West of George Yard; the burden is upon JS to demonstrate that the sequential test is passed. Where an application fails to satisfy the sequential test, it should be refused.

200. A new point was mooted during XX of Mr Morris, that there are two elements of the proposal, a retail scheme and a B1 scheme. It is an entirely new point, never aired in any of JS' proofs of evidence or its PRS for the application (C10). It is an opportunistic point now taken because it arises in the RL decision (A11). Yet that is a decision which is, for a whole host of reasons, distinguishable from the present appeal proposal in any event. For example, the RL proposal is materially different from the retail element of the appeal proposal and there are unique characteristics surrounding the RL site and how that development would compete with surrounding centres (G10 p6.15).

201. This appeal relates undeniably to a retail proposal and the refurbished B1 floorspace has never been put forward as an indivisible part of the whole. To suggest otherwise is misleading.

202. It cannot be disputed that the Framework requires the appellant to have demonstrated sufficient flexibility with regard to the proposal in order to comply with the sequential test and in relation to an assessment of whether there are suitable, available or viable alternative sites. JS purports to accept this in its Statement of Case (G3 p3.1.1(a)) as did Mr McGrath in examination in chief when he suggested that *"there has to be flexibility; an appellant has to go beyond what it is actually proposing – or hold back from what it is proposing"*.

203. Yet, JS has failed to demonstrate sufficient flexibility. There has never been any genuine or meaningful attempt to *"hold back"* from what it is proposing in the manner described above, notwithstanding the absence of flexibility.

204. The Guidance deals with the scope for flexibility (A2 p010). There are a number of points in the checklist under the heading *"due regard to demonstrate flexibility."* It suggests that it is not necessary to demonstrate that a potential town centre/edge of centre site can accommodate precisely the scale and form of development proposed,

rather to consider what contribution more central sites are able to make individually.

205. This suggests that one or more sites could accommodate the proposal (given the plural “central sites”). It is a perfectly reasonable and sensible interpretation of such guidance to suggest that it is appropriate to look at one or more “sites”. The consideration of disaggregation in the context of the RL decision is readily distinguishable from the present instance given the unique characteristics of the site and the proposed development in that case.

206. However, and given JS’s continued reliance upon the RL decision, it is useful to look within it for threads of general principle. It would be wrong to overlook the fact that the S/S was careful not to adopt in every respect all of the Inspector’s comments (or “arguments” as they were termed) and specifically emphasised that applicants must demonstrate flexibility in terms of both format and scale for the purposes of the sequential test. It is important to note that the SoS considered that there is no requirement for a sequentially preferable site “to accommodate precisely the scale and form of development being proposed” (A11 DL p15).

207. In *Tesco Stores Ltd v Dundee City Council* (A4), the Supreme Court held that the question of suitability was to be interpreted objectively in accordance with the language used, read in its proper context. As such, the Council in that case was correct in interpreting “suitable” to mean “suitable for the development proposed by the applicant”. The requisite flexibility had been shown in that instance because the developers had not confined their assessment “to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing”.

208. In analysing whether there has been the appropriate degree of flexibility, we submit that (contrary to what we understood was a contrary preliminary indication by the Inspector) the analysis must be undertaken on an objective basis not least because planning permission runs with the land.

209. Indeed, the Inspector’s observations appear to have been encouraged by the appellant who has said that the Inspector and/or SoS cannot go behind the JS business model because that is a matter for the appellant alone. However, if the JS model is that there is a requirement for two stores – one out of centre and one in centre – then that would effectively rule out any application of the sequential approach.

210. This is the point made by Inspector Christina Downes in the July 2014 Farnborough (Hobbycraft) decision (G10a Appx 13). Her p10 deals with sequential alternatives and notes that the sequential test should not be specific to the business model of one particular operator but have regard to the fact that permission runs with the land.

211. Further, Ms Downes notes (p12): *“The appellant considers that the Dundee and Zurich judgments support its case. However if that were so*

it would mean that any company that presents a business model that can only be satisfied in an out of centre location could sidestep the sequential test. This does not seem to me to be what either judgment is saying nor is it what national and local planning policy intends”.

212. Moreover, the ‘real world’ described in *Tesco v Dundee* (A4) is the same world inhabited by JS’s direct competitors, such as Tesco, who are evidently able to satisfy their business models and requirements with far smaller stores than the appeal proposal.

213. A developer’s proposal can only be used to set the parameters for “suitable” sites if that proposal properly demonstrates flexibility in its formulation. Otherwise, there would be no need to engage in a broader search because any site that could not accommodate the precise form of the applicant’s proposal could automatically be disregarded.

214. The parallels between the Farnborough decision and this appeal are striking when one considers the practical result arising from the appellant’s strident claims to, on the one hand, require two stores here in Braintree whilst, on the other, seeking to avoid genuine and meaningful consideration of suitable and available sites in centre.

215. To its credit, the JS case is marginally more nuanced in that it contends that the demonstration of suitable flexibility was purportedly undertaken in its PRS (C10), albeit that Mr McGrath added in XX that such demonstration also requires consideration of “numerous documents following the PRS” (without providing any further guidance as to which documents, how they demonstrate flexibility or why he failed to flag them up in his written evidence).

216. In this respect, note the following: the PRS has a section on the sequential approach (C10 pg26); the existing JS TW site is sequentially preferable (C10 p6.13) and it is, therefore, appropriate to explore the potential of that site to accommodate more intensive retail development; and TW is further considered (C10 p40-6.86 and Appx 8) in the assessment undertaken by the Architects DMWR.

217. However, Mr McGrath suggests (G12 p7.16) that whilst flexibility is a “key consideration”, JS has already explored extending the TW store (G10 p3.16-3.28). He goes on to suggest (G12 p7.17) that this is evidence that JS has been flexible in format and scale and has been unable to reach a mutually acceptable solution. Yet if permission for the TW extension had been granted, he agreed that this would have been a mutually acceptable solution and that we would not be here today because JS would simply have extended the TW store.

218. Thus, sufficient flexibility in business terms and for the purposes of the Framework, is (contrary to the case that has since been advanced by JS) actually one store in BTC as per the proposal for 4,118sqm f/space and 400+ car parking spaces at TW in 2009. Rather than being permitted to sidestep the requirement to demonstrate flexibility by pointing to the 2009 extension application, JS’s case ought properly to be analysed directly in relation to the rationale for the extension as set out in the PRS for the 2009

extension application (G10A Appx 11 p3.4) which was to “improve the retail offer and customer environment at the store, to respond to customer feedback and compete more effectively with larger supermarkets within and outside of the town centre”.

219. The Inquiry heard no evidence to support the assertion in the PRS for the application that led to this appeal (C10 6.53) that an extended TW store “would not be of a sufficient size to materially affect shopping patterns...or to provide genuine competition for dominant Tesco stores at Marks Farm and Great Notley” or the assertion (p6.56) that JS has “established that there is a genuine need for the size of the store proposed at Broomhills and that the quantum of retail floorspace that could be accommodated at the TW store through an extension, would not meet that need”. Indeed, such assertions are inconsistent with JS’s case for the 2009 application. It is fundamental, in considering what really constitutes a flexible approach, to recall that Mr McGrath confirmed that the proposed extension to the TW store represents a flexible approach.

220. Moreover, BDC’s Statement of Case (G4 p19, 20) sets out the Council’s concern about the lack of evidence on the sequential test. No meaningful attempt has been made by JS to respond to this beyond a self-serving letter from the JS Head of Property Acquisition and Development to “whom it may concern” (G10a Appx 9) of 11 November 2014, the date for the submission of evidence; it was obviously prepared solely for this Inquiry.

221. The letter fails to provide any reasoned analysis as to why JS no longer considers an extension to TW to be suitable for its purported business needs if, indeed, that is the case. The letter contains numerous statements that are either inconsistent with the JS evidence to this Inquiry (such as a statement that the TW store is “a popular store and it trades strongly” despite Mr McGrath’s evidence that it trades only marginally above company average); or assertions that are unsupported by any evidence at all (such as the suggestion in paragraph D that the appeal proposal “needs to be at least twice the size of the existing town centre Foodstore”). Furthermore, the assertion at paragraph G that the TW store is unable to compete with other Braintree foodstores fails to address the potential for an extended TW to compete.

222. The Inspector and the SoS are invited to conclude that JS has failed to demonstrate, illustrate or evidence any material change in circumstance which would oblige the appellant to increase the size of its proposal and/or opt for a less flexible format in Braintree.

223. No case has been made by JS to support a need for more than 4118m² at TW or for the 4,700m² at the appeal site. This remains so, despite the extended Great Notley and Marks Farm Tesco stores, given that JS was aware of those proposals at the time the appeal scheme was being promoted.

224. Mr McGrath’s attempts to caveat the TW extension proposal as no longer meeting the JS business requirements due to Braintree’s changed retail landscape must be accorded limited weight, given that nowhere in his

proof of evidence (G12 e.g. p7.16 and 7.17) does he seek to caveat the TW extension application's relevance as a demonstration of sufficient flexibility for the purposes of this appeal by saying something along the lines of 'the retail landscape changed following the decision to refuse'.

225. At the very least, the SoS can note that in 2009, the TW extension represented a sufficiently flexible form of trading so far as JS was concerned, it met JS's purported business requirements and was still relied upon by Mr McGrath as demonstrating flexibility.

226. That proposal was for an extended TW store to provide additional floorspace on both the ground and first floors, with a deck over the existing adjacent car park. It was not for an extension plus an out-of-centre site or any other two store combination. Also, TW would have been 4,118m², much larger than anything else in the town centre (G10 pg14 table 2.2).

227. The floorspace of the appeal proposal is 4,765m² net and, although this would be the largest supermarket in Braintree, the 2009 extension proposal would also have been the largest store (around 400m² larger than Marks Farm and 1,500m² larger than Great Notley).

228. Mr McGrath suspends reality by contending that he does not consider that there is anything more that JS could reasonably have done in respect of the TW extension or could reasonably have been expected to do to promote that extension. The reality is different; the 2009 extension application was only withdrawn after it was scheduled for planning committee and the finalisation of the Committee Report for the 2009 Sainsbury's Town Centre Extension Proposal (G10a Appx 8).

229. This stated that there was "no objection in principle to the proposed store extension and decked car park". It was "acknowledged that the site is entirely appropriate for such proposals and would benefit Braintree town centre". It is clear that BDC was willing to engage in the process of refinement and that it supported the principle of extension (G8 p5.23-5.28), despite a number of matters of technical objection. JS failed to press home its 2009 proposal notwithstanding that clear support for the principle of the extension. The officers were "entirely supportive of the principle of extending the existing store" and "the principle and scale of development [was] found to be wholly acceptable" (G12a Appx 6 pg44/45 email from I Harrison to L Croft at 09.32 on 26/3/09).

230. In the Committee Report for the 2009 TW proposal, the first point of concern related to design matters, namely the poor quality of the extension proposal's design and its poor architectural detailing (G10a Appx 8 pg68-70). Yet, JS chose not to instruct Professor Tavernor or any other expert to deal with this matter. JS acknowledged that it could deal with the second point on highway matters (Appx 8 pg70/71). The third related to the lack of an arboricultural report (pg71), which JS did not obtain, notwithstanding the Council's suggestion.

231. Consider the letter from Ian Harrison of BDC of 28 July 2011, which notes (D1 pg2) "as made clear at the meeting, it appears that a very narrow range of options for the town centre have been explored". Indeed,

that letter also directly pre-empts what now appears to have become JS's central argument against the feasibility of extending TW (that the site is subject to a number of insurmountable constraints) when it notes that "whilst landscaping features provide challenges in respect of the development of the site", the Council "remain unconvinced that these constraints make development impossible".

232. The reality is that by this stage, JS had directed its attention towards a new store at Broomhills. Indeed, and notwithstanding Mr McGrath's assertions that the 2009 application demonstrated sufficient flexibility, there is no evidence as to how JS continued to explore options to extend its TW store. JS would not, apparently, spend £300,000 on the TW scheme and then walk away, notwithstanding the clear indication of support in relation to principle and scale, unless the real explanation was that it had lost its appetite for the site in favour of Broomhill's Industrial Estate.

233. Thus, JS allegedly spent £300k on fees for the 2009 extension scheme; it was told by officers that they would work with Sainsbury's and that they supported the principle and scale of the proposal and, yet, there was just one meeting with the Council thereafter until the appellant came back with a pre-application on the Broomhills site. When considered objectively, the irresistible conclusion is that there are a number of things that JS could reasonably have done or been expected to do to promote the TW extension. These include simply continuing in their ongoing dialogue with the Council and consultees rather than turning heel to Broomhills.

234. Mr McGrath's statements about JS being unwilling to invest further time and effort in relation to the extension of the TW store sit uncomfortably with the time and effort now being spent on the appeal scheme. It is telling that the TW proposals were abandoned very easily whilst the current, out of centre, proposal is being pursued with determination.

235. Insofar as JS may attempt to suggest that its 'two store strategy' now requires the appeal proposal to operate in tandem with the TW store, a requirement for two stores was not set out in relation to this appeal prior to the letter of 11 November 2014 (G12a Appx 9). That letter is manifestly self-serving and inconsistent with other aspects of the appellant's case and it can therefore be accorded no material weight.

236. There was never any suggestion of a two-store strategy at the time of the application in 2009. Furthermore, no such requirement was set out in the PRS dated July 2012 (C10) or in Mr McGrath's proof (G12).

237. It may be suggested that JS' "strategy" was intimated in an email of 9 September 2013 (C57) but when considered in its proper context, reference to "strategy" in that email is no more than a statement of what the effect of an out-of-centre and in-centre store would be. It is merely a description of what would be provided in due course should this appeal succeed. It is not a coherent statement of the appellant's requirements or needs in any strategic sense and it does not purport to be.

238. It is also relevant to note in relation to the assertion that it is the JS "strategy" in Braintree "to operate two stores that complement each other" (and despite other assertions that the appellant was "always going to keep the TW store"), that the various incarnations of the UU as presented during the course of evidence did not require that store to continue trading as a Sainsbury's supermarket (H21). Indeed, this was accepted by Mr McGrath in XX when he agreed that JS would not be "legally obliged to continue to operate from TW" but that he was "confident that they will continue to trade from TW".

239. As such, and in relation to whether the TW store would be a Sainsbury's store in 2, 5 or 10 years' time, the position following the conclusion of the evidence was that the Inspector could report no more than that he had been assured by the appellant's planning consultant that this is the company's current intention. Subsequently, JS has recently proffered a S106 which covenants to keep the store open and trading as a Sainsbury's.

240. However, it is only at the eleventh hour that this was offered is clear evidence that there was never any "two-store" strategy. Only at the last minute did the penny drop on the appellant's side when it realized the fundamental inconsistency of claiming its strategy was for two stores while only guaranteeing one.

241. Thus, does the strategy depend on the appellant's 'say so' or on an objective assessment of the need for two stores? (H35 p11.10). No material weight can be attached to the suggestion that JS needs a two store retail strategy for Braintree. The reality is that the appellant has been forced to maintain a town centre store.

242. As to the weight that should be attached to the "keep open" covenant, note the terms of the email of 2 January 2015 sent by the appellant's solicitors, Dentons, to Ms Lambert and Mr Hunt of the Council attaching a revised draft of the S106 Obligation which includes "the addition of a personal covenant by Sainsbury's Supermarkets Ltd to keep the store open".

243. Dentons notes that "this covenant is offered notwithstanding that the appellant does not consider the obligation to be Regulation 122 compliant" (H18).

244. Not only is the revised 'keep open' covenant offered "on the basis that it takes effect only if the Secretary of State confirms in his decision letter that he considers such an obligation to be compliant" but also in the belief that such a covenant is unlawful and should be given no material weight. As such, the weight to be attached to the 'keep open' covenant as contained in the January 2015 revision ought properly to be regarded as negligible. The evidence in this Inquiry was heard on the basis, and in the context, of an appellant giving nothing more than vague, potentially unenforceable, assurances that TW would remain operated by JS for ten years. A non-CIL compliant 'keep open' covenant adds nothing but confusion in that context.

245. The two-store strategy extends to one store out-of-centre at Broomhills but no guaranteed Sainsbury's in the town centre. This is also relevant in terms of any assertions that JS may make in relation to support for the proposal based on the outcome of public consultation and/or engagement. Such consultation and engagement has always been explicitly based upon the premise of TW being maintained as a Sainsbury's store (G12a Appx8). Those in support of the appeal scheme will not know that the most the appellant is guaranteeing is a store at TW operated by an unspecified retailer.

246. If JS were to employ a reasonable approach to flexibility, then an extended store at TW, which lies in a sequentially preferable location, would meet the same role and function as the appeal proposal. Both stores would be large enough to meet main and top-up food shopping needs, as evidenced by the survey material.

247. The TW store already provides a modern attractive sales area which includes fresh meat, fish and vegetables, refrigerated, frozen and pre-packaged groceries, beers, wines and spirits and a small area of comparison goods sales. The sales area also possesses bakery, fish, butcher and delicatessen counters.

248. The suggestion that an extension to the TW store would perform "an entirely different role and function to the new store" and/or only compete with the other large out of centre Tesco stores due to their size and large turnover was neither borne out by the evidence nor the apparent business requirements of JS, so far as it was possible to discern them.

249. The stated objectives of both proposals are undeniably similar and if one looks at main food expenditure as a proportion of total turnover then the Tesco MP and JS TW stores are no different from the large Tesco stores. Main food shopping means as much to town centre stores as larger stores elsewhere. Arguably, it may mean more given that the turnovers and market shares of town centre stores are falling.

250. It is agreed that it is appropriate to consider both the TW site and the Land West of George Yard site for the purposes of the sequential test.

Land West of George Yard

251. The appellant's insistence that the Land West of George Yard site is unavailable for the purposes of the proper application of the sequential test in this appeal is unsustainable and, in any event, not proved. As explored in evidence, RL (A11) is not the only post-Framework decision that deals with the issue of availability.

252. The Bath Press decision (A13) considers the timing of availability and notes that (A13 December 2013 p12.27): "*The final element of the sequential test is availability. The Practice Guidance at paragraph 6.37 defines availability as "whether sites are available now or are likely to become available for redevelopment within a reasonable period of time (determined on the merits of a particular case, having regard to inter alia, the urgency of the need)." Thus, the questions to answer are what is a*

reasonable period of time to assess potential availability, and is the site available?"

253. Then at p12.28: *"On this, the Practice Guidance at paragraph 6.39 indicates that the issue of availability and the sequential approach have to be considered together with the impact of development occurring in edge or out-of-centre locations, and the long term consequences for town centres. Thus, whether it is appropriate to assess availability over 3 to 5 years, or a longer time period will depend upon local circumstances. One of the elements of "local circumstances" is the "urgency of need". Retail need is generally expressed in terms of quantitative need or capacity and qualitative need. Here, whilst Tesco and the LPA do not agree over the level of population growth to be used to determine future retail capacity, it is clear from the various estimates of capacity and turnover of the proposed store that there is no urgent quantitative need up to and beyond 2021 (6.36, 8.49, 8.5 & 8.51)."*

254. Then at p12.32, the Bath Press decision notes that: *"Whilst there may be commercial benefits to both Homebase and the landowner for a relocation to occur significantly earlier than 2020 and the uncompromising tone of the December 2012 letter could be construed as commercial posturing, I agree with Tesco that any suggestion that the Homebase site could come forward earlier than December 2020 is speculative (5.19). That said, given my conclusion on what is a reasonable timescale to consider potential availability, I consider a site that would be available in December 2020 would meet the Practice Guidance and test relating to availability and would not be inconsistent with the Framework when taken as a whole."*

255. In light of the above, BDC emphasises that there was no suggestion in evidence that there would be insufficient space available for a redevelopment scheme that would suit the appellant's requirements at the West of George Yard site. Mr McGrath said that "in geographical terms – there might be a site big enough to accommodate our application". As such, and in light of the Bath Press decision, this site ought not to have been discounted as a redevelopment possibility for JS, yet it has not provided any evidence to demonstrate a proper investigation of the opportunities that the site would provide.

256. While there is no formal direct link between the sequential test and the former test of need, there is no plausible reason why the **issue of need** and its urgency should not be considered a material factor in terms of the availability of alternative sites. Notwithstanding the appellant's reliance on the RL decision, when that decision is considered in full and due regard paid to the SoS (A11 p15, 16), there is nothing to support the contention that, in a post-Framework and post-Guidance world where we now have far fewer policy documents, 'need' has become an irrelevant consideration.

257. The appellant's misplaced reliance on RL with reference to the issue of need is an unhelpful distraction. While there is no planning policy requirement to demonstrate need for the proposal (and, therefore, the issue of need was not determinative of the decision to refuse the proposal), 'need' remains relevant insofar as the rationale of the proposal may be important and, in accordance with the Framework, plays an

important part in determining those sites that should be identified to meet the demand for land for town centre uses.

258. 'Need' is relevant both in terms of it falling to the appellant to demonstrate that the adopted retail strategy fails to meet this need or provide clear evidence to support the contention that the need exists for the scale of store that is proposed. It is also relevant in terms of how the appellant chooses to formulate its purported business requirements or objectives in that such requirements or objectives could just as easily be described as business needs. Such nuances were frequently lost during evidence, given the appellant's refusal to deal with 'need' in the light of their interpretation of the RL decision.

259. Although JS insists that need is "*an irrelevant consideration*", its own PRS considers precisely that issue when it asserts (C10 p6.56) that it has "*established that there is a genuine need for the size of the store proposed at Broomhills and that the quantum of retail floorspace that could be accommodated at the TW store through an extension, would not meet that need*".

260. Such assertions are inconsistent with the case proffered by the appellant in relation to the 'flexible' 2009 application. Also, the most up to date evidence on the health of the town centre does not sustain the suggestion that additional convenience floorspace is required to claw back spending leaking from the Braintree area, given that the evidence clearly indicates a high level of convenience spending being retained within the catchment.

261. JS has made no attempt to evidence such assertions or address the survey evidence where it is materially at odds with its case. Even if there were evidence of the leakage of convenience expenditure (which there is not), there is a difference between clawing back that expenditure to support the town centre and clawing back expenditure to a development in a location that compromises the health of the town centre. Whilst there is some capacity available for comparison floorspace to meet the need of the Braintree town catchment, the Core Strategy seeks to direct this provision to the town centre where it can support town centre vitality and viability.

262. JS has provided no evidence to support its case for consumer demand for this scale of store. The evidence reveals no substantial or urgent need, in a quantitative, qualitative or business sense, to support the case for a large supermarket at the appeal site. The assessment and quantification of need is relevant in determining the timescale for meeting that need, particularly in the assessment of whether any sequentially preferable site for meeting the need is available.

Sequential Test Conclusions

263. The appellant has failed to adequately justify the contention that there are no sequentially preferable sites within the town centres in the catchment area of the proposal. There is such a site or sites, the first being

JS TW. Here, the size of store identified by the appellant as being suitable for the appellant is 4,118m².

264. The appellant seeks to hide behind the comments of third parties such as EH but, notwithstanding concerns raised by third parties to the form of development comprised in the 2009 application, the principle of that application was strongly supported by planning officers. There is no reason to believe that EH's comments would have been determinative of any decision. The effect on the character and appearance of the Conservation Area was a matter for the planning judgment of the Council.

265. JS made no effort to deal with or counter the criticisms identified by the Council. Mr McGrath was unable to identify any way in which the appellant had sought to address the issues raised by the Council and third parties. JS was aware of the availability of Broomhills Industrial Estate at the time of the 2009 application for TW. Indeed, Mr McGrath was in discussions with planning officers about Broomhills since 2008.

266. The appellant was distracted by the prize of what it saw as a commercially more attractive proposition so it took no further steps to advance the TW extension. There was no genuine and reasonable attempt to obtain planning permission for what it identifies as a flexible format store which would satisfy its requirements and the sequential test.

267. Given the level of support from BDC's officer for the enlarged TW store, JS's failure to advance a new application is explicable only on the basis it had taken the decision to focus on Broomhills. Thus, the appellant has not been flexible in the scale and format of its proposal and has made no attempt to justify the scale and form of the superstore proposed on the site. However, it is clear that the TW store, as extended, would represent an acceptable flexible alternative which JS could have accepted.

268. The proposal fails the sequential approach and, as a consequence, conflicts with Policy CS6 of the Core Strategy and p24 and 27 of the Framework.

Impact

269. The Framework makes clear (A1 p26) the importance of assessing the impact of a proposed development, particularly in terms of impact on existing private investment in a centre within the catchment area of the proposal. This must extend to an assessment of the impact of the proposal on town centre vitality and viability including local consumer choice and trade in the town centre up to five years from the time the application is made, and for major schemes, for ten years from the time the application is made.

270. There is a good deal of agreement with the appellant on the assessment of impact; the assessment years are 2019 and 2024 and it is appropriate to assess the impact of the appeal proposals on BTC as a whole, including the combined convenience and comparison impact and separate convenience and comparison goods impacts at 2019 and 2024 (G6 p2.7, 2.26).

271. There can be no dispute that the proposal would have an adverse impact on BTC. Both retail experts predict this. The issue is whether such an impact would be significantly adverse (A1 p27).

Health of the Existing Town Centre

272. This is an area upon which there is substantial agreement and substantial disagreement. There is substantial agreement that there has been a sea-change in the amount of convenience spending taking place within BTC since the application was made (G10 Table 2.3 and p2.21-2.22). The agreed total convenience spending in BTC in 2012 was £83.8m but, in 2014, the agreed comparable figure was £40.9m, less than half. This is a "collapse" in convenience retail spending in the centre, as Mr McGrath agreed in XX.

273. This demonstrates that there has been a marked change in the retail profile and provision within BTC in the past two years. The Framework recognises, as does the appellant (G6 p2.26), that changes in retail profile and function can take between five and ten years to manifest themselves. On any basis, this collapse in convenience retail spending is merely nascent, and the full effects have not had time to fully take effect or be appreciated. On any basis, the Inspector and the SoS should be seriously concerned at this major change of circumstance, which has manifested itself since the application was submitted.

274. Both principal parties have submitted written statements on the 'health of the town centre' (G13, G13A, G14). Neither can be afforded full weight given the inability to cross-examine their authors. The appellant's Mr Shearman has no local knowledge; he suggests that the site is in East Anglia (G13a Appx 9 p8).

275. Mr McLeod, by contrast, has 40 years experience as a local agent specialising in rent reviews, lease renewals and agency matters, acting for landlords and tenants. He deals with the suggestion that, because the vacancy level is not high, this could give the impression that the town centre is in robust health (G14).

276. However, he says that "my experience in recent years does not subscribe to that viewpoint.....We are now seeing a proliferation of shops relating to Ladies and Gents hair fashions, nail bars, tanning studios, tattoo parlours" (G14 section 5). He explains that the status of tenant, particularly in the non-core area, is diminishing. Further "there are signs that this effect is now beginning to encroach into the core area including George Yard". He describes the town as "fragile and certainly losing its vitality and viability".

277. There is powerful corroboration of this from members of the public who have spoken. Mr Bignold described a "sad state of affairs with a run-down town centre" with "virtually nothing but a limited Tesco store, where there would appear to have been no investment in the ground floor grocery area for years, plus a fairly active but limited Sainsbury's, where there has been some investment in refurbishment, and a limited Morrison's; also, there are the usual estate agents, charity shops, bank

branches, a pound shop, party shops and branches of one or two of the national chains, etc. It is all a very unattractive retail proposition to attract consumers into the town". Indeed, and contrary to Mr Shearman's assessment, Mr Bignold cited the "total decline of the town centre".

278. Particular weight should be accorded to these assessments as they, along with the oral evidence provided by other residents, represent a consistent view of members of the public as to the perception of BTC as a retail destination and its relative fragility. Note also the email of 19/9/12 from Ms Saffell (G2A last 'letter').

279. It is notable that these views are at odds with the appellant's assessment. However, no one has advanced the argument that, given the parlous state of the centre, it does not deserve any further protection from national and local policy designed to protect and strengthen the vitality and viability of the town centre.

280. There is clear evidence of the manner in which the town centre is changing (G10 Table 2.1), with the decline in both convenience and comparison stores and an increase in the service sector. This is consistent with the assessment given by Mr McLeod and local people. This is evident from a comparison table of the survey results from 2011 and 2014 (F10, F12, F13). The decline in main clothes shopping is from 38.5% to 17.9%; Books, DVDs, stationery and cards from 51.1% to 32.7%; recreation and leisure from 32.6% to 18.3%; china, glass, textiles from 36.3% to 26.8%; and audio visual equipment from 20.4% to 12.9%.

281. This indicates a drop in turnover of town centre non-food expenditure from £110m in 2012 to £95m in 2014, a fall of some 14% (C10 Appx 7 Table 14a; G12a Appx 4 Table 14).

282. JS sought to offer the rise of the nail bar as a virtue in establishing the vitality and viability of the town centre (H35 p16.8) but that merely serves to emphasise the problem. The evidence clearly points to the importance of the convenience store in leading to linked trips for the benefit of vitality and viability of the town centre as a whole and the on-street surveys bear this out.

283. Table 5a of G10a Appx 6 demonstrates the source of the turnover for the town centre stores. Some 79% of JS TW and Tesco MP turnover is main food shopping. It is 69% for Morrisons. This demonstrates the very strong main food shopping function of the town centre as existing. This is similarly borne out by the surveys as to the main (primary) reason for visiting the centre. The 2014 on-street survey discloses (F14 pg5) 20% for non-food and 31% for all food. The other (secondary) reason (F14 pg6) discloses 24% for non-food and 26% for all food.

284. This survey also indicates (F14 pg21) that, in respect of those who visit the town centre for food as their main reason, 38% of full trolley shoppers also go non-food shopping, 29% of half trolley shoppers also go non-food shopping, and 32% of basket shoppers also go non-food shopping. Overall, of the 96 food shoppers surveyed, 32% were going non-food shopping and a mere 7% were going to services such as a hairdresser

or nail bar. Thus a low number of people are linking with services such as hairdressers and nail bars and a considerably higher number are linking with non-food shopping.

285. The hypothesis that Braintree has an important role as the nail bar capital of Essex is wrong. Braintree is a town that still sees food shopping as the principal reason for visits to the centre. The evidence also demonstrates strong linkages between food and other non-food shopping (G10 Table 2.5 pg20 - linkages between main food shopping trips and other shops and services).

286. The numbers of shoppers going to JS TW, Tesco MP, and Morrisons for main food shopping and undertaking linked trips is high, at 47%, 43% and 40% respectively.

287. For those using out-of-centre stores the figures are markedly lower.

288. Of those linking, the percentage using other shops and services is very high: JS TW – 92%; Tesco MP 74%; Morrisons 83%. These high percentages underline the importance of food shopping for supporting the vitality and viability of the town centre.

Conclusion on the Health of the Town Centre

289. There has been a dramatic “collapse” in convenience retail spending in BTC which coincides with the opening of out-of-centre stores. This agreed “collapse” is relatively recent (within the last 2 years) and it remains to be seen how it will affect the town centre. The indications are that this has also led to a significant reduction in comparison shopping and expenditure.

290. The perception of the locals is that the town centre is “run-down” and was effectively destroyed years ago. The view of the only local commercial agent is that the town centre is fragile with a diminishing quality of tenant, particularly in the non-core area.

Impact on the Town Centre

291. There is significant agreement on a range of retail data as set out in the RSoCG and the reconciliation statement (G6, G6A). However, this masks a very different conclusion with respect to the town centre impact. Regard must be had to the various shopping surveys and cross-tabulation information (F10-F14; B6, B7, B9; G10 pg6, pg9-21, p3.14-3.15, p5.7-5.9, p5.11, p5.24-5.25).

292. Mr Morris considers that the appeal scheme would, when other commitments are taken into account, have a cumulative impact of 27% on convenience spending in BTC by 2019. In terms of convenience spending diversion from the centre, that would amount to £13m (G10a Appx 6 Table 13 - £1.9m diverted to commitments and £11.1m diverted to the appeal scheme). Whilst not a failing centre now, there is continued pressure on convenience market share and turnover levels and competition for the comparison goods sector from the Freeport Outlet Village and the adjacent

Retail Park and leakage to Chelmsford and Colchester (G10 p2.43, 2.47-2.51).

293. The residual convenience turnover in the town centre would be £34.6m post commitments and the opening of the appeal scheme (G10a Appx 6 Table 13), compared with a pre-impact turnover figure of £47.6m. However, the figure of £47.6m should itself be compared with the agreed pre-2012 figure for town centre convenience turnover of £83.8m. Thus, taken with the opening of the out-of-centre stores in 2011, plus the cumulative impact of commitments, the impact on the town centre food expenditure would be a massive (£83.8m - £34.6m = £49.2m or) 59% on the 2012 position.

294. On a like-on-like comparison of approaches, Mr McGrath says that the existing town centre convenience turnover is £47.41m (G12a Appx 4 Table 12b); he agrees the 2012 convenience turnover figure of £83.1m (G12 Table 4.1 pg15). However, he considers that the residual convenience expenditure in the town centre after commitments and following opening of the appeal scheme, would be £41.56m, a cumulative convenience impact of 18%, and a reduction of only £5.85m in relation to expenditure from shoppers visiting the centre.

295. Leaving aside for a moment the issue of on-line sales, the differences in residual town centre turnover (Mr Morris £34.6m and Mr McGrath £41.56m, a difference of £6.96m) appear to derive from the following. Firstly, Mr McGrath considers that the committed floorspace will draw £0.76m from the town centre, whilst Mr Morris considers its draw will be £1.9m (a difference of £1.14m). Secondly, Mr McGrath considers the draw to the appeal scheme from existing town centre stores would be £5.09m, Mr Morris puts this figure at £11.1m (a difference of £6m) (G12a Appx 4 Table 12b; G10a Appx 6 Table 13).

296. Dealing with the above differences in turn, the main issue on the commitments trade draw is the type of store assumed on the **EMD Halstead** site. Mr McGrath considers it will be a discounter but Mr Morris considers that an Asda is more likely. There is no reason to give the benefit of the doubt to the appellant. The permission is not restrictive in any way and it does not impose any conditions which would make the site more attractive to a discounter than a main food operator.

297. Indeed, Mr McGrath's assertion that restrictions on Sunday deliveries would prove materially more of a disincentive for main food operators than discounters who clearly also would require Sunday servicing, albeit possibly at a lower frequency, was given without any evidence in support and thus cannot be attributed any material weight. The suggestion that Asda would not be interested in such a site is also an assertion without any evidence. Indeed, Asda has made clear its desire to open smaller stores of this size, as Mr McGrath agreed in XX.

298. As to the **diversion from existing town centre stores**, the differences are marked. Mr McGrath considers the convenience trade diversion in 2019 from the existing JS TW store would be £3.97m (plus £3.18m on-line sales), Mr Morris says £5.6m; Mr McGrath says £0.83m

from Tesco MP and Mr Morris says £4m; Mr McGrath says £0.25m from Morrisons and Mr Morris says £1.2m (G10 pg65 Table 7.1; G10a Appx 6 Table 12c; G12a Appx 4 Table 12b; see also table 8 and G12 table 6.1A pg37).

299. If Mr McGrath were correct, the impacts he identifies could be considered relatively modest but that would be to ignore the accepted collapse in convenience retail expenditure in the town centre. Any further transfer of convenience expenditure would be in addition to such a collapse. It is unreasonable to suggest that an extended 4,118m² net town centre Sainsbury's would perform an entirely different role from the proposed 4,765m² appeal proposal (G10 p6.53-6.54).

300. Mr McGrath's figures cannot be correct for a number of reasons. It is clear that these town centre stores are susceptible to trade diversion to out-of-centre stores. Note Mr McGrath's own evidence (G12 Table 4.1) where he charts the reduction in turnover from 2011-2014 which is directly attributable to the opening of out-of-centre stores, a reduction of £16.62m for JS TW and £23.53m for Tesco MP. These are impacts of 47.5% and 61.5% respectively. And all agree that they are attributable to the opening of Tesco Marks Farm, and Tesco Notley, where the net convenience floorspace is 2,609m² and 1,953m² respectively (a total of 4,562m²) (G6 p2.17 Table 2.5). Mr Morris' convenience store turnover figures also show significant falls for the town centre Tesco and JS stores and increases in the out-of-centre ones, with the convenience turnover of the centre falling from £83.8m in 2012 to £40.9m in 2014 (G10 pg14 Table 2.3).

301. Thus, the provision of 4,562m² of floorspace in out-of-centre locations has led to the diversion of a total of £40.15m of convenience expenditure away from the two main foodstores in the town centre, that is £8,800 for every new square metre of out-of-centre floorspace provided (H35 p17.10).

302. Against that background, Mr McGrath suggests that the provision of 3,097m² net convenience floorspace within the appeal scheme would divert just £5.85m, of which £4.8m would be from JS TW and Tesco MP. This indicates a diversion rate of £1,550 for every new square metre of convenience floorspace provided within the new development. This is a serious under-estimate of the effect of the proposed new store.

303. Mr Morris calculates diversions from the JS TW store and the Tesco MP store of £5.6m and £4m respectively (G10a Appx 6 Table 13) (total £9.6m) would give a diversion rate of £3,100, which itself would be only one third of the rate for the two Tesco stores on those two main town centre stores. It may be thought that Mr Morris' assessment is conservative but it is far more realistic than that offered by Mr McGrath.

304. It is accepted that there is no science to these assessments but it must also be accepted that the two stores that have been provided out-of-centre, and which have had such a profound effect on the convenience expenditure turnover on the town centre, are both Tesco stores. The provision of a new out-of-centre JS store, with ample parking and easy accessibility for the car-borne shopper would be bound to have a similarly

profound effect, especially given the brand strength of Sainsbury's as a retailer.

305. The other remarkable aspect of Mr McGrath's assessment is the source of the turnover of the new store. He assumes that it would derive £3.31m of its turnover from the out-of-centre **Lidl** on Rayne Road and a similar amount from the JS TW store (£3.97m) (G12a Appx 4 Table 12b). Indeed, the proportion derived from the Lidl would be, as a percentage of Lidl's turnover, slightly more than that from JS TW.

306. This is nonsensical. Lidl is an established discounter which has a very limited range of lines and offers a very basic shopping experience. While there would, no doubt, be some turnover of the new store diverted from Lidl, by far the greater share would be from the JS TW, from those customers who enjoy the Sainsbury brand.

307. This is precisely the point of the proposed store (G12a Appx 9), to "improve the shopping offer and experience of our customers" and to allow the store "to function as a destination for full weekly grocery shopping trips" and "to stock and display a full range of grocery items". This would inevitably draw trade from the existing TW store, which also offers convenient car parking. Mr McGrath seriously underestimates that draw, as underlined by the comparison with the estimated trade draw from Lidl.

308. Mr McGrath's estimated trade draw from **Tesco MP** is similarly far too low. The JS letter (G12a Appx 9 para G) cites competition with the out-of-centre Tesco as a *raison d'être* of the application but there is no logical reason why that should not extend also to the main food shoppers who use Tesco MP. Mr McGrath attributes a diversion of just £0.83m from Tesco MP, yet (apparently based on the ability of the new store to take trade from the Tesco brand) he assumes a diversion of £4.97m and £6.62m from Tesco Marks Farm and Tesco Great Notley respectively. This indicates an unfair and unbalanced assessment by the appellant (H35 p17.14).

309. Mr McGrath's assessment is also notably different from that which he produced as part of his own Planning and Retail Statement (C10 Appx 7) for the application that led to this appeal. Table 12 of that PRS indicates a diversion to the new store from the existing Tesco MP of £4.75m, and from the JS TW of £8.23m. These were impacts of 15% and 26% respectively, at a time when Tesco Marks Farm and Tesco Great Notley were trading. But now, Mr McGrath's assessment is that the impacts would be a diversion from Tesco MP of £0.83m, giving a solus impact of 4.8%, and a diversion from JS TW of £3.97 (excluding online, see below), giving a solus impact of 18.7%.

310. This is the percentage impact in 2019 of a diversion of £3.97m on a turnover of £21.23m. The figure given in Mr McGrath's G12a Appx 4, table 12b, of 29% is the solus percentage impact of diverting the £3.97m plus the £3.18m online sales, from the **JS TW store**, assuming a turnover of £21.23m plus £3.18m online sales = £24.41m i.e. an impact of a diversion of £7.15m on a turnover of £24.41m.

311. The last area of major disagreement is the treatment of **on-line sales**. This is because Mr McGrath's assessment of the impact on the town centre assumes that £6.62m of the convenience turnover of the proposed store would derive from on-line sales. His approach in the PRS (C10) was not to separate out on-line trading as a separate contributory item to a store's turnover. It was effectively ignored and the assessment was undertaken on the basis of turnover derived from shopping visits. However, this is not the approach that he has adopted for this Inquiry.

312. For the new store, he has taken the data from Verdict which assumes a benchmark turnover of £33.11m, which is agreed by Mr Morris (G10A Appx 6 table 12a). However, Mr McGrath then seeks to identify £6.62m (being 20% of the total turnover) as being on-line, and that this would include the £3.18m on-line turnover from the JS TW store. This enables him to claim that the consequential residual turnover for the new store would impact less on the town centre as it is possible to reduce the assumed diversion (given that a higher proportion would be derived from on-line sales).

313. This argument is flawed on a number of levels. Firstly, the approach is wrong as a matter of principle. Both consultants agreed to use a Verdict-based "benchmark turnover" figure for the turnover of the new store. However, Verdict does not separate out on-line sales from sales to visitors to the shop. The 20% figure was, as Mr McGrath accepted in XX, a figure derived from his client but it is 5% above the figure used for the JS TW store for on-line food sales (said to be 15%), which itself has no independent verification. However, this is comparing oranges with apples.

314. Mr McGrath was prepared to take a benchmark figure for the turnover of the new store (from Verdict data) but to use JS derived figures (which have not been provided to the Inquiry) as the basis for assessing the contribution of on-line sales for both the existing JS TW store and the proposed new store. This is unfair and unprincipled.

315. Either one uses a benchmark figure which makes no alternative assumption in respect of the contribution of on-line sales or, if the appellant's own forecasts are to be used, then they should be fully revealed. However, Mr McGrath would not release any figures of either actual sales at JS TW or forecast sales at the new store. The new store's reliance on on-line sales is simply conjecture. No material weight may be attributed to the contribution of on-line sales.

316. While there is evidence that the on-line sales would "transfer" from JS TW to the new store - thus "releasing" some turnover for the new store from the old store but without impacting on vitality and viability of the town centre - there is no contractual (through S106) or other provision to require this. Indeed, it is impossible to envisage how it could be enforced. It will be a matter for JS as to where it sells on-line from. For the purposes of this Inquiry, the utility to JS's case of "deriving" turnover in the new store from on-line sales can be seen in its predictions (G12a Appx 4 compare tables 15a and 15b).

317. Without any independent verification of the contribution of the on-line sales element to any particular store, it is wrong as a matter of principle to seek to strip out this element. For the existing JS TW store, Mr McGrath assumes a pre-impact 2019 convenience turnover of £21.23m plus £3.18m from on-line sales. He then makes an allowance for commitments (the EMD site at Halstead and a Morrisons extension at Witham) and assumes there will be a £3.97m diversion of trade from customers presently visiting the JS TW store shopping for convenience goods. He separately assumes that the existing £3.18m of on-line sales will be transferred to the new JS store.

318. Mr McGrath is using a higher assumed turnover for the JS TW store and adding as an extra component the on-line sales. This is in contrast to Mr Morris' approach which has derived turnover from the household surveys. There was no suggestion in the XX of Mr Morris that he had underestimated the existing turnover of the JS TW store. The effect is that, on Mr McGrath's assessment (G12a Appx 4 table 12b) for 2019 following opening of the Broomhills store, there would be a diversion of £3.97m convenience in-store spending and £3.18m on-line spending (which is his 15% of convenience turnover of the TW store).

319. So far as the Broomhills store is concerned, although both consultants agreed to use an assumed benchmark turnover for the new store, there was never any suggestion from Mr McGrath that any given proportion of that should be attributed to on-line sales, apparently using private information from his client. He has 'cherry picked' assumptions that suit his client's case and used alleged information known only to his clients.

320. The consequence of his SM's approach is that he can reduce the trade draw of the new store by assuming that 20% of its benchmark turnover will be derived from on-line sales of convenience goods. While it is possible that the JS business plan assumes that 20% of the turnover would be from on-line sales, it may also be that the store would trade more successfully than benchmark levels.

Impact Conclusion

321. The assumptions made by Mr McGrath are inconsistent, unbalanced and unfair. His predicted 17.9% impact (including on-line sales) or 12.3% impact (excluding on-line sales) (G12a Appx 4 Tables 15a and 15b) on the convenience offer of the town centre represents a serious under-estimate of the impact of the new store on the centre.

322. By contrast, the assumptions made by Mr Morris are fair, balanced and appropriate. His prediction is that the impact of the new store on the town centre convenience offer would be 27% in 2019 and the total convenience and comparison impact would be 10% (G10a Appx 6 table 14). This would all be on top of the accepted recent collapse in town centre expenditure.

Consequences of the Impact

323. There is already clear evidence of the impact on the town centre of the opening of the out-of-centre Tesco stores at Marks Farm and Great

Notley – the closure of the town centre M&S store in 2009 and its relocation in 2014 as an M&S Simply Food to Freeport (i.e. to the Retail Park), which is increasing its market share in some comparison goods sectors, while the town centre is losing market share (G12 p4.6c).

324. The pre- and post-impact trading performance of town centre stores has been examined (G10 pg69 table 7.2). All parts of the convenience sector in the centre are currently trading below benchmark averages and this would be substantially exacerbated by the opening of the new JS store. The residual turnover of the JS TW store would £14.7m (Mr Morris G10a Appx 4 table 13) against a benchmark turnover of £24.5m (His table 8), some 40% less.

325. If the convenience floorspace of TW were less than the assumed 2,237m² (as indicated by JS in its 2009 application) and it were 1,827m² (as suggested by Mr McGrath and as now agreed in G6 p2.20), then the benchmark turnover for convenience goods at JS TW would be £20.03m. But the post-impact JS TW store would still be trading 27% less than the benchmark (G12A Appx 4 Tables 8 and 12b). It is not surprising that JS has been reluctant to commit to keeping J Sainsbury as the operator of the TW store for ten years.

326. The Tesco MP store would also trade substantially below benchmark rates - £12.4m against a benchmark of £21.9m based on Mr Morris' figures, trading at 44% less than benchmark figures. Again, there is a dispute as to the actual convenience floorspace at Tesco MP, and this depends on the ratio of convenience to comparison floorspace. Mr Morris uses that set out in the NLP study, as used by Mr McGrath in the appellant's PRS (C10). If Mr McGrath is correct, the benchmark figure for a store of that size would be £17.5m. However, even if he is correct, the residual trading would be 30% below benchmark.

327. As to Morrisons, there is no agreement on its convenience floorspace. Mr Morris says 1,214m² and Mr McGrath says 1,079m². Benchmarked against the larger figure, the store should be trading at £14m (G10a Appx 6 table 8). If Mr McGrath's floorspace figure is used, it would trade at £12.49m. Mr Morris' predicted post-impact convenience turnover is £5.8m (G10a Appx 6 table 13), which would be 59% less than Mr Morris' benchmark figure and 54% less than Mr McGrath's. If it were to close, the identified need is for comparison floorspace (B1 pg66 p6.28).

328. Based on those figures, Morrisons would appear to be doomed. JS TW would be in a precarious state and, even if it were to remain open for 10 years, there would be a substantial knock-on effect on the rest of the town centre's vitality and viability. Even Tesco MP would give cause for concern. The essential point is that each of the town centre main convenience stores would be trading substantially below its benchmark figure and it is obvious that at least one would be likely to cease trading. It would have been irresponsible for Peacock and Smith, on behalf of Morrisons (F17, F17a), to say this and worry staff and customers in advance of a Board decision.

329. Thus, **in conclusion** on this topic, there would be severe impacts on a centre that has already suffered a collapse in its convenience spending turnover. On any basis, the impact would be significantly adverse. It would be outstandingly irresponsible for such an impact to be countenanced and supported by this unmeritorious and opportunistic proposal.

330. This is a proposal for which there is no need and there is no other weighty material consideration which could justify such serious harm to the centre. Planning permission must be refused based on the impact the proposal would have on the vitality and viability of the centre and the impact on existing investment within it.

Design

331. The proposed design is neither in accordance with the Framework nor the Guidance and it would fail to satisfy the requirements of Policy CS9 of the Core Strategy and Policy RLP90 of the LPR.

332. There are functional needs for operators to consider when designing a superstore. However, the architect's brief (which, according to Prof Tavernor's evidence never existed) appears to have been shaped largely by the desired size of store, specific fixed operational matters and Sainsbury's fairly rigid model format. Very few opportunities for suitable, appropriate and/or merely different design features have been taken. Local contextual influences make an impact on the character of Braintree. There are several character areas around the site, which display positive and negative attributes for the sense of place. (G9 p44, G9A).

333. Superstores are inherently relatively large-scale land uses but they offer an opportunity to make a major positive contribution to an existing place, economically, visually and in terms of strengthening the 'sense of place' (G9 p59 and 60). A superstore is not limited to being a purely functional building or simply an efficient storage and distribution centre (G9 p162).

334. No weight can be attributed to the existing condition of the site and its large concrete blocks as it is the responsibility of the landowner to maintain a site. JS owns the site and is responsible for placing the concrete blocks at various points to prevent access and/or HGV parking. To seek to rely upon the presence of these concrete blocks as evidence that the proposal would improve the current state of the site is manifestly self-serving.

335. JS criticises BDC's design witness for never having designed a supermarket; the same can be said of the JS design witness, who was called to give evidence rather than the architect who had been briefed in relation to the appeal proposal or the JS TW extension scheme. Prof Tavernor for JS has had few conversations with the architects about the proposal and has only made suggestions in relation to potential adaptations to the SE corner of the site (G11A pg19-20). He was never asked to consider the opportunities associated with an extension to the TW store.

336. He insisted (G11 p3.11) that his client provided no "hard and fast brief". He also described his interpretation of the typical process involved

in such projects as it being “customary for the architect to first examine the sensitivities”, suggesting that this is “borne out by the recorded design process”. However, the DAS (C11) neither bears out a meaningful examination of sensitivities nor the absence of a “hard and fast brief”.

337. The DAS (C11 pg11, 12, H35 pg41/42 p25/26) refers to meeting the client’s brief, which suggests that one was provided but no evidence of it has been provided. In trying to deduce what that brief included, it is revealing that the proposed area of floorspace appears to have arisen solely as a result of the appellant’s unspecified model format. Indeed, the DAS states that: “The initial store design and elevation treatment is based on Sainsbury’s model format store’ (C11 p6.1)” (and) “The store layout provided the starting point from which the store design evolved to respond to the specific characteristics of the site.” (C11 p5.3.2).

338. There is little evidence of the appellant having been flexible in respect of the size of the proposal. Furthermore, rather than the design process having been a genuine and meaningful evaluation of various options, it is telling that the layout options documented in the DAS (C11; and in G11a) all have similar sized sales and service yard areas, are all aligned the same (on the plan of the existing industrial units) and all have rigidly orthogonal plans. Most notably, all are above 50,000 sq ft.

339. Further, and whilst reiterating that he understood the appellant to regard 50,000 sq ft as the smallest size appropriate to satisfy the commercial operational standards it needs to achieve, Prof Tavernor was unable to provide any information as to when that 50,000 sq ft minimum was first mooted by JS as a requirement or the basis for its calculation. The reference in Scheme 06 to 70,000 sq ft to “meet(ing) clients desired store size” also appears to be plucked from thin air without any basis for its calculation or justification.

340. The scheme options are limited by their comparable size and a lack of any clear theoretical or principled thread to the design process, it being a sequence of slightly different options that do not appear to directly address or respond to any particular concerns. There is no analysis to show how each option responds to a particular concern. The proposal fails to take advantage of or retain the slope across the site as it would be levelled for parking or trolleys. The landscape would be dominated by a regimented car park, unrelieved by any planting or pedestrian-only spaces within the parking layout (G9 p137, 141). Pedestrian routes would be unappealing (G9 p128-131).

341. There is no evidence before this Inquiry about how the options were tested, how different considerations were weighted, how they were balanced and prioritised or how they were “discounted accordingly” (H35 pg43, G11 p3.2, 5.5). The design process cannot properly be evaluated, either objectively or subjectively. The weight to be afforded to the options analysis in terms of being a demonstration of flexibility or simply as an exercise in good, responsive, design, must be very limited. Indeed, in terms of scale and size, only one alternative was significantly different from the others; it was so large as to be unrealistic.

342. Neither prior to nor during this Inquiry has JS demonstrated a sensitive analysis of the proposal's location within Braintree and the landscape and setting beyond the site's boundaries. This may stem from the appellant's failure to conduct a site appraisal as required by Policy RLP91. The Guidance provides that "a development's context" refers not only to "the particular characteristics of the application site" but also "its wider setting". The appellant's attempts to address context in both the DAS and the Landscape Design Statement (C11, C17) are insufficient evidence of a thorough analysis of contextual influences as they exist in that "wider setting".

343. Whilst Prof Tavernor was only prepared to accept the site's potential for a gateway development, the Landscape Statement (C17 pg7) notes the site's "*key pivotal position...*" and the DAS describes "*a 'gateway site' on the approach to Braintree*" (C11 pg6). The site presents a design opportunity for a meaningful contribution to the store's wider setting in Braintree. Its design should respond to that wider setting, either in terms of its layout and orientation, its architecture and/or its prominent and public-facing site frontage. It fails on all counts.

344. The proposal is a large-scale box with large elevation planes. The lack of varied form fails to provide any meaningful character. Notwithstanding the assertion that the different materials would result in a textured variation across the elevational planes, the grey metal cladding, the larch cladding (which would weather to grey) and the glazed facades would result in little variation in tone, colour or appearance. The four materials run around all four sides without variation of treatment. There are neither patterns in the materials nor variation in form.

345. The relatively minor variations in height and projection would result in a building with little visual interest or impact. There would be no perceptible separate volumes except for the raised plant room which it is suggested would clearly locate the store in relation to the road network, provide a local focal point and contribute to the 'gateway' status of the store so that it would be visible from the Rayne Road roundabout (C11 pg33). However, this fairly featureless and squat feature would be only 2 metres above the roof.

346. The scale of the building and the appellant's operational needs and access priorities appear to have affected the layout to the detriment of the proposal. The limited engagement between the park opposite and the proposed store that would arise from the glazed café area would be insufficient to mitigate the limitations that would result from the store's orientation, which places its entrance away from the principal street frontages on Pods Brook Road and Rayne Road, where the appearance of the front and the activity could have engaged and related the development with the town more effectively.

347. The rigid orthogonal form and other design weaknesses indicate a lack of flexibility in size and form, compounded by the lack of an overall concept for landscape and outdoor public realm, which result in a proposal that would be dominated by car parking. The site's location and extensive car parking provision strongly indicate that the proposal would be focused

on customers accessing the site by car, as borne out by the anecdotal evidence from local residents who, all bar one, suggested that they would drive to Broomhills in order to shop should this appeal succeed.

348. Notwithstanding Prof Tavernor's rebuttal proof (G16) which seeks to address criticisms in terms of the amount and quality of landscaping, it is unclear which parts have been included in the calculations. He agreed to provide clarification of this but did not. Thus, no material weight can be attached to section 2 of his rebuttal. The issue is also one of qualitative enhancement and whether available opportunities to provide an interesting and varied landscaping concept and outdoor public realm have been taken. It clearly goes beyond a measured calculation of what is, in large part, simply screening.

349. A cursory glance at the relevant plans reveals the dominating effect of the extensive car parking provision, which results in little effective landscaping that could otherwise have enhanced the appearance of the development or the character of the local area. The minimal attempts at landscaping give the impression of being something of an afterthought, at the margins of the site and inadequate to counteract the building's volume. The Council's criticism of the design of this poorly-conceived proposal is entirely justified.

Section 106 Obligations

350. The most recently proposed obligations are insufficient in scale and inappropriate in nature to effectively mitigate the significant adverse impact that the proposal would be likely to have on the vitality and viability of the town centre, particularly in terms of retail expenditure and linked trips.

351. Without prejudice to the above, BDC has engaged with the appellant to the extent that prior to the Christmas break there was an agreed draft S106. This must not in any way be taken as the Council having conceded that the proposal's impact would now be acceptable.

352. BDC retains significant concerns as to the manner in which JS has sought to put its case on the basis that there would be two Sainsbury's stores in Braintree. The various incarnations of the Unilateral Undertaking (UU) either do not require the appellant to keep that store trading as a Sainsbury's or would be likely to be unenforceable as to the same. The pre-Christmas drafts of the UU would not operate in this manner.

353. The most that the Inspector could report is that the appellant's planning consultant asserted that the TW store would remain a Sainsbury's store because he claims to have been assured that this is the appellant's current intention. Further, the weight to be attached to the 'keep open' covenant now contained in the signed January 2015 UU is limited, given that JS maintains that it would not be Regulation 122 compliant (H18), albeit without sharing any further detail of this surprising conclusion. The evidence in this Inquiry was heard on the basis of an appellant giving nothing more than vague, potentially unenforceable, assurances that TW

would remain operated by JS for ten years. A non-CIL compliant and unlawful 'keep open' covenant adds nothing more than confusion.

Conclusions

354. The Council invites the Inspector to recommend dismissal of this appeal on the basis that:

- The proposal is not in accordance with local and national planning policy and guidance.
- The appellant has failed to demonstrate compliance with the sequential test. No meaningful effort was made to address the issues identified at an early stage by officers, who were clearly entirely supportive of what JS seemingly wished to achieve.
- The proposal would have a significant adverse impact on Braintree town centre with regard to the effect on existing investment and coming hard on the heels of an agreed collapse in convenience expenditure in the town centre.
- The proposal would have a significant adverse impact on the vitality and viability of Braintree town centre. The evidence reveals an increasing vulnerability which would be further threatened by the potential impact of the proposal. On a balance of probability, at least one existing town centre food store (Morrisons) would close. There is no compelling evidence that that site could be re-let to any quality occupier.
- The appellant has neither demonstrated the retail capacity need either in qualitative or quantitative terms nor consumer demand for a new store of the scale and format proposed.
- The design of the proposal is not in accordance with local and national planning policy guidance in particular, but not exclusively, in relation to its form, layout and scale.

THE CASES FOR THE INTERESTED PERSONS

The material points are:

355. **Mr N Bignold** is a local Braintree resident who has lived here for more than 30 years (H6). The poorly attended Inquiry is because it was not well publicised. When he moved to Braintree, it was a small market town with an attractive old town centre. There was active in-town food shopping – with traditional butchers, a fishmonger, grocer, delicatessen, vegetables and also non-food retailing, ironmonger/DIY, clothes, electrical etc. Since then, there have been major developments in and out of town.

356. The unattractive George Yard development took the heart out of the town centre. The failure to attract a major retailer was perhaps the last straw. Both were major factors in effectively destroying the town centre, years ago. Braintree is in stark contrast to some other towns in the area with their old town centres which, even today, are vibrant and attractive centres with traditional shops.

357. Another major change has been a huge population expansion with new "villages" on the outskirts. There was the development of the Great Notley Tesco and then the one at Marks Farm, plus the much more recent approvals for major extensions for both of these stores. There are also two Tesco 'One Stop' shops in the town. There has also been out of town development of the Retail Park, including a B & Q, Halfords, a golf shop, restaurants, a cinema complex and the town public swimming pool and now also a Marks & Spencer food store. Then there was the building of Freeport, with its 80 plus retail brand shops.

358. This has all resulted in attracting people away from the town centre, leading to today's sad state of affairs, with a run-down town centre. It now has virtually nothing but a limited Tesco store, where there would appear to have been no investment in the ground floor grocery area for years and a fairly active but limited Sainsbury's, where there has been some investment in refurbishment, and a limited Morrisons. There are also the usual estate agents, charity shops, bank branches, a pound shop, party shops and branches of one or two of the national chains. However, it is a very unattractive retail proposition to attract consumers into the town. The decline has been accelerated by high business rates and rents.

359. Is there any concern from the Council about the impact of George Yard and the out-of-centre development on the town centre? If so, it has sadly failed to stop the total decline of the town centre. To worry now about the adverse impact of a superstore development on the vitality of the town centre and of investment in the town, is far too late. Rejection of the appeal proposal would not stop further footfall decline in Braintree. There is no realistic prospect of attracting any real food or other attractive retailing in the town. Without that, retail usage of the centre will continue to decline, with or without the new development. It's also unlikely to affect local trades people adversely. The people who use them today will most likely continue to do so.

360. For local people, the development would bring enhanced consumer choice, rather than having to travel long distances. We are virtually the only ones of the Braintree residents we know who still regularly use the town centre, for Sainsbury's, banks, Boots, the library and other services and we would continue to do so if the development were approved. But nothing will bring most people we know back into town. Most of them shop in the out-of-centre Tesco stores today because it is easier to park and they have better choice than the town centre stores.

361. It would also bring increased competition, which would help the Braintree consumer. The vast majority of food shopping is done in the three Tesco stores. An eyesore, with run down mainly empty and derelict buildings and large concrete barriers, would be removed.

362. If the appeal were dismissed, there would be no chance of any other attractive retail development at the site. If used as an extension to the industrial area to the north, that wouldn't add to local consumer choice.

363. The new Sainsbury's would be a benefit for many residents. The development would not be "out of town", unlike the Freeport and the 2 big

Tesco. It would be within walking distance for possibly thousands of Braintree residents living on the west side of town, plus many more. We are 10 minutes' walk from the town centre but would also be 10 minutes walk to a new Sainsbury's along the old railway line, now an attractive and much used linear park.

364. It would be popular with local people. With a Sainsbury's superstore virtually in the town, it would stop many residents driving to the superstores in Chelmsford and Colchester, as many do, and it could bring people to the town from the surrounding areas and they may use town centre services.

365. The residents of Braintree have much to gain from the new development. The opposing policy argument fails to recognise the reality of the inadequate retail offering in the town centre. It is hoped that this appeal is successful.

366. **Mrs S Parsons** has lived locally for 30 years. She agrees with Mr Bignold but does not agree that the town centre is in total decline. Indeed, it is vibrant and very busy on Market Days (Wednesdays) and residents from elsewhere comment how lucky we are. The Tesco stores with their extensions must be 10,000m² but the Sainsbury's, Morrisons and Lidl stores will be less than 5,000m². Braintree is growing fast but there is dominance by Tesco stores including two that are out-of-centre. Why can't this be the same for Sainsbury's? Its total floorspace with two stores would still be only 7,250m², much less than the Tesco stores.

367. Mrs Parsons uses the town centre considerably, on foot, but is unable to carry a 'big shop' home so, for this, she has to call at an out-of-centre Tesco or go to the JS Stanway store, which is a long way. The Broomhills store would reduce the need to travel.

368. Her friends are incensed that they can get recipes in Tesco but are unable to buy the ingredients there that are needed to cook them; they need a big Sainsbury's with a large range of goods.

369. The new store would benefit from passing trade plus purchases from those working on the industrial estate: it would not be new traffic.

370. A good town centre is necessary. Even Saffron Walden is suffering from too many empty shops. Braintree town centre is lively and unique and the market is one of its best assets

371. **Miss Tina Smith**, from Chelmsford, has worked for Sainsbury's for 26 years and is now the Deputy Manager at the JS TW store, which is where she shops but its range of goods is limited and she has to go to the JS Springfield for some items. JS is a very progressive company that offers good career opportunities.

372. The appeal site is very run-down and has problems with drug users and travellers. It needs regeneration for a Sainsbury's store.

373. Braintree is a very Tesco oriented town but it has many loyal Sainsbury's customers

374. **Mr D Williams** says that Braintree has one average sized Sainsbury's and one Morrisons but five Tesco. The town needs a large Sainsbury's to increase the range of goods sold, including clothes. This would avoid having to travel elsewhere for purchases.

375. A 14,000 unit housing development is planned for the north of the town, although it does not yet have planning permission, and a 650 unit scheme at Towerlands. These developments would bring extra custom. The Government says that Braintree District needs an extra 1,000 dwellings per year for the foreseeable future. A large store would be needed to cope with the demand generated. The appeal site would be more central when the town extends to the west.

376. **Mrs M Gurteen** has been a Sainsbury's employee for over 30 years. The proposed development is wanted and it would have many advantages: employment, choice, remove an eyesore and avoid the need to travel to other towns to shop. Funds for the Museum have been promised and the TW store would remain. If the appeal proposal had been by Tesco it would already have had permission. Marks and Spencer got a unit in the Retail Park without any trouble this year [Inspector's note: I am advised that this was as a result of a Lawful Development Certificate].

377. **Mr M Cutmore** has lived near the site for 22 years. When he bought his house, the valuation report stated that there was a disappointing approach to the estate but the industrial units were occupied then and it is a lot worse now. The Broomhills estate is an eyesore that detracts from the whole area and causes people to move elsewhere.

378. George Yard in the town centre is not unattractive; it is one of the town's main attractions. Mr Cutmore attended the 2011 exhibition for the JS application and signed the petition in support. He was surprised that planning permission was refused.

379. The appeal site is not out-of-centre. Mr Cutmore can walk from the site to the town centre, have lunch and walk back within an hour. If the JS proposal were built, it would not affect his use of the town centre as parking in Braintree is limited and expensive. He prefers to shop in Chelmsford and Sudbury. Parking at the appeal site would be welcome.

Written Representations

380. The appellant has provided a summary of third party objections to and support for the appeal proposal (H19).

381. At the **appeal stage**, the **Braintree Chamber of Commerce** representation opposes the proposal (H2) because of the damage to town centre businesses. The site is 'edge' or out-of-centre and fails the sequential test. The JS TW site could be extended or an alternative found. Downgrading of its town centre store and increased competition from the appeal site store would have a harmful impact on the town centre. The need in Braintree is for more comparison rather than convenience shopping.

382. There is a problem in the town from traffic at peak times, particularly on the through routes. The appeal scheme would generate up to 500 cars per hour plus delivery and home delivery vehicles. This would be a major concern for residents, motorists and traders. Shoppers would divert away from the congested approaches to the town centre. New jobs would not be created.

383. Messrs **Peacock and Smith** (F17, F17A), on behalf of **Morrisons**, object to the appeal proposal. There is a real risk that the appeal proposal would lead to the closure of the policy-protected town centre Morrisons in George Yard. The appeal proposal is in conflict with the development plan and Government policies. Core Strategy Policy CS6 seeks to promote the improvement and regeneration of the town centre. The Framework has the clear objective of promoting competitive town centres.

384. The evidence of Mr McGrath is contradictory. He accepts that the Morrisons store is one of three in the centre that meets the primary convenience shopping needs but then says that there would not be a significant impact if Morrisons were to close. There has been significant investment in staff training, the store occupies a gateway location to the town centre, in a prominent location and with a strong relationship with the George Yard Shopping Centre and the rest of the centre. The store sells a wide range of convenience goods that cater for main and top-up shopping and it has strengthened consumer choice and improved competition. Its anchor role is recognised in the Council's Retail Study Update 2012.

385. As Mr McGrath indicates, there are some 3,075m² of floorspace and 22 units unoccupied in the town centre. If Morrisons were to close, there is no certainty that the store would be re-occupied. It is illogical to open an out-of-centre store to replace an in-centre one, especially when JS already has a large store at TW. The appeal proposal would saturate the local food market and make the out-of-centre provision even more buoyant.

386. The latest telephone survey reveals that the Morrisons is trading at only 57% of the company average. The expectation of increasing market share and the forecast growth in available expenditure could bring this more in line with the average, maximising its support for and benefits to the town centre. It is noted also that all of the convenience trading provision in the town centre is below benchmark levels.

387. The 17.9% impact forecast by Mr McGrath would harm the fragile health of this vulnerable town centre, which has been selected as one of only 15 UK Portas Pilot scheme centres, ahead of 400 applicants for funding and initiatives to reverse the decline. Protecting retailers such as Morrisons is critical to changing perceptions of the centre. The Portas scheme needs time to be successful by strictly controlling out-of-centre developments. Weakening the centre would send the wrong message.

388. The new JS would be an isolated car-borne main food shopping destination with, unlike Morrisons, neutral linked trips to the town centre.

389. The Framework seeks to reduce the need to travel and maximise sustainable transport modes. The appeal proposal would not comply with these aims. The appeal should be dismissed.

390. The **Braintree Town Team** (H3) which developed from the Portas Pilot, comprises many local businesses. Building a major edge-of-town store would harm the town centre and create barriers for independent retailers. Linked shopping trips would be lost.

391. **Ms P Clark** (H5) supports the appeal proposal. More competition is needed in clothes shopping. While Freeport caters for clothing for all ages, another store in the Broomhills area, particularly a JS with its quality and range of clothing, would be a trade draw. Consideration could be given to amended layout details to overcome any traffic safety concerns.

392. **Mr A Etall** (H7) supports the proposal and seeks fair treatment for Sainsbury's. Some 400 jobs would be created. Parking at Freeport, Tesco or in the town centre is a 'nightmare'. The disastrous road network and parking facilities discourage use of the town centre.

393. **Ms E Newman** (H8) supports the proposal. It would enhance the area and be a welcome addition to the area in terms of employment. There be no significant traffic problems.

394. **UK Electrical** (H9) occupies two of the industrial units at the appeal site (H9), one of only two remaining businesses there. The estate has declined and is in poor condition, not helped by intermittent gypsy incursions. The company may want to occupy one of the refurbished industrial units. Fears about retail impact on the town centre are unfounded. Impacts would be on the out-of-centre Tesco stores, the Sainsbury's at Colchester or the Lidl in Rayne Road. The appeal proposal is supported. It would transform an eyesore and give people driving to Braintree a good impression of the town.

395. **Ms A Dooling** (H10) considers that a new Sainsbury's would benefit Braintree. The town centre would not be harmed. She works in Rayne Road and walks to the JS TW store to shop, appreciating the quality of products sold. For a larger range of goods, she travels to Colchester. The town centre Tesco is always busy and it has two edge-of-town stores plus an Express. The proposed JS store would rejuvenate the western end of the town and bring employment. Many new houses are being built: where will the occupiers shop? Tesco should not have a monopoly in Braintree.

396. Additional representations in support (G7) are from **S F Hulford, T Atkinson, Mrs V Rees**, one with an address but an **illegible signature**, **Ms T Nash, Mr and Mrs A Rogers** and **Mrs C Wright**. These raise similar issues to those outlined above.

397. Additional representations against (G7) the proposal are from **Mrs J Hill, N P Jesse** and **R Miller**. The grounds are similar to those in the representations made by others. In addition, Mr Jesse provides photographic evidence of congestion on Pods Brook Road in August 2012.

398. At the **application stage**, as confirmed in the Report to Committee of 19 November 2013 (E11A pg9; G2), some 33 unique letters and 18 identical letters were received in support of the application. The reasons are, in summary: greater competition for Tesco; employment; site regeneration and visual improvement; no major traffic issues; site more accessible than the town centre store; improved shopping offer; no neighbour harm; encourage people to shop in Braintree; improve remaining employment units; and prevent use of the site by Gypsies and Travellers.

399. In addition, there was a petition of support with 59 signatures, another of some 2,138 signatures (E12) and the former Chair of the Planning Committee handed in a 'petition' of support comprising 36 on-line responses and 96 post cards. Some 74% of the feedback forms (C24) from a public exhibition in 2011 were in general supportive of the proposal.

400. There were 22 letters of objection on the following grounds: traffic congestion and highway safety; increased parking in surrounding residential roads; store not needed as there is enough retail choice in Braintree; harmful impact on town centre; overshadowing of Nayling Road dwellings; noise and disturbance including odours from HGV movements; misleading traffic survey done at a quiet time of the year; no recycling area included; poor store design; retain existing employment land; existing buildings could contain asbestos and other contaminants; unneighbourly lighting; impact on shops outside the town centre; employment would be relocated from town centre as the jobs at the store would not be new jobs; ecological impact; loss of trees; air pollution; and property values.

401. **Hermes (Freeport) Ltd** objected at the application stage (E11A pg11, G2). The Broomhills site is out-of-centre and would rely on car borne customers. The impact on existing centres would be significant. It would be better to site an Asda at Freeport with its good public transport connections.

402. **Hills Residential Ltd** and **Mersea Homes** (E11A pg11; G2) objected at the application stage because of undermining the Core Strategy commitment to provide a local supermarket in the Panfield Lane strategic growth area.

403. The **George Yard Shopping Centre** objected at the application stage (E11A pg11; G2) because of failure to pass the sequential test, lack of need, the existing threat to the town centre, the loss of linked trips and the harmful impact of traffic on the west side of the town.

INSPECTOR'S CONCLUSIONS

Introduction

404. The sequence of the sections in these conclusions is set out in the Contents list at the end of this report, immediately after the Glossary. To set the scene and to make the Conclusions relatively self-contained, I will start with procedural and other background matters, including a short description of the proposals and reference to the relevant policy and guidance. After that, I will deal with each of the main considerations in turn, which will be identified by sub headings.

405. Paragraph references in square brackets at the ends of paragraphs indicate the sources of the material relied on in reaching my conclusions. Some references may be included to show that a particular argument has been considered, even though it might not merit specific mention. Inevitably, in a report of this length, it is necessary to be selective about the source paragraphs, especially where the same point is made by more than one party.

Procedural Points

406. The agreed postcode for the site is as given on the banner heading to this report, not as shown on the Notice of Refusal. [1]

407. The proposed layout plans indicate small extensions to some of the gardens of the properties to the west and north of the appeal site. Permission for these extensions is not being sought. [3]

Site and Surroundings

408. The appeal site (the site) is an irregularly-shaped parcel of land of approximately 3 hectares known as the Broomhills Industrial Estate, built in the 1960s on the western edge of Braintree. It lies about 1km west of the town centre, on the west side of Pods Brook Road (B1258) and south of Rayne Road. Three rectangular buildings on the site are largely disused; they once accommodated a range of industrial/storage and distribution businesses. Access to the estate is from a service road off Guernsey Way, which follows the southern boundary of the site. [8-10. Useful photographs are to be found in Documents G9A and G11]

409. There are residential areas to the south, west and north of the site and it faces a large car showroom and display area on the opposite side of Pods Brook Road (G9A pg7 Photo 15) and, to the south of that, a recreation ground/small park. The site lies at a lower level than Pods Brook Road and there are falls within it from north to south and east to west. There is little on-site landscaping. [11]

410. There is no direct access to the site by a dedicated pedestrian or cycle route from Pods Brook Road. The footway from Rayne Road ends shortly after the roundabout on the western side of Pods Brook Road and extends only about 30m south of the roundabout on the opposite side. The footways accommodate cycle-ways close to the roundabout and breaks in crossings are provided by pedestrian refuges. [12,13]

411. The most direct route from Braintree Town Centre (BTC) to the site is along Rayne Road, an unattractive walk of a little over 10 minutes. An alternative – albeit unlit - pedestrian route between the site and the town centre takes about 18 minutes along Flitch Way. Other routes are available to the town centre through the intervening housing areas. Bus links between the site and the centre are limited. [13, 14]

The Proposal

412. The proposal is, in summary, for a new superstore for Sainsbury's (JS) and refurbishment of the western block of industrial buildings (Plans at H31 and photomontages in G11 pg19-22 and G11A pg20). The two industrial buildings closest to the Pods Brook Road frontage to the site would be removed. The land would be remodelled, with some excavation towards the northern end. The superstore would have a gross external area of 9,366m² and a net retail floor area of 4,765m². The net retail floor area would include 3,097m² convenience and 1,668m² comparison floorspace, a 65:35% ratio. [20, 25]

413. The proposed store would be on stilts above a car parking area. It would have a rectangular plan (123m x 97.5m) with the longest elevations facing north and south. The layout would locate the sales area nearer to the southern side of the building with ancillary space (storage, staff rooms etc.) to the north and east. The service yard, which would also be raised above the car park level, would be immediately to the north of the store and be linked to it by an oblong loading area above the car park. Pedestrian access to the sales area would be via an escalator and lifts at the southern side of the building. [21]

414. The building would have a shallow pitched roof, with its ridge running east-west. The northern section of the building would have a flat roof and there would be a "tower" with a false pitched roof at the north eastern corner. The "front" of the building would be in its southern elevation, with its central section glazed to full height with narrow vertical timber cladding to either end. The eastern frontage, to Pods Brook Road, would contain a similar mix of glazing and cladding although the full height of the building would not be apparent easily towards the north as Pods Brook Road rises in relation to the site as it ascends towards the roundabout. [22]

415. The existing access from Pods Brook Road (Guernsey Way) would be improved for vehicular access for store customers and staff and for the refurbished industrial building. The access to the proposed service yard would be over a new access "bridge" from Pods Brook Road, with entrance and exit by left turns only. Other highway modifications would include traffic light controls on Pods Brook Road at the site access, a new pedestrian crossing just south of the roundabout and a pedestrian crossing on Guernsey Way to the south of the proposed store. [23]

416. The western leg of the access road to the store would have turnings into rows of parking spaces. Most of the 502 parking spaces would be sited beneath the building and there would be provision for bicycle, motorcycle and disabled parking. Provision would be made for a new

cycle/pedestrian route along the Pods Brook Road frontage of the site, linking to existing cycle-ways and footways on Rayne Road and Pods Brook Road. Also, a pedestrian link is proposed from Rayne Road, to the west of the roundabout, and then across the store car park under the store to the entrance. Additional landscaping is proposed. [24, 25]

Policy and Background

417. Paragraphs 24, 26, 27, 56-58, 60, 61 and 64 of the National Planning Framework (the Framework) and the National Planning Practice Guidance (the Guidance) are particularly relevant. [26]

418. The Development Plan includes the Saved Policies of the Braintree District Plan Review 2005 (the LPR) and the Braintree Core Strategy 2011 (the CS). The Statement of Common Ground (SoCG) lists 27 relevant policies from the LPR and six from the CS. Of these, LPR Policies RLP33 Employment Policy Areas, RLP49 Pedestrian Networks, RLP50 Cycleways, RLP52 Public Transport, RLP54 Transport Assessments, RLP55 Travel Plans, RLP90 Layout and Design of Development and RLP91 Site Appraisal and CS Policies CS4 Provision of Employment, CS6 Retailing and Town Centre Regeneration, CS7 Promoting Accessibility for All and CS9 Built and Historic Environment are of most relevance. The latter includes create good quality built environments in commercial and business districts and in the public realm. [29, 30, 48, 62-65, 171]

419. The emerging draft Policy ADM37a – Broomhills, Pods Brook Road of the Pre-Submission Draft Braintree District Site Allocations and Development Management Plan, is a material consideration. [27, 49-61, 195-197]

420. There is no objection to the principle of redevelopment of the appeal site or to the loss of the industrial units and there are no objections from the Highways Authority subject to conditions and obligations. It is agreed that redevelopment of the site for Class B1/B2/B8 uses would not be viable in the short or medium term and that there would be no conflict with LPR Policies RLP50, 52, 54, 55, 73 and 74 and CS Policy CS7. Also, there are no flood risk objections, the site is of low ecological value and an Environmental Impact Assessment is not required. [28, 29, 30, 32]

421. The sketches at Appx 3 of the SoCG can be considered in relation to required landscape details. SoCG Appx 1 shows proposed footway, cycleway and zebra crossings; Appx 2 shows the proposed junction arrangement; Appx 3 shows landscape sketches including a revised Option 1 Plaza sketch at the corner of the junction with Pods Brook Road. [31, 32]

422. The issues in dispute are: impact on planned investment in Braintree Town Centre (BTC), impact on its vitality and viability and whether the development would create a good quality built environment which would improve the character and quality of the area and the way it functions. I approach these by dealing with the sequential test, the impact on the town centre and design. [33]

Obligations

423. Two signed S106 Obligations have been submitted. One is an Agreement with the Highways Authority, Essex County Council (ECC) and the other is a Unilateral Undertaking (UU) in favour of BDC. All Obligations must meet the requirements of the CIL Regulations (Reg 122) and each Obligation is accompanied by a Statement of Compliance. Reg 122 makes it unlawful for a planning obligation to be taken into account in a planning decision if it does not meet all of the following three tests: necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development. [186, 188; 350-353]

424. The **Agreement with ECC** (H24) seeks to meet the requirements of ECC in line with its application consultation response (which, for convenience, is attached to H25). This Agreement includes payment for a Traffic Regulation Order, a Stopping-Up Order, a Landscape Licence, provision for a Bus Infrastructure Improvement Scheme, Updated Travel Plan and Monitoring Contribution, Pedestrian/Cycle Route Signage Contribution, Junction Improvement Contribution, Sustainable Travel Fund, Traffic Signals Maintenance Payment, appointment of a Travel Plan Coordinator and other linked matters.

425. The Statement of Compliance for this Agreement confirms that each of the obligations would relate to a matter that could lawfully be treated as a reason for approval under Regulation 122 and each would pass all three tests. This is undisputed and I agree.

426. The **Obligations in the UU** (H20) that would bind the existing Toft's Walk store include maintaining its Net Sales Area, keeping it open and trading in Foodstore Goods (as defined in the Obligation) for at least 10 years and, for that time, it would be a Sainsbury's store. In addition, there is provision for a Training Plan, a Town Centre Initiative Scheme to promote local businesses, largely free town centre parking by linking the use of the Broomhills and Toft's Walk stores, a Braintree Museum Improvement Contribution, a Service Yard Management Plan at Broomhills and linked matters.

427. BDC was unwilling to engage in discussions with the appellant on the obligation being made in its favour. Its stance was that the obligation would be inadequate to outweigh the harm that would be caused. [188 and see H21, 351]

428. The Statement of Compliance (H22), which has attached the Braintree Town Centre Enhancement Strategy and Town Centre project Proposals and a list of Town Centre Improvements, sets out the compliance factors and policy support, where relevant.

429. However, while the Statement deals with the retention of the Toft's Walk store, it makes no mention of its occupation being by Sainsbury's. Part A of Schedule 1 of the UU has three parts: the first is to keep the store open; the second relates to its floor area; and the third is that the existing store shall remain a Sainsbury's store. The Statement 'Summary' refers only to the first two of these, even though the section on

'Compliance' states that "The Appellant is willing and committed to its presence within Braintree Town Centre.....". Also, the Statement was written on 16 December 2014 when the draft obligation (H21) did not include the obligation for the Toft's Walk store to be occupied by Sainsbury's.

430. The email of 2 January (H18) from the instructing Solicitor, which accompanied a revised draft of the UU, states, without any explanation, that the personal covenant by Sainsbury's is offered "...notwithstanding that the appellant does not consider the obligation to be Regulation 122 compliant.....". No case law on this subject has been submitted if, indeed, any exists. [100, 353]

431. This personal covenant has implications for the appellant's two-store strategy, which I deal with below. Its case to the inquiry is that it needs two stores, Broomhills and Toft's Walk. The trade diversion from town centre stores is considered on the basis that one of the two main stores in the centre is a Sainsbury's. Indeed, many of the assumptions in the studies are on the basis that the Toft's Walk store is and would be a Sainsbury's. If it were not, and the store were to be occupied by another food retailer, there would be implications for many retail issues including retail impact, brand loyalty and its effect on trade diversion to other stores both within and beyond the study area, sequential arguments about extending the Toft's Walk store and more. These are matters that I deal with below in my conclusions, when I give appropriate references.

432. The appellant has provided no reasoning to support its argument that the personal covenant would not be CIL compliant. Planning permissions 'run with the land'. Nevertheless, if this appeal were to be allowed and permission granted and if a crucial factor leading to that decision were to be the retail arguments provided by the appellant and examined in great detail at the inquiry, then I consider that the covenant would be necessary to make the development acceptable in planning terms; it would be directly related to the development; and it would be fairly related to the development in scale and kind.

433. The other obligations within the UU are adequately justified within the Statement of Compliance. Thus, I am satisfied that all of the obligations would pass the three tests.

Retail Background

434. BDC has undertaken a new household survey and JS has undertaken a new on-street survey. New retail assessments have been prepared. In doing so, JS (Indigo Planning) and BDC (GVA) agree matters as outlined below. The Study Area and its six zones are as defined in the plan attached at Appx 1 of the RSoCG. [34]

435. The sample sizes and questionnaires for the household and on-street shopping surveys are agreed, as are population figures and estimates for the six zones of the Study Area; the convenience and comparison expenditure per capita data from Experian (at 2010 prices) are used (G6 Tables 2.1.-2.3), extrapolated as necessary. The survey results

are used as the base for current shopping patterns and store turnover levels in the Study Area. The agreed price base is 2010 while 2014 is the relevant base year and the relevant assessment years are 2019 and 2024. Convenience expenditure is split between main food and top-up shopping on the ratio of 75:25%. The convenience/comparison split for the proposed store would be 65:35%. [35-38]

436. Net convenience floorspace figures (in m²) for some stores in Braintree are agreed: Tesco, Great Notley 1,953; Tesco, Marks Farm 2,609 and Lidl, Rayne Road 1,157. While the figure for the Morrisons, in the town centre at George Yard, is said to be agreed in the SoCG, BDC later stated that the food/non-food split is 90/10, giving a net convenience figure of 1,214m²; JS uses an 80/20 split to give a figure of 1,079m². There is disagreement over the size of the Tesco MP store. JS uses 1,676m² net convenience floorspace for Tesco MP while BDC uses 2,096m². Disagreement over the size of the JS Tofts Walk store (JS uses a net convenience floorspace figure of 1,827m² while BDC uses 2,237m²) has been resolved and the JS figure is preferred. [39, 40, 137]

437. As requested by BDC, my assessment from a visual inspection is that Morrisons has a 90:10 ratio or 1,214m² net convenience floorspace, as Mr Morris/BDC says, rather than the 1,079m² used by Mr McGrath for JS. My net convenience floorspace figure for Tesco Market Place leads me to be content with the JS figure for this store. [40]

438. The RSoCG includes agreed sales densities for convenience and comparison goods for nine retail companies. The parties agree that there are two 'commitments' to be considered: the EMD site in Halstead, which has the benefit of a planning permission for A1 retail development for 1,474m² net retail floorspace and 114 parking spaces, and the Morrisons store at Witham with permission for an extension of some 1,319m². [19, 41, 139]

439. With regard to retail impact, it is agreed that it is appropriate to assess the impact of the appeal proposals on BTC as a whole, including the combined convenience and comparison impact and separate convenience and comparison goods impacts, at 2019 and at 2024. The proposal would not have a significant adverse impact on Great Notley District Centre and there would not be a significant adverse impact on any specific planned or committed investment in Braintree. [42]

440. There is disagreement on the likely impact on investment in BTC but it is agreed that the Land East of Town Hall (known also as the Henry Boot site) is not a sequentially preferable site. On 22 October 2014, there were 22 vacant units in BTC. A 'reconciliation paper' lists six key areas of disagreement as the reasons for the differences in the retail figures from the consultants. [43-45, 81, 130]

441. There is no dispute that the proposal involves the development of an out-of-centre superstore; that the superstore is a main town centre use; that the proposal would not accord with the adopted Local Plan or the Core Strategy; that the burden is on JS to demonstrate that the sequential test is passed, that the relevant town centre sites for this test are the JS site at

Tofts Walk and Land West of George Yard; and that when a proposal fails this test, it should be refused. Thus, before looking at the six key areas of disagreement, I will consider the sequential test. [43, 66, 81, 200]

442. The Council agrees that the Framework should be taken as the retail policy framework for the sequential and impact tests, with the Guidance assisting in its interpretation. [64, 65]

Sequential Test

443. This test is set out in the Framework at p24. A sequential test should be applied to planning applications for main town centre uses which are not in an existing centre. It is only if town centre locations and edge-of-centre locations are not available, should out-of-centre sites be considered. When considering edge-of-centre or out-of-centre proposals, preference should be given to accessible sites that are well connected to the town centre. Also, applicants and local planning authorities should be flexible on issues such as format and scale. [References after next paragraph but one]

444. The Guidance confirms that the sequential test seeks to deliver the Government's "town centre first" policy. The test will identify development that cannot be located in town centres, which would then be subject to the impact test. The Guidance sets out a checklist of considerations. To demonstrate flexibility, it asks whether the suitability of more central sites to accommodate the proposal has been considered and whether there is flexibility in the format and/or scale of the proposal.

445. Among these considerations, *"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"* (my emphasis). Moreover, the Guidance advises that the *"application of the test should be proportionate and appropriate for the given proposal"*. [26, 66-68, 198, 199, 202-206]

446. What is meant by "precisely" in the above quotation in a context where it is necessary for both parties to demonstrate flexibility on issues such as format and scale? And what does p24 of the Framework mean when it refers to town centre locations being 'available'? Clearly, sites must also be suitable.

447. As to availability, the Bath Press decision is of little assistance because it relied on the cancelled guidance in PPS4 for the definition. The Framework does not ask whether sites are likely to become available; it asks whether they are available. [91-94, 252-254]

448. The Tesco Stores Ltd v Dundee City Council decision by the Supreme Court establishes that the suitability of potentially sequentially preferable sites must – quoting from the Lidl UK case - be considered on the basis *"whether an alternative site is suitable for the proposed development, not whether the proposed development can be altered or reduced so that it can be made to fit an alternative site"*. The exercise is directed towards what the developer is proposing. Moreover, in the Secretary of State's Rushden Lakes decision of 11 June 2014 (and on which

he specifically sought the comments of the parties on the post-inquiry issue of the Guidance), he stated that "*there is no requirement to disaggregate*". [69-76, 106]

449. Was that statement specific to the Rushden Lakes decision as the Council suggests, given the 'unique characteristics of that site and the proposed development in that case? It was not qualified in any way other than by reference to the two report paragraphs from which it derived. While one of these paragraphs dealt with specific aspects of the proposal, the other dealt with the intention of national policy in paragraph 24 of the Framework following the demise of PPS4. And that paragraph was not specific to the site or to the proposal in any way. [References after next paragraph]

450. Moreover, the RL application was for a wide variety of uses including a home and garden centre, retail units, visitor centre, restaurants, boathouse, hotel, crèche and leisure club. It was described in summary as a mixed retail and leisure scheme. The retail element was of significant size, being some 31,502m² of retail units. If the Secretary of State had wanted to qualify his statement on disaggregation in any way, that could have been achieved very simply by the addition of words such as 'in this case'. Indeed, the variety of uses in the RL proposal and the fact that the proposal included retail units, rather than one large retail unit, would have afforded more rather than less opportunity for some disaggregation if that had been an aim. [76, 200-206]

451. The quote above from the Guidance about whether "*a potential town centre site can accommodate precisely the scale and form of development being proposed (and) consider what contribution more central sites are able to make individually to accommodate the proposal*" might suggest that it is appropriate to look at one or more sites. [204, 205].

452. There was discussion at the Inquiry whether 'precisely' could mean, for example, a development within, say, 10% of the size of the appeal proposal. However, the Secretary of State confirmed in RL on 11 June 2014 that "*the sequential test relates entirely to the application proposal and whether it can be accommodated on an actual alternative site.*"

453. In the Tesco/Dundee case, the developer is expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form and to have thoroughly assessed sequentially preferable sites on that footing. Also, as indicated above, to demonstrate flexibility, the Guidance asks whether the suitability of more central sites to accommodate the proposal has been considered and whether there is flexibility in the format and/or scale of the proposal. Has there been flexibility in the formulation of the appeal proposal or is this a case where a business model that can only be satisfied in an out-of-centre location provides an opportunity to sidestep the sequential test? [70, 71, 75, 100, 207-218]

454. There has been no serious suggestion that JS should have two town centre sites in Braintree. They would be competing with each other and I have no doubt that a second store in the centre would not be a

sensible investment. JS seeks an out-of-centre store to complement its town centre store at Toft's Walk – but more of that later. Indeed, in the Zurich Assurance Ltd case, Hickinbottom J said that it is unrealistic to expect a commercial operator to reveal its precise, commercially and valuable calculations as to why it considers possible alternatives to the development proposal not to be commercially viable. [75, 77, 87, 105]

455. Two town centre sites fall to be examined: Land at Toft's Walk, which is the site of the JS town centre store, and Land West of George Yard. I deal with these in turn.

Sequential Test - Land at Toft's Walk

456. References by JS to the nine schemes and two analysis schemes at Broomhills that were worked on for the design of the appeal proposal do not constitute evidence of flexibility in terms of scale and format for the purposes of the sequential test. They are significant factors for the design of the appeal scheme and whether - in terms of layout, scale, appearance, materials, highway safety and so on - the submitted details would be appropriate and would meet with policy aims for the Broomhills site. [111-113]

457. However, they have little relevance to an assessment of town centre options. For example, putting the parking beneath a building that would be on stilts, as in the appeal scheme, is a specific design solution to the constraints and opportunities offered by the appeal site. That is not a design solution for a different site in the town centre and it does not demonstrate flexibility in scale and format. [References as above]

458. Sainsbury's aim for the appeal site is to challenge Tesco's dominance and compete with it for the bulk food market. Work started in 2007 on an application by JS to extend its Toft's Walk (TW) store. Meetings were held in 2007 and 2008 and the application was submitted in January 2009. The proposal, for 4,118m² floorspace and over 400 parking spaces, had mezzanine floorspace, a decked car park and entry to the store at that level. While BDC supported the proposal in principle, the development faced a number of constraints, not least being the need to keep the store open and trading during building works. [107, 116-123, 218, 226, 227, 229]

459. Also, the parking at TW is and would be shared between town centre users and store customers; the site is within a Conservation Area and within the setting of other designated and undesignated heritage assets. Trees on the site boundary are protected by a Tree Preservation Order. The consultation replies from Essex County Council (ECC) and English Heritage (EH) include serious concerns about the design details which would impact on the principle of the development. The report to Committee stated that significant weight should be given to the consultation responses of EH and ECC. [References as above]

460. A further constraint since 2009 is the conversion and occupation of the adjacent water tower for residential purposes. In addition, the 2014 Court of Appeal decision on Barnwell Manor has highlighted awareness of heritage constraints. [122]

461. JS spent a considerable amount of time, effort and money – some £300,000 on consultants’ fees alone – on trying to extend its store at TW. When faced with an adverse recommendation, a refusal to defer consideration of the application and substantial concerns about the design and the impact on heritage assets and on surroundings, it chose to walk away. To have continued with a proposal to extend the TW store, JS would have needed far more than the ‘process of refinement’ that BDC suggests. Indeed, there must be doubts whether an acceptable scheme that would have met the conflicting requirements of both sides could have been devised. [122, 229, 232, 233]

462. Whether or not JS saw that application as meeting its business needs in 2009 has little relevance now. As indicated in p454 above, its business case is its business case. I have no doubt that, since 2009, the retail landscape has changed considerably, both generally and locally to Braintree: on-line shopping has grown; JS will relocate its on-line service from the TW store regardless of the outcome of this appeal; the two out-of-centre Tesco stores have been extended and are trading very successfully; the Stanway JS has been built; the very successful Lidl in Rayne Road has opened; and there has been a shift from reliance on town centre stores for convenience goods. JS now states that the extended TW store would not be of sufficient size to provide genuine competition for dominant Tesco stores at Great Notley and Marks Farm. [102-108, 110, 116, 126, 131, 133, 144, 209-249, 304]

463. The Council argues that no material weight be afforded to the appellant’s two-store strategy: Broomhills and Toft’s Walk. And that JS abandoned its TW proposals too easily because, by 2009, it had directed its attention to a new store at Broomhills. This may be so and I acknowledge the apparent unwillingness of JS to confirm that the TW store would continue to be occupied for at least the next 10 years by JS. However, it is for JS to decide its business case in order for it to compete in the changing retail landscape as outlined above. [87, 101, 105, 106, 209, 234, 235, 239-245, 265, 352, 353]

464. Lastly, I do not accept that a two-store strategy effectively side-steps the requirement to demonstrate flexibility and seeks to avoid genuine and meaningful consideration of suitable and available sites in centre; quite the opposite in this case. JS tried to extend its TW store but faced substantial design constraints. Thus, not only has the suitability of a more central site been considered, in accordance with the current Guidance, it has been explored in detail through a planning application, at considerable effort and cost. [209, 214, 218]

465. Moreover, as the Secretary of State confirmed in the Rushden Lakes decision, “*the sequential test relates entirely to the application proposal and whether it can be accommodated on an actual alternative site*”. And BDC accepts that the appeal proposal could not be accommodated at Toft’s Walk. [75, 126]

Sequential Test - Land West of George Yard

466. This site is occupied mainly by the Morrisons store and the Council’s multi-storey car park. The lease to Morrisons runs to 2018. While

Morrisons is concerned about the impact of the appeal proposal on its store, it is clear that it has no plans to vacate the site. The multi-storey car park generates income for the Council. There is no indication of any consideration by the Council of the implications of redeveloping all or part of this structure. [95-99, 251-255, 383-389]

467. This site is not available. There is no need to consider it as a sequentially preferential site any further.

Sequential Test Conclusion

468. The sequential test has been passed. I turn now to consider the six areas of disagreement listed in the reconciliation paper, albeit not in the same order. [43-45]

Areas of Disagreement – Store Sizes

469. This dispute is over the net convenience floorspace of the Tesco Market Place and the Morrisons stores. I made a visual assessment of the relative amounts of convenience and comparison goods on display in each. [39, 40, 45]

470. My assessment is that Morrisons has a 90:10 ratio or 1,214m² net convenience floorspace, as BDC says, rather than the 1,079m² used by Mr McGrath.

471. My figure for Tesco Market Place is around 55% net convenience floorspace, derived from the whole of its smaller first floor being comparison goods plus about an eighth of the larger ground floor. 55% of 2,794m² net floorspace is approximately 1,540m² net convenience floorspace, a little less than the JS figure, which appears to be based on 60%, but well below that used by BDC. I am content to use the JS convenience figure for this store.

472. There had been disagreement over the floorspace in the JS store at Toft's Walk but this has been resolved. The JS figure is to be preferred. [137, 325]

Areas of Disagreement - EMD Site, Halstead

473. The disagreement is over the likely turnover of the store that would occupy this site and its trade diversion from stores in Braintree town centre. There is a difference of about £3m in the capacity analyses of the two consultants and £1.27m in relation to impact. [45, 139, 140, 296, 297]

474. JS considers that the site would be developed by a 'discounter' but the Council considers an Asda to be more likely. The former would be likely to have a much lower turnover. Permission was granted in 2012 for A1 retail development for some 1,474m² net retail floorspace and 114 parking spaces. The applicant was a developer rather than a retailer and no action has been taken to date to discharge the conditions.

475. There is very little evidence to use as the basis for a judgment. I am not convinced that a restriction on delivery days would be, on its own, a decisive factor and neither would the relatively small size for a new out-of-centre store. However, taken together they would persuade me to lean

more towards occupation by a discounter rather than Asda but this is little more than an educated guess. It could also be possible that the permission is not taken up at all, given the lack of activity to date.

476. Occupation of the site by a discounter would have a lower impact on the Braintree town centre.

Areas of Disagreement - On-line sales

477. BDC made no allowance for on-line sales in its calculations. It is not disputed that on-line customers do not make any linked trips within the centre that would contribute to its vitality and viability, albeit that they do assist the viability of the store that provides the on-line service. [131]

478. Both parties use a Verdict-based benchmark turnover figure for the turnover of the new store. Verdict does not separate out the on-line sales from sales to customers who visit the shop. However, the existing JS store at Toft's Walk has an on-line sales facility and I see no reason to doubt its figure of 15% or £3.18m of the convenience turnover being derived from this source. [133, 313]

479. The system for the on-line service is that pickers select goods for each order from the shelving within the sales area. Thus, the range on offer within the store or on-line are the same. The proposed new store, which would be larger and have a greater range of goods and a purpose-built on-line facility, would be likely to achieve a greater market penetration and percentage of its convenience turnover on-line. The 20% figure is not unreasonable, even though it would be 20% of a larger turnover. [133]

480. The Experian/Verdict benchmark turnover data, based on company averages, include sales on-line. JS states that its company average for such sales is 20%. Thus, using the agreed benchmark convenience turnover of the new store of £33.1m, 20% of this would be £6.62m and of this, £3.18m would be transferred from the Toft's Walk store. These figures appear reasonable in the context of the amount spent on convenience goods in on-line sales in the area in 2014 and 2019. [133, 134, 142, 314-319]

481. Benchmark levels have been used for turnovers by both sides. So while it is possible that the new store could trade more successfully than benchmark levels indicate, there is no evidence to support this. [320]

482. The effect of not deducting the on-line sales from the turnover of the proposed Broomhills store is to increase trade diversion and impact by 20%. [135, 320]

Areas of Disagreement – Comparison Turnover Efficiencies

483. There is no dispute that the comparison goods impact on Braintree town centre would be low. This subject makes little difference to the comparison goods impact figures. [150, 322]

Areas of Disagreement - Clawback

484. The Council argues that, if there were evidence of the leakage of expenditure – which it disputes occurs – there is a difference between clawing back that expenditure to support a town centre and clawing it back to a store that would compromise the health of the centre. I agree but the turnover of the proposed store is agreed. Any part of that trade that it would derive from clawing back leakage is trade that might otherwise have been drawn from a town centre. [143, 261]

485. I have no doubt that leakage is occurring; the residents who appeared at the inquiry told me so, as did others in the written representations. [364, 374, 379, 394]

486. However, while no allowance is made for clawback in the Council's convenience goods expenditure capacity in Braintree, it is allowed for (£2.1m) in its trade diversion calculation. The difference in trade diversion between the two sides is £1.21m. I agree with JS that the Council's judgments on this subject are too conservative, given the large JS stores at Stanway and Springfield just outside the study area, their turnovers, the brand loyalty to Sainsbury's, the lack of any JS stores in zones 3-5 and only a small one in zone 2 at Halstead and the good connections along the A120 and A131 roads from areas near the south and east of Braintree. [141]

Areas of Disagreement – Trade Diversion from BTC Stores

487. The Guidance confirms that, as a guiding principle, impact should be assessed on a 'like-on-like' basis. Retail uses tend to compete with their most comparable competitive facilities. In this case, the most comparable competitive facility would be with stores aiming at the bulk food full weekly shopping trips, which stock and display a full range of grocery items. [78, 144, 146, 147, 307]

488. As the Council points out, the differences between the parties in 2019 are marked: convenience diversion in 2019 from the JS Toft's Walk store – JS says £3.97m (plus the transfer of £3.18m on-line sales) and BDC says £5.6m; diversion from the Tesco Market Place store – JS says £0.83m and BDC says £4m; diversion from Morrisons at George Yard – JS says £0.25m and BDC says £1.2m. In total, for the three stores, JS' diversion figures add up to £5.05m and the Council's to £10.8m. [298]

489. Moreover, it is clear that the town centre stores have been susceptible to trade diversion to out-of-centre stores, where the turnover in 2011-2014 of the JS at Toft's Walk fell by £16.62m (47.5% impact) and that of the Tesco at Market Place fell by £23.53m (61.5% impact). It is not disputed that a significant factor in this was the opening of the out-of-centre Tesco stores at Marks Farm and Great Notley, albeit that the same table (G12 Table 4.1) shows that in the 2011-2014 period, there was little change in the turnover at Marks Farm (£27.17m to £27.97m) while Great Notley increased from £18.4m to £34.17m and Lidl rose from £2.37m to £14.02m. [300]

490. It is, however, disingenuous to attribute all of the (£16.62m + £23.53m =) £40.15m trade lost by the town centre JS and Tesco stores to draw by the two out-of-centre Tesco stores; to then calculate the expenditure diverted in pounds per square metre of out-of-centre floorspace (at £8,800 for every new square metre); and then to use this as a yardstick with which to compare diversion rates. Firstly the calculation is not accurate because in the same period, and as shown in the same table, the turnover of the Lidl store increased by £11.65m while that of the town centre Morrisons (formerly the Co-op) rose by £4.81m. Secondly, it provides a flawed basis for an assessment because many factors are involved. [147-148, 301-304]

491. Nevertheless, the trade lost by the two largest town centre stores was huge and it occurred over just a few years. It may also serve to demonstrate the brand loyalty factor where, for example, a Tesco store has more impact on a Tesco store than on a Sainsbury's. In addition, I am mindful of the national Guidance which states, in relation to the impact test, that it must be assessed over time, with periods of five or ten years quoted, depending on the size of the proposal. [141, 149, 300, 368, 374]

492. There have been doubts as to the accuracy of the earlier shopping surveys with regard to matters such as the definition of 'main food shopping' but, with further survey work, the shopping patterns are much clearer. There is now a greater incidence of main food shopping outside the town centre and a significant move away from reliance on town centre stores for this type of shopping. [147]

493. I accept that, with allowance for brand loyalty, the Tesco customers who want a bulk food shop will largely have deserted the **Tesco Market Place** store already in favour of Great Notley and Marks Farm and some, for example, to Lidl at Rayne Road. The 2014 convenience turnover given for Tesco Market Place is the same from each side. As shown in the JS table (in G12 pg15) its convenience turnover has fallen already some £23.53m, from £38.29m to £14.76. Also, its function as the 'usual destination for the main food shop', as shown in Table 4.10, has fallen from 48.2% to 23.3% from 2011-2014. [References after next paragraph]

494. Also relevant is that the new store would be a Sainsbury's rather than a Tesco but it would be much larger than either of the two out-of-centre Tesco stores and have a bigger range of goods. With the above factors in mind, I would be surprised if the diversion from this town centre Tesco store were only £0.83m as JS claims. A more likely diversion would be between the figures from the main parties, say around £2.0m. [25, 141, 147, 148, 149, 223, 227, 300, 308, 309, 368, 374]

495. As to the **JS store at Toft's Walk**, and using the JS figures again, its turnover in 2012 was some £3.36m less than the nearby Tesco but it is now £3.55m more, as the trade diverted from the town centre Tesco has been greater; the Toft's Walk convenience turnover from 2011-2014 fell some £16.62m, from £34.93m to £18.31m, and in terms of the 'usual destination for the main food shop', it has dropped from 33.8% to 26.2% in the same period. This 'usual destination' fall is far less than that suffered by Tesco Market Place and may be an indication of the brand

loyalty effect where Tesco shoppers have been more willing than JS customers to leave their respective town centre stores for the two out-of-centre Tesco units. [147, 298, 300]

496. The picture is complicated by the fact that BDC was not aware that Toft's Walk had on-line sales. As I concluded above, the effect of not deducting on-line sales from the Broomhills store turnover is to increase trade diversion and impact by 20%. While JS allows for a convenience trade diversion from Toft's Walk to Broomhills of some £3.97m, it also allows for the transfer of £3.18m of on-line sales to the new store, which together result in a solus convenience impact on the Toft's Walk store of some 29% in 2019. [131, 132, 298, 310]

497. Many of the factors to be taken into account have been considered above in relation to Tesco Market Place. They include: the size of the proposed store at Broomhills; its wide range of goods and the offer it would make; the much smaller but very successful Tesco stores at Marks Farm and Great Notley (especially the latter) and the successful Lidl at Rayne Road; the changes in shopping patterns; the relative losses experienced to date by the two main town centre stores and their current turnovers; the brand loyalty by Sainsbury's customers and the level of support for the appeal proposal; and the effect of on-line sales on which I have concluded above. With these factors in mind, and stripping out the on-line sales aspect, I consider that the diversion would be closer to the Council's assessment (£5.6m) than the appellant's £3.97m. [25, 38, 301, 302, 304, 355-379, 391-396, 398, 399]

498. I have agreed above that the Council is correct that the **Morrisons at George Yard** has a 90:10% split in convenience:comparison goods (or 1,214m² net convenience floor space, rather than the 1,079m² figure used by the appellant). Using the appellant's table 8 (from G12a Appx 4), and applying the company average sales density to the larger floor area, would increase the 2014 benchmark turnover from £12.17m to £13.69m. However, when comparing this with the actual turnover for the store, the shortfall in 2014 from the company average increases from £5.21m to about £6.73m, indicating an even worse performance than the 57% of the company average that is indicated. [298, 383-387] H

499. Be that as it may, the table on the 'usual destination for main food shop' (G12a Table 4.10) shows that only 6.5% use the Morrisons. It has limited use for the bulk shopping that is the principal aim for the appeal proposal. With this in mind, the impact on it would be relatively small. JS says £0.25m diversion and the Council says £1.2m but I lean towards the appellant's figure. [78, 79, 147, 298]

Health of the Existing Town Centre

500. The Guidance lists ten indicators for assessing the health of town centres. [154]

501. There is no dispute that the Braintree town centre has an attractive appearance and good accessibility, as my numerous visits to it during and after the inquiry confirm, albeit that concern is expressed by some about traffic problems. [15, 155, 392]

502. There were mixed views about the health of the centre from the residents who spoke at the inquiry from it being run down, in total decline and with an unattractive retail proposition, to it being lively and unique and being very lucky to live there because is so good. The representatives for Morrisons say that the centre is fragile and vulnerable. [153, 160, 277, 278, 290, 355-360, 366, 370, 378, 387, 395, 403]

503. In statistical terms, the centre has 22 vacant shops, down from 28 which was itself below the national average, and most of these are in peripheral locations. There is evidence from a local letting agent on behalf of the Council that it is proving harder to let units. However, on the other hand, in the town centre ranking survey, Braintree centre rose by 30 places from 2005 to 2014 in the period when the two out-of-centre Tesco store extensions and the Lidl were trading. And most significantly, when the town centre convenience turnover halved from £83.1m in 2011 to £40.89m in October 2014. During the same period, as the survey results show, there was a drop of some £15m in non-food expenditure and a decline in various types of comparison shopping, such as main clothes or books, DVDs, stationery and cards. [155-158, 272, 274-276, 280, 281]

504. As the appellant says, local shopping patterns have changed from 2011-2014, I would say dramatically in such a short time. Certainly, Braintree town centre is facing significant challenges, as the substantial, rapid and recent fall in its convenience turnover, plus a smaller fall in its comparison turnover, indicate. [References after next paragraph]

505. I recognise that some of the existing challenges for the town centre, which are from comparison as well as convenience shopping, would be affected by the appeal proposal (such as the extent of leakage). They are, not in any order of importance:

- the change in shopping patterns and the more than halving of the town centre convenience turnover in the last few years;
- the extensions to the two out-of-centre Tesco stores at Great Notley and Marks Farm opened in 2010-late 2011;
- the leakage to the JS store at Stanway, which opened after the 2009 application, and the one at Springfield;
- the commitments at the EMD site in Halstead and the Morrisons extension at Witham;
- the Braintree Retail Park;
- the closure of the M&S store in the town centre in 2009 and the opening of the M&S Simply Food at the Retail Park in 2014;
- the massively overtrading Lidl store on Rayne Road that opened in 2011;
- the Freeport Retail Village with its 80 retail units, good road access and its own railway station;

- the loss of linked trips to town centre shops and services from convenience shoppers;
- and the rise of on-line shopping. [17, 18, 41, 45, 78, 108, 131, 141, 144, 147, 148, 152, 165, 280-282, 284-286, 288, 292, 323, 350, 357, 363, 364, 388, 390, 391, 392, 401, 403]

506. Town centres continually evolve and change, as they must. The Braintree town centre is standing up well to the pressures it is facing. It is not displaying any serious signs of poor health or fragility but I recognise that some of the above changes are relatively recent and will take time to have a noticeable effect.

Impact on the Town Centre

507. It is agreed that it is appropriate to assess the impact of the appeal proposal on Braintree town centre as a whole, including the combined convenience and comparison impact and separate convenience and comparison impacts, at 2019 and 2024. [42]

508. The Framework (p27) states that permission should be refused where there would be a significant adverse impact. There is no dispute that it would be wrong to approach this question on the basis of identifying a specific percentage of impact that would be significant. The Guidance advises that: *"A judgement as to whether the likely adverse impacts are significant can only be reached in light of local circumstances"*. Also in the Guidance, the checklist for applying the impact test advises that it is necessary to focus on *"impact in the first five years as this is when most of the impact will occur"*. [152]

509. The impact figures are found in G10A Appx 6 Table 14 and G12A Appx 4 Tables 15A and 15B. There is no dispute that there would be an impact on the town centre. [151, 291-295, 321, 322]

- The Council's figure for combined convenience/comparison cumulative impact (including commitments) is 10% (£17.3m) at 2019 or 9% solus impact (£15.4m).
- The Council's figure for solus convenience impact at 2019 is 24% (£11.1m) or 27% (£13m) including commitments.
- The appellant's figure (including on-line sales) for solus convenience impact on the town centre at 2019 is 16.4% or a cumulative convenience impact of 17.9% including commitments.
- The appellant's figure (including on-line sales) for combined convenience/comparison impact on the town centre at 2019 is 6.5% solus or 7% including commitments.
- The appellant's figure (excluding on-line sales) for solus convenience impact on the town centre at 2019 is 10.7% (£5.09m) or a cumulative convenience impact of 12.3% (£5.85m) including commitments.

- The appellant's figure (excluding on-line sales) for combined convenience/comparison impact on the town centre at 2019 is 4.8% solus (£8.39m) or 5.3% (£9.15m) including commitments.

510. As indicated above, my conclusions lead to impact figures between those of the two sides.

511. What would the effects be? The town centre Tesco and JS stores would each be trading well below benchmark as shown on the tables by both parties. There is no suggestion that either store would close. Indeed, the S106 Unilateral Undertaking would provide for a retail store to continue at this site for 10 years, as indicated above. [324-327]

512. With regard to the Morrisons at George Yard, it is not an anchor store in the centre, it is poorly located in relation to George Yard and it is trading now well below the company average. It is possible that it would close if Broomhills were to proceed. If so, the Council's aim would be to seek more comparison retail floorspace in the town centre. [15, 27, 162-164, 327, 328, 383-387]

513. As I say above, the Braintree town centre is standing up well to the pressures it is facing, the test for impact is whether it would be significantly adverse, the judgement as to whether the likely adverse impacts are significant can only be reached in the light of local circumstances, and it is necessary to focus on impact in the first five years as this is when most of it will occur.

514. There can be no doubt that the town centre is facing substantial competition. Note, for example, the more-than halving of convenience turnover from about £83m to some £41m; or the turnover of the Great Notley Tesco increasing from £18.4m to £34.17 (G12 Table 4.1); or the £12m increase in the out-of-centre Lidl turnover in the last 3 years. Indeed, several of the retail changes in the locality are of recent origin and there will not have been time for their full effects to be felt and assessed.

515. Excluding on-line sales, the impact on the town centre for the combined convenience plus comparison plus commitments would be, in monetary terms, between £9.15m on the appellant's figures, and £17.3m on the Council's figures. For convenience impact, solely from Broomhills, the town centre would lose between £5.09m and £11.1m. The results of my conclusions on impacts would put the likely amount between the two figures. This would, of course, be in addition to the £42m drop in the centre's convenience turnover in the last few years.

516. Even when looking at convenience turnover in isolation and leaving aside the effect of the commitments at the EMD site, Halstead and the Morrisons extension at Witham, the trade lost to the centre would be approaching (£42m + say a midway £8m =) £50m.

517. Moreover, leaving aside the on-line trade, the drop in convenience turnover in the town centre must be considered in the context of the importance of convenience shopping for linked trips to other town centre shops and services. Lower turnover means fewer shoppers in the

centre. Thus, there would be knock-on effects for other parts of it. [131, 165, 282-288, 390, 403]

518. Also, while the surveys indicate that the majority of respondents do not link their main food shopping trip with any other purpose, it must be borne in mind that 35% of the net sales area of the proposed store would be for comparison goods so there would be scope for 'linking' within the store that might otherwise have taken place in the town centre. [20, 165]

519. No specific planned or committed investments have been identified as being at risk. Nevertheless, the town centre has already suffered a significant adverse impact in terms of convenience turnover in a very short period of time and, as the full effects of the competing challenges to the centre develop, the situation would be likely to get worse. If the impacts of Broomhills and the commitments were added to this retail landscape, I am satisfied that the existing situation in terms of discouraging investment in the centre and impact on shopping and services would be made greater. The impact on the centre would be likely to be significantly adverse. [42]

Design

520. For convenience, I have moved the appeal plans, which were not together in one place, to Document H31. Photographs and photomontages have been submitted. The proposal is described in some detail at p20-25 of this report. [8]

521. LPR Policy RLP90 seeks a high standard of layout and design in all developments. It includes criteria on many factors including reflecting or enhancing local distinctiveness, a high standard of design and materials, impact on character and appearance, sustainable modes of transport, traffic generation, landscape design and lighting. Also, the Framework paragraphs 56-68 deal with "Requiring good design"; p61 states that *"Although visual appearance and the architecture of individual buildings are very important factors, securing high quality and inclusive design goes beyond aesthetic consideration"*. [26, 27, 171, 331]

522. The site is a run-down eyesore near the edge of town and close to housing. Without doubt, it detracts from the appearance of the area. I do not accept that the site has been deliberately run-down in order to seek to improve the chance of gaining permission. As Mr Cutmore says, the site presented a disappointing approach to the nearby housing estate 22 years ago, albeit that the appearance is worse now that much of it is unoccupied. The large concrete blocks were placed there to prevent incursions. [References after next paragraph]

523. The Broomhills estate was developed in the 1960s, the Council accepts that there is no market for the existing buildings, that the units closest to Pods Brook Road could not be modernised, that the layout is poor and that redevelopment would not be viable for the foreseeable future. Moreover, in the emerging Site Allocations and Development Management Plan (ADMP), Policy ADM37A, for the Broomhills Regeneration Site, lists a wide variety of uses to achieve redevelopment. [28, 49, 54, 55, 172, 173, 175, 332, 334, 372, 377, 394, 396, 398]

524. The local contextual design influences to which the Council refers, such as the town centre and the George Yard multi-storey car park, are generally at some distance from the site. The character areas that it has defined near to the site include, as it agrees, positive and negative attributes for the sense of place. The site is not in a conservation area or near any heritage assets. It is near the edge of town, close to industrial buildings, car showrooms and external display area and housing. [175, 332]

525. A detailed layout design process was undertaken. This examined different schemes and their effects on the amenity of nearby residents, on accessibility and safety, landscaping and so on, defining and assessing the positive and negative factors for each of the options. Concerns of residents, as expressed at the public engagement stage, were taken into account. 'Before and after' images are provided. It is clear that each option or change to it causes consequences – good or bad – for other aspects of the proposal. For example, the location of the raised service yard has implications for noise and disturbance for residents as well as highway safety, the location of the access to it, the prominence and appearance of that access, the orientation of the store and more. [176, 179, 338-342]

526. The Council accepts that the functional needs of operators must be considered but it points out that superstores offer an opportunity to make a major positive contribution to an existing place, economically, visually and in terms of strengthening the 'sense of place'. This is not in dispute. However, I do not accept that the scale of the building and operational needs and access priorities have affected the layout to the detriment of the proposal. If the scheme could not function efficiently and safely for the operator, it is unlikely that it would be built. [176, 332, 333, 346]

527. The existing site slopes down from N-S and from E-W. At most superstores, there is a large building behind large areas of parking. At Broomhills, however, landform is an important factor that has been used as a positive design element. The land within the site would be levelled, primarily for operational reasons, and the building would be on stilts, with most of the parking hidden beneath it rather than dominating. [20, 21, 337, 338, 340, 349]

528. Pods Brook Road rises towards the roundabout at Rayne Road, so that it gets progressively higher in relation to the levelled site and more embanked. It is only from the southern part of the recreation area on the eastern side of Pods Brook Road that there is any view towards the site, and even this is restricted by the landform and fencing or vegetation other than from the rising land in its south eastern corner. Thus, there would be limited opportunities for any engagement between the two. However, the proposed glazed café area, which would be, of necessity, at 'first floor level' (i.e. above the parking level), would have views in the direction of the recreation area. [11, 346]

529. The narrow funnel shaped area at the north eastern corner of the site, near to Rayne Road roundabout, is close to housing and it would provide access for pedestrians and scope for additional landscaping. It is not an area where I would expect the building to dominate because of the

impact that that would have on residents. An examination of the various options (G11A) reveals several where proximity to housing would be a negative factor. [177, 181, 343, 345]

530. I agree with the appellant that the proposed layout, with the main entrance towards Guernsey Way to the south, is the most appropriate. The Council's suggestion that the main entrance should face Pods Brook Road (as in Scheme 6 in G11A) was examined but it would only work if the site level matched the sales floor level and there would be other linked disadvantages. [176, 346]

531. The proposed building has been designed by an architect. It is criticised as being a large box with large elevational planes, having little visual interest or impact, a rigid orthogonal form and no perceptible separate volumes. There are, however, changes and points of interest to the proposed elevations and the roof line; it exhibits subtle variations and modulations rather than any element(s) of it seeking to make a dramatic statement. And, as p61 of the Framework recognises, the design of a proposal is far more than its external appearance. [172, 174, 332, 344, 345, 347]

532. The details of the external facing materials could be controlled by a condition. [178]

533. The proposed landscaping, including some bunding and supplementing the existing vegetation, would provide an appropriate setting for the store as well as screening in part for nearby residents. Dedicated provision would be made for pedestrians and cyclists plus – via the S106 Agreement with the County Council – a new path on the west side of Pods Brook Road and a new zebra crossing. In addition, other sustainable transport measures would be secured. [169, 171, 173, 176, 177, 180-185, 340]

534. While it is argued that the route for pedestrians would be unappealing, those who did not wish to enter from the north east and then go through the car park under the store could use the proposed footpath on Pods Brook Road. This could link with a suggested and improved revised detail at the south eastern corner of the site, which would also open up the view at that point, albeit that it is only a suggestion and is not part of the application to be considered. [180, 340]

535. Moreover, it is worth recognising that the uses for the site that the Council is promoting would, as the appellant points out, be likely to involve orthogonal forms of building and large areas of parking. The appeal proposal would secure a substantial improvement to the appearance of the area. The proposal would not conflict with p64 of the Framework or with Policy RLP90. [172]

Conditions

536. A schedule of conditions within the Statement of Common Ground was examined and amended at the Inquiry. Conditions 1-3 are the standard time limit, specification of the approved plans and a requirement for approval of external facing materials (p532 above). No 4 requires approval for plant and equipment, No 5 deals with management of the

service yard and No 6 with the biomass plant, in each case to protect the amenity of the nearby residents. A BREEAM Very Good rating would be required (No 7).

537. Approval would be needed for landscaping works and drainage details (No 8 and No 10) and the identified flood risk measures would be required to be provided and maintained (No 9). It would be necessary to further investigate land contamination and take action as necessary (Nos 11 and 12). Any infiltration of surface water would only be permitted where there would not be an unacceptable risk to controlled waters (No 13) and details of surface water drainage details would be required (No 14) to prevent increased risk of flooding and protect and improve water quality and provide for future maintenance of the drainage system.

538. Requirements for the approval of a Construction Traffic Management Plan, of access arrangements, of controls over the prevention of the discharge of surface water onto the highway and of various junction, highway, access and parking details (Nos 15-27) would be in the interests of highway safety and efficiency.

539. Controls over the external lighting to the site, including the Service Yard, would seek to protect the character and amenity of the area (No 28).

540. Lastly, No 29 would restrict the net sales area and, within that, the convenience goods sales area, to those specified in the application, while No 30 would ensure that the industrial units to be retained would be refurbished.

Overall Conclusion

541. The appeal proposals would secure the redevelopment of a largely vacant industrial estate within which the existing premises are at the end of their useful life and redevelopment for Class B employment uses would not be viable. The proposed design details for the store would be satisfactory and there would be a substantial improvement to the appearance and character of the area by the rejuvenation of a brownfield site. There would be no conflict with Policy RLP90 or with paragraph 64 of the Framework.

542. Other benefits would include the new Sainsbury's superstore - in an accessible location within the urban area of Braintree - which would improve consumer choice and competition. Some 400 jobs would be created (141-181 Full Time Equivalent jobs) and the on-line service employment would be retained locally. The new industrial units would serve the needs of modern business more effectively while meeting, to a degree, the development plan, the emerging plan and the Council's aims for the site. Café and toilet facilities in the store would be available for those using the recreation area opposite.

543. There would be improvements to pedestrian, cycling and public transport facilities and enhancements to Braintree town centre, as well as a commitment to retain the Sainsbury's Toft's Walk store open and trading as a Sainsbury's for at least 10 years. Town centre parking would be largely

free by linking the Broomhills and Toft's Walk stores. While there is some objection to the proposal, there is a substantial level of support. [46, 355-403]

544. I can well understand the appellant's wish to compete in Braintree with Tesco, which has three large stores to Sainsbury's one and, as the figures indicate (as quoted above in p489, 493 and 495), a far larger convenience turnover; compare that of Sainsbury's at Toft's Walk, some £18.31m, with the sum of the three Tesco stores at (£27.97m + £34.17m + £14.76m =) £76.9m in 2014.

545. The superstore part of the proposal would be in conflict with policy RLP33, which defines Employment Policy Areas including the appeal site on the Proposals Map, while Policy CS4 seeks to retain employment sites in sustainable locations for employment use. However, as indicated above, that would not be viable at this site, so to retain and refurbish any of the units would be a positive factor. Emerging draft policy ADM37A is a material consideration; it allocates the site for a variety of uses but they do not include food retailing.

546. Policy CS6 confirms that any proposals for retailing and town centre uses will be based on the sequential approach with larger scale development focused on the town centres in the District. Paragraph 23 of the Framework seeks to ensure the vitality of town centres while p24 deals with the sequential approach for proposed main town centre uses that are not in an existing centre.

547. The sequential approach has been passed. The health of Braintree town centre is standing up well to the pressures it is facing. There are no serious signs of poor health or fragility but I recognise that the challenges to it are very large and several are of relatively recent origin and will take time to have a noticeable effect.

548. No specific planned or committed investments have been identified as being at risk. Nevertheless, Braintree town centre has already suffered a fall of over 50% in its convenience turnover in a very short period of time as a result, largely, of competition from out-of-centre retailers. As the full effects of the existing competing challenges to the centre develop, the situation would be likely to get worse. If the impacts of Broomhills and of the commitments were added to this retail landscape, I am satisfied that discouragement of investment in the centre and the impact on shopping and services would be much greater. BDC accepts that the Framework should be taken as the retail policy framework for the retail impact assessment; in this case, the impact on the centre would be likely to be significantly adverse, in conflict with paragraph 27 of the Framework. [42, 62-65, 269-272, 329]

549. I acknowledge that the two S106 Obligations would both pass the tests in Regulation 122 of the CIL Regulations but the improvements that they would secure, which are included in the benefits and positive factors outlined above, would not be enough to outweigh the significantly harmful impact on Braintree town centre and the discouragement of investment that would result.

550. I will recommend that the appeal be dismissed. If this recommendation is not accepted, I commend consideration of the attached Schedule of Conditions, which is to be found after the list of appearances.

Recommendation

File Ref: APP/Z1510/A/14/2219101

551. I recommend that the appeal be dismissed.

K G Smith

Inspector

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mr P Village QC
assisted by Mr J Darby, of
Counsel

Instructed by the Solicitor to Braintree
District Council

They called:

Ms T Lambert

Head of Development Control, BDC

Mr R Estop

Mr M Morris

Mr I Hunt

Head of Governance, BDC

BSc(Hons) PGDipLP

FGS

FOR THE APPELLANT:

Miss M Ellis QC

Instructed by Ms M Vas, Managing
Associate, Dentons UKMEA LLP

She called:

Professor R

Robert Tavernor Consultancy

Tavernor BA

DipArch PhD RIBA

Mr S McGrath BA

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Ms L Croft

Associate Director, Indigo Planning

Bach.URP MRTPI

Ms M Vas

Managing Associate, Dentons

LLB(Hons) DipLG

INTERESTED PERSONS:

Mr N Bignold

Local resident

Mrs S Parsons

Local Resident

Miss Tina Smith

Deputy Store Manager, Toft's Walk,
Sainsbury's

Mr D Williams

Local resident

Mrs M Gurteen

Local resident

Mr M Cutmore

Local Resident

SCHEDULE OF CONDITIONS

1. The development hereby permitted shall be begun before the expiration of three years from the date of this permission.
2. The development/works hereby permitted shall be implemented in accordance with the following approved plans, unless agreed in writing by the local planning authority:

- DMWR/A1/2646_PL-00001 Rev B - Existing Site Location Plan;
 - DMWR/A1/2646_PL-00002 Rev A - Existing Ground Floor Site Plan;
 - DMWR/A1/2646_PL-00020 Rev A - Existing Site Sections;
 - DMWR/A1/2646/PL_00110 Rev C – Proposed Ground Floor Site Plan;
 - DMWR/A1/2646/PL_00111 Rev B – Proposed First Floor Site Plan;
 - DMWR/A1/2646/PL_00112 Rev B – Proposed Roof Floor Site Plan;
 - DMWR/A1/2646_PL-00120 Rev A - Proposed Sections;
 - DMWR/A1/2646_PL-00130 Rev A - Proposed Elevations Sheet 1;
 - DMWR/A1/2646_PL-00131 Rev A - Proposed Elevations Sheet 2;
 - DMWR/A1/2646_PL-10002 Rev A - Existing Ground Floor Site Plan - Units 35-38;
 - DMWR/A1/2646_PL-10010 Rev A - Existing Ground Floor Plan - Units 35-38;
 - DMWR/A1/2646_PL-10011 Rev A - Existing Mezzanine Plans - Units 35-38;
 - DMWR/A1/2646_PL-10012 Rev A - Existing Elevations - Units 35-38;
 - DMWR/A1/2646_PL-10102 Rev A - Proposed Ground Floor Site Plan - Units 35-38
 - DMWR/A1/2646_PL-10112 Rev A - Proposed Roof Plan - Units 35-38;
 - DMWR/A1/2646_PL-10130 Rev A - Proposed Elevations - Units 35-38;
 - N11618-01 Rev G – Landscape Proposal;
 - DMWR/A1/2646/00002 – Existing Landscape Ground Floor Site Plan;
 - DMWR/A1/2646/S09-00014 – Proposed Landscape Ground Floor Site Plan;
 - 110101/A/21 Rev A – Proposed Access; and
 - 3150 Rev C – Proposed Site Lighting Layout.
3. Before development commences (excluding demolition), samples of materials to be used in the construction of the external surfaces of the development, cross referenced to elevation drawings including the acoustic fence, hereby permitted shall be submitted to and approved in writing by the local planning authority. The development shall be implemented using the approved materials.
 4. Details, including acoustic specification, of all fixed plant, machinery and equipment associated with air moving equipment, compressors, generators or plant or equipment of a like kind installed within the site, including the proposed biomass facility, shall be submitted to and approved by the local planning authority in writing before installation. Thereafter, such plant shall be installed and maintained only in accordance with the approved details.
 5. A Service Yard Management Plan, incorporating measures as set out in the Noise Assessment prepared by WYG Environment and dated December 2011, and including details of a winter maintenance regime for the service access road, shall be submitted to and approved by the Local Planning Authority. The details as approved shall be implemented upon commencement of use of the store and maintained thereafter.
 6. Details of the proposed biomass boiler, including the chimney height calculation, shall be submitted to and agreed in writing with the Local Planning Authority prior to installation. The details as approved shall be implemented only in accordance with the approved details and maintained thereafter.
 7. The applicant shall incorporate on-site renewable or low-carbon energy technologies to achieve BREEAM Very Good rating and provide at least

10% of the annual energy needs of the approved development in-use. Details of the energy contribution of the proposed technologies shall have been submitted to and approved in writing by the Local Planning Authority and shall be operational prior to the first opening of the store and thereafter maintained in such operation.

8. All hard and soft landscape works shown on Drawing N11618-01 Rev G – Landscape Proposal prepared by The Landscape Partnership shall be carried out generally in accordance with the approved plan. Details and specifications of hard and soft landscape works (including pedestrian routes and retaining structures) shall be submitted to the local planning authority for approval prior to commencement of works (excluding demolition).

All planting, seeding or turfing and soil preparation comprised in the approved details of landscaping shall be carried out in the first planting and seeding seasons following the occupation of the buildings, the completion of the development, or in agreed phases whichever is the sooner, and any plants which within a period of five years from the completion of the development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species. All landscape works shall be carried out in accordance with the guidance contained in British Standards, unless otherwise agreed in writing by the local planning authority.

9. All flood risk management measures identified in the approved Flood Risk Assessment shall be incorporated into the development prior to the occupation or first use of the development hereby permitted and thereafter maintained in accordance with the Flood Risk Assessment.
10. Details of the foul and surface water drainage arrangements for this development, including details of the stages of construction at which the relevant drainage infrastructure will be provided, shall be submitted to and approved in writing by the Local Planning Authority before any work commences on site. The drainage works shall be constructed in accordance with the approved details.
11.
 - 1) Prior to commencement of development (excluding demolition) details of a programme of further investigative works to address the recommendations at Section 11.2 of the Geotechnical and Geo-environmental Report prepared by RSK and dated November 2011, shall be submitted to and approved in writing by the local planning authority. Any requirement that is identified shall be implemented in accordance with the approved programme.
 - 2) If required by the findings of the further investigation required under part (1) above, a verification report demonstrating that any necessary remediation works are complete and identifying any requirements for longer-term monitoring and/or maintenance arrangements to be set out in a Method Statement shall be

submitted to and approved in writing by the Local Planning Authority prior to the commencement of development (excluding demolition). Any requirement that is identified for longer-term monitoring and/or maintenance arrangements shall be implemented as approved and maintained thereafter.

12. If, during development, contamination not previously identified is found to be present at the site, then no further development shall be carried out until the developer has submitted, and obtained written approval from the Local Planning Authority for, an amendment to the Method Statement required under condition 11(2) detailing how this unsuspected contamination shall be dealt with. Any necessary remediation works shall then be completed in accordance with the details approved and a verification report shall be submitted to and approved in writing by the Local Planning Authority before further development works are carried out.
13. Should any infiltration of surface water drainage into the ground be proposed for the development hereby approved, before commencement of development (excluding demolition) details shall be submitted to and approved in writing by the Local Planning Authority, and thereafter implemented as approved. Approval shall only be given for those parts of the site where it has been demonstrated that such infiltration will not result in unacceptable risk to controlled waters. Thereafter, such works shall only be carried out in accordance with the approved details.
14. Development shall not begin until a surface water drainage scheme for the site, based on the principles set out within the Flood Risk Assessment Report prepared by RSK and dated November 2011, has been submitted to and approved in writing by the local planning authority. The surface water drainage scheme shall be implemented only in accordance with the approved details and shall be in place prior to the first occupation of the development and thereafter maintained in accordance with the approved scheme.
15. Before development commences (including demolition) on site a Construction Traffic Management Plan, shall be submitted to and approved in writing by the local planning authority. The Construction Traffic Management Plan as approved shall subsequently be adhered to during the construction phase of the development.
16. Provision shall be made for suitable access arrangements to the application site in connection with the demolition/construction operations, to include wheel washing facilities, turning and off loading facilities for delivery / construction vehicles within the limits of the site together with an adequate parking area for those employed in developing the site. Details of all measures/installations shall be submitted to and agreed in writing by the Local Planning Authority prior to the commencement of development (including demolition).

The approved details shall be implemented on site and maintained during demolition and construction operations.

17. Prior to commencement of the development, details showing the means to prevent discharge of surface water from the development onto the highway shall be submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be carried out in its entirety prior to the access becoming operational and shall be retained at all times.
18. Prior to occupation of the development, traffic signals shall be provided at the junction of Pods Brook Road and the site access road as shown in principle on drawing number 110101/A/21 Rev A. Works shall include, but not be restricted to, a pedestrian/cycle refuge island on the site access arm, tactile paving, the resurfacing of the carriageway to provide high skid resistance surface on the Pods Brook Road approaches, advanced warning signage and the relocation of the existing lay-by on the eastern side of Pods Brook Road. Details of all proposed works shall be submitted to and approved in writing by the Local Planning Authority, and the works shall be carried out in accordance with the approved details.
19. Prior to occupation of the development, provision shall be made for a bellmouth access together with associated tactile crossing points from Pods Brook Road to the site, as shown in principle on drawing number 110101/A/21 Rev A, for use by service / delivery / goods on line vehicles only. The access is to be constructed in a manner to allow left-in/left-out movements only, together with provision of appropriate signage. All details of this access and related signage shall have been previously submitted to and approved in writing by the Local Planning Authority and the works and signage shall be carried out in accordance with the approved details.
20. Prior to occupation of the development, the existing directional sign on the western verge of Pods Brook Road shall be relocated, as shown in principle on drawing number 110101/A/21 Rev A. Details of all proposed works shall be submitted to and approved in writing by the Local Planning Authority and the works shall be carried out in accordance with the approved details.
21. Prior to occupation of the development, provision shall be made for a shared footway/cycleway along the western side of Pods Brook Road, as shown in principle on drawing number DMWR/A1/2646/PL_00110 Rev C. Details of all proposed works shall be submitted to and approved in writing by the Local Planning Authority, and the works shall be carried out in accordance with the approved details.
22. Prior to occupation of the development, provision shall be made for a zebra crossing on the site access road to the east of its junction with Guernsey Way as shown in principle on drawing number DMWR/A1/2646/PL_00110 Rev C. Details of all proposed works shall

be submitted to and approved in writing by the Local Planning Authority and the works shall be carried out in accordance with the approved details.

23. Prior to occupation of the development, provision shall be made for a zebra crossing on Pods Brook Road to the south of the Pods Brook Road / Rayne Road / Springwood Drive roundabout as shown in principle on drawing number DMWR/A1/2646/PL_00110 Rev C. Details of all proposed works shall be submitted to and approved in writing by the Local Planning Authority and the works shall be carried out in accordance with the approved details.
24. Prior to occupation of the development, provision shall be made for a pedestrian / cycle access into the north east corner of the site from Rayne Road, to measure a minimum of 3m wide, as shown in principle on drawing number DMWR/A1/2646/PL_00111 Rev B. Details of all proposed works shall be submitted to and approved in writing by the Local Planning Authority and the works shall be carried out in accordance with the approved details.
25. The service road shall be constructed at a gradient no greater than 1:19 and surfaced with a high friction bound surface material. Details of such works including gradient, surface treatments and materials shall have previously been submitted to and approved in writing by the Local Planning Authority and the works shall be carried out in accordance with the approved details prior to the first use of the service yard and maintained in perpetuity.
26. Prior to occupation of the development detailed plans of the car parking area shall be submitted to and approved in writing by the Local Planning Authority and the works shall be carried out in accordance with the approved plans. The car parking area (including parking spaces for the mobility impaired) shall be hard surfaced, sealed and marked out in parking bays and made available for use prior to occupation of the development. The car parking area shall be retained in this form at all times. The car park shall not be used for any purpose other than the parking of vehicles that are related to the use of the development.
27. The cycle parking provision and the provision of 11 powered two wheeler parking spaces (as shown in the plans hereby approved) shall be installed/provided and made available for use prior to the first opening of the approved store to members of the public.
28. The external lighting to the site shall be installed in accordance with the details contained in the External Lighting Statement Issue 4 dated 28 November 2011 and Drawing 3150 Rev C – Proposed Site Lighting Layout, prepared by Synergy.

Notwithstanding the content of the above mentioned External Lighting Statement, prior to the commencement of the development hereby

approved, details shall be submitted to and approved in writing by the Local Planning Authority of all lighting that is proposed within the Service Yard. Lighting within the Service Yard shall be installed in accordance with the approved details.

29. The maximum net (sales) floorspace of the store shall not exceed 4,765m², within which a maximum of 65% of the area shall be devoted to convenience goods sales.
30. Prior to the first opening of the supermarket to members of the public, the employment units at the South West corner of the site shall be refurbished in accordance with the plans hereby approved and made available for occupation.

Lists of Documents and Plans

A	GOVERNMENT GUIDANCE AND RELEVANT LEGISLATION, CASE LAW AND APPEAL DECISIONS
1	National Planning Policy Framework (2012)
2	Planning Practice Guidance on ensuring the vitality of town centres (published on 6 March 2014)
3	The Community Infrastructure Levy Regulations 2010 (as amended)
4	Tesco Stores Limited v Dundee City Council 2012 UKSC 13 [in particular paras 29, 38]
5	Zurich Assurance Limited trading as Threadneedle Property Investment v North Lincolnshire Council and Simons Developments Limited [CO/4764/2012] [in particular paras 58-64]
6	Telford and Wrekin BC v Secretary of State for Communities and Local Government [2013] EWHC 1638
7	Trusthouse Forte Hotels v Secretary of State for the Environment (1986) 53 P&CR 293
8	Lidl UK GmbH v Scottish Ministers [2006] CSOH 165
9	Appeal Decision APP/J4423/A/13/2189893 - Vulcan Road, Sheffield (3 July 2013)
10	Appeal Decision APP/A1015/A/10/2120496 - Sainsbury's, Chesterfield (17 August 2010)
11	Secretary of State Decision (11 June 2014) and Inspector's Report (14 November 2013) – Land Adjacent Skew Bridge Ski Slope, Northampton Road, Rushden APP/G2815/V/12/2190175
12	Planning Practice Guidance on Design (6 March 2014)
13	Appeal Decision APP/F0114/A/13/2191952 – Former Bath Press, Bath (18 December 2013)
14	Appeal Decision APP/Z1510/A/07/2052026 – Lidl UK GmbH and Ernest Doe and Sons, Rayne Road, Braintree (22 January 2008)

B.	DEVELOPMENT PLAN, EMERGING PLAN AND EVIDENCE BASE DOCUMENTS
1	Braintree District Core Strategy (2011)
2	Braintree District Local Review Plan (2005) Saved Policies
3	Pre-submission Site Allocations and Development Management Plan (September 2013)
4	Further Changes to Pre Submission Site Allocations and Development Management Plan (May 2014)
5	Lambert Smith Hampton Viability Review of Employment Sites in Braintree District (2012)
6	Braintree District Retail Study Update 2012 (Report and Appendices)
7	Braintree District Retail Study Update 2010 (Report and Appendices)
8	Braintree Town Centre Preliminary Development Analysis (2009)
9	North Essex Authorities Retail Study – Stage 2 Report Braintree District Retail Study 2006 (Report and Appendices)

C.	PLANNING APPLICATION DOCUMENTS (REF: 12/01000/FUL)
1	Pre-application Meeting request submission to BDC (7 June 2011)
2	Pre-application Meeting request submission to BDC (23 September 2011)
3	Indigo Planning Retail Assessment Methodology Briefing Note (November 2011)
4	Screening Opinion Request (24 October 2011)
5	Braintree District Council Screening Opinion Response (1 November 2011)
6	Screening Direction Request (11 November 2011)
7	Screening Direction (2 December 2011)
8	Planning Application Form and Certificates
9	Planning Drawings prepared by DMWR Architects
10	Planning and Retail Statement prepared by Indigo Planning (July 2012)
11	Design and Access Statement prepared by DMWR Architects
12	Transport Assessment and draft Travel Plan prepared by Vectos
13	Flood Risk Assessment Report prepared by RSK
14	External Lighting Statement prepared by Synergy Building Services

C.	PLANNING APPLICATION DOCUMENTS (REF: 12/01000/FUL)
	Limited

C.	PLANNING APPLICATION DOCUMENTS (REF: 12/01000/FUL)
15	Report on Marketing and Letting History and Viability of the Broomhills Industrial Estate prepared by Kemsley LLP
16	Tree Survey, Arboricultural Implications Assessment and Arboricultural Method Statement prepared by The Landscape Partnership
17	Landscape Design Statement prepared by The Landscape Partnership
18	Ecological Appraisal prepared by The Landscape Partnership
19	Renewable Energy and Energy Efficiency Assessment prepared by Synergy Building Services Limited
20	Sustainable Design and Construction Checklist
21	Noise Assessment prepared by WYG Environment
22	BREEAM 2008 Pre-Assessment Report prepared by Synergy Building Services Limited
23	Utilities Statement prepared by Synergy Building Services Limited
24	Statement of Public Consultation prepared by PPS
25	Air Quality Assessment Report prepared by WSP
26	Daylighting, Sunlighting and Overshadowing Assessment prepared by Drivers Jonas Deloitte
27	Site Waste Management Plan prepared by Longcross
28	Town Centre Improvements Report prepared by DMWR Architects
29	Letter from Indigo Planning to Braintree District Council (6 August 2012) providing revised drawings and additional application fee for validation
30	Indigo Planning response to Retail Critique and Objections (September 2012)
31	Indigo Planning letter to Braintree District Council (18 October 2012) relating to EMD scheme in Halstead and cumulative retail impact
32	Vectos response to Essex County Council comments on Transport Assessment (November 2012). Vectos email dated 23 November 2012.
33	Letter from Indigo Planning to Braintree District Council (3 December 2012) regarding employment land allocation and report by Lambert Smith Hampton
34	Email from Indigo Planning to Braintree District Council (4 December 2012) regarding garden extensions
35	Email from Indigo Planning to Braintree District Council (14 December 2012) and accompanying proposed Section 106 heads of

C.	PLANNING APPLICATION DOCUMENTS (REF: 12/01000/FUL)
	terms

C.	PLANNING APPLICATION DOCUMENTS (REF: 12/01000/FUL)
36	Email 1 from Indigo Planning to Braintree District Council (18 December 2012) design and landscape matters and accompanying drawings
37	Email 2 from Indigo Planning to Braintree District Council (18 December 2012) design and landscape matters and accompanying drawings
38	Email from Indigo Planning to Braintree District Council (14 January 2013) and accompanying letter in response to second GVA retail critique
39	Email from Indigo Planning to Braintree District Council (14 January 2013) and accompanying employment land viability report by Derrick Wade Waters
40	Email from Indigo Planning to Braintree District Council (11 February 2013) and accompanying note prepared by Vectos in relation to highways matters discussed with the Highways Agency / Aecom
41	Letter from Indigo Planning to Braintree District Council (14 February 2013) regarding inconsistent retail advice
42	Letter from Dentons to Braintree District Council (15 March 2013)
43	Letter from Indigo Planning to Braintree District Council (16 April 2013) regarding retail matters
44	Indigo Planning Briefing Note: Technical Response to GVA further independent retail advice (May 2013)
45	Email from Indigo Planning to Braintree District Council (14 June 2013) and accompanying copy of decision - Zurich Assurance Limited trading as Threadneedle Property Investment v North Lincolnshire Council and Simons Developments Limited [CO/4764/2012]
46	Letter from Dentons to Braintree District Council (27 June 2013)
47	Letter from Indigo Planning to Braintree District Council (9 July 2013)
48	Email from Indigo Planning to GVA (10 July 2013)
49	Email from Indigo Planning to GVA (11 July 2013)
50	Email from Indigo Planning to GVA (15 July 2013)
51	Indigo Planning letter to Braintree District Council (30 July 2013) regarding application decision timeframe
52	Email from Indigo Planning to GVA (1 August 2013) regarding retail matters
53	Draft s106 agreement submitted to Braintree District Council and Essex County Council on 6 August 2013

C.	PLANNING APPLICATION DOCUMENTS (REF: 12/01000/FUL)
54	Letter from Indigo Planning to Braintree District Council (14 August 2013) and accompanying extracts from DTZ Retail Planning Appraisal of Sainsbury's application in Herne Bay dated July 2013, extracts from Colchester Borough Retail Study prepared by NLP (2013), and Aldi Store Requirements Note sourced from Aldi Corporate web pages
55	Email from Indigo Planning to Braintree District Council (14 August 2013) and accompanying report by Professor Robert Tavernor
56	Email from Indigo Planning to Braintree District Council (6 September 2013) and accompanying Advice from Morag Ellis QC
57	Email from Indigo Planning to GVA (9 September 2013) regarding retail matters
58	Email correspondence between Indigo Planning and Braintree District Council (20 and 23 September 2013) regarding officer reaction to LDF Sub-Committee decision
59	Letter from Indigo to Braintree Council (23 October 2013)
60	Email from Indigo Planning to Braintree District Council (1 November 2013) regarding report to Planning Committee
61	Email from Indigo Planning to Braintree District Council (15 November 2013) and accompanying letter from All The Little Shops
62	Sainsbury's letter to Councillors (15 November 2013) and accompanying Sainsbury's Investing in Braintree brochure
63	Email from Indigo Planning to Braintree District Council (19 November 2013) and accompanying finalised draft section 106 unilateral undertaking
64	Geotechnical and Geo-environmental Report prepared by RSK (November 2011)

D	LPA DOCUMENTS AND CORRESPONDENCE REGARDING PLANNING APPLICATION 12/01000/FUL
1	Braintree District Council Pre-Application Advice letter (28 July 2011)
2	Braintree District Council Pre-Application Advice letter (17 October 2011)
3	Emails between Braintree District Council and Indigo Planning (25 October to 2 November 2011) regarding Tesco Market Place sequential analysis
4	GVA independent retail advice (19 December 2012)
5	Email from Fiona Bradley dated 27 November 2012 relating to

	design and employment use
6	Email from Fiona Bradley to Ian Harrison (date 4 December 2013) regarding Garden Extensions
7	Strutt & Parker viability study of Broomhills Industrial Estate (16 May 2013)
8	GVA further independent retail advice (24 May 2013)
9	GVA independent retail advice (16 July 2013)
10	GVA's independent retail advice (29 August 2012)
11	Letter from GVA to Ian Harrison (13 September 2013)
12	GVA retail sensitivity test (13 September 2013)
13	Braintree Council Decision Notice (27 November 2013)

E	LPA COMMITTEE AND CABINET PAPERS, REPORTS AND MINUTES
1	Braintree Cabinet Meeting Report (Agenda Item 5a) and Appendix 4 (9 June 2011)
2	Braintree Cabinet Meeting Minutes (9 June 2011)
3	Braintree Council Planning Committee Agenda and Report (19 March 2013)
4	Letter from BDC - withdrawal of report from Committee Agenda (19 March 2013)
5	Braintree Council Local Development Framework Sub-Committee Report (11 July 2013)
6	Braintree Council Local Development Framework Sub-Committee Minutes (11 July 2013)
7	Braintree Council Planning Committee Report and Agenda (2 July 2013)
8	Braintree Council Planning Committee Minutes (2 July 2013)
9	Braintree Council Special Meeting Agenda (23 September 2013)
10	Braintree Council Special Meeting Minutes (23 September 2013)
11	Braintree Council Planning Committee Report (19 November 2013) and E11A Final Corrected Version
12	Braintree Council Planning Committee Minutes (19 November 2013)
13	Braintree Council Meeting – Agenda No. 8 Report and Background

	Information (30 June 2014)
14	Braintree Council Meeting Minutes (30 June 2014)

F	OTHER RELEVANT BACKGROUND DOCUMENTS
1	Nathaniel Litchfield and Partners EMD Retail Assessment Halstead (September 2012)
2	Nathaniel Litchfield & Partners Halstead Tesco retail assessment (10 December 2012)
3	Retail Update 2013 Colchester Borough Council by Nathaniel Litchfield & Partners (15 March 2013)
4	DTZ retail planning appraisal of Sainsbury's planning application, Herne Bay (July 2013)
5	Recent and Relevant Press Articles [Braintree and Witham Times 29.11.13 - Masterplan for transforming centre unveiled; Braintree and Witham Times 29.11.13 – Clock ticks on major town retail project; Braintree and Witham Times 05.12.13 – All quiet on seven-floor shopping plan; Braintree and Witham Times 30.06.14 – Campaign group to stop Braintree bus park redevelopment is disbanding; BDC News Release 03.04.14 – Redevelopment proposal deadline extended]
6	Planning Application Form (Ref: 09/00071/FUL)
7	Essex Parking Standards, Design and Good Practice (Essex County Council) 2009
8	Officers' report to Planning Committee Meeting of 14 April 2009 (Ref: 09/00071/FUL)
9	Land Registry Search Details relating to the Site
10	May/June 2011 household survey results
11	May/June 2011 in-street survey results
12	September 2014 household survey results – main results
13	September 2014 household survey results – cross tabulations
14	October 2014 in-street survey results – main results and cross tabulations
15	Essex Design Guide Urban Place Supplement, March 2007 [Section 4 and Part Section 5]
16	The Urban Design Compendium, third edition, UDC1, 2013 [Section 02 Appraising the Context]

17	Representations by Peacock and Smith on behalf of WM Morrison (28 August 2012)
17a	Further representations by Peacock and Smith on behalf of WM Morrison (4 December 2014)
18	WYG Appraisal of Retail Planning Issues - Planning Application 13/01476/FUL (February 2014)

G	APPEAL DOCUMENTATION (REF: APP/Z1510/A/14/2219101)
1	Appeal Form (ref: APP/Z1510/A/14/2219101)
2	LPA Appeal Questionnaire and G2a Representations that had been missing from the Questionnaire
3	Appellant's Statement of Case
4	Council's Statement of Case
5	Statement of Common Ground between the Appellant and the Council, with A – E attached conditions and superseded copies and G5F agreed conditions
6	Retail Statement of Common Ground between the Appellant and the Council, with attached superseded copies
6a	Note reconciling Matthew Morris' and Sean McGrath's Retail Figures
7	Third Party Representations
8	Proof of Evidence of Tessa Lambert on behalf of the Council
9	Proof of Evidence of Roger Estop on behalf of the Council and G9a Appendix of Context Plans and Photographs
10	Proof of Evidence of Matthew Morris on behalf of the Council and G10a Appendices
11	Proof of Evidence of Professor Robert Tavernor on behalf of the Appellant, G11a Appendix and G11b Rebuttal
12	Proof of Evidence of Sean McGrath on behalf of the Appellant and G12a Appendices
13	Proof of Evidence of Peter Shearman on behalf of the Appellant and G13a Plans and Appendices
14	Proof of Evidence of Andrew R McLeod on behalf of the Appellant

15	Rebuttal Proof of Sean McGrath on behalf of the Appellant and G15a Appendices
16	Rebuttal Evidence of Professor Robert Tavernor on behalf of the Appellant

H	DOCUMENTS SUBMITTED TO INQUIRY
1	Barnwell Manor Wind Farm Energy Ltd v East Northamptonshire District Council and others [2014] EWCA Civ 137
2	Letter from Braintree Chamber of Commerce (November 2014) commenting on the appeal proposals with attached copy letter of 5 September 2012
3	Letter from Braintree Town Team (December 2014) commenting on the appeal proposals
4	Planning Permission (reference 12/01692/FUL) for Braintree Museum and Existing and Proposed Ground Floor Plans
4a	Plans in connection with planning permission (reference 12/01692/FUL) showing the proposed Braintree Museum walkway
5	Letter from Patricia Clark (9 December 2014) commenting on the appeal proposals
6	Note of Mr Nick Bignold oral submissions to the inquiry (12 December 2012) commenting on the appeal proposals
7	Comments of Mr Andrew Etall (8 December 2014) on the appeal proposals
8	Comments of Ms Eileen Newman (11 December 2014) on the appeal proposals
9	Letter from UK Electrical (10 December 2014) on the appeal proposals
10	Comments of Ms Amanda Dooling (16 December 2014) on the appeal proposals
11	Section 106 agreement dated 3 July 2009 between (1) Braintree District Council (2) Essex County Council and (3) Tesco Stores Limited in relation to land at Marks Farm, Clay Pits Way, Braintree
12	Deed of variation dated 14 May 2010 between (1) Braintree District Council (2) Essex County Council and (3) Tesco Stores Limited in relation to land at Marks Farm, Clay Pits Way, Braintree
13	Section 106 agreement dated 3 July 2009 between (1) Braintree District Council (2) Essex County Council and (3) Tesco Stores

H	DOCUMENTS SUBMITTED TO INQUIRY
	Limited in relation to land at 1 The Square, Notley Green, Great Notley, Braintree
14	Deed of variation dated 14 May 2010 between (1) Braintree District Council (2) Essex County Council and (3) Tesco Stores Limited in relation to land at 1 The Square, Notley Green, Great Notley, Braintree
15	Note agreed between the Council and the Appellant on the Experian definition of convenience and comparison goods
16	Appellant's explanatory note on the calculation of likely job creation
17	Note on turnover efficiencies agreed between M Morris and S McGrath
18	Email from Dentons UKMEA LLP to BDC (2 January 2015) regarding the Unilateral Undertaking
19	Appellant's summary of third party objections to and support for the appeal proposals
20	S106 Unilateral Obligation by Sainsbury's Supermarkets Ltd in favour of BDC dated 7 January 2015
21	Superseded copies of emerging S106 in H20 and related correspondence from 17 October to 15 December 2014 (see also C63)
22	Statement of Compliance for H20 with attached Braintree Town Centre Enhancement Strategy First Draft 20 May 2011, Town Centre Project Proposals 6 March 2014 and list of Revenue and Capital Projects
23	Superseded version of H22 Statement of Compliance
24	S106 Agreement dated 7 January 2015 between Sainsbury's Supermarket Ltd and Essex County Council
25	Statement of Compliance for H24 with attached consultation response from Essex CC of 21 December 2012 to the planning application (see also C53)
26	Superseded version of H25
27	Superseded draft of H24
28	BDC paper on Comparison Goods Market Share of BTC in Zone 1 of Study Area in 2011 and 2014
29	Email re date of instruction to S McGrath from JS to look at the

H	DOCUMENTS SUBMITTED TO INQUIRY
	Broomhills site
30	Experian Retail Planner Briefing Note 12.1 October 2014, with Addendum, including UK retail spending, constant floorspace from 2014, changing floorspace and the future for retail sales densities
31	Bundle of Appeal Plans (extracted from Document s C29 and C37) as listed in condition 1
32	Inspector's site visit itinerary after visiting the appeal site, with attached plans
33	Opening statement on behalf of the appellant
34	Opening statement on behalf of Braintree District Council
35	Closing submissions on behalf of Braintree District Council
36	Closing submissions on behalf of the appellant.

GLOSSARY

BDC	Braintree District Council
BTC	Braintree town centre
CD	Core Document
CS	Core Strategy
DAS	Design and Access Statement
DL	Decision Letter
ECC	Essex County Council
EH	English Heritage
Framework	National Planning Policy Framework
Guidance	National Planning Practice Guidance
IR	Inspector's Report
JS	Sainsbury's
LPR	Braintree District Local Plan Review
MP	Tesco's Market Place store in Braintree Town Centre
p	paragraph
pg	page
PRS	Planning and Retail Statement

RL	Rushden Lakes appeal decision
RSoCG	Retail Statement of Common Ground
SoCG	Statement of Common Ground
TW	Toft's Walk Sainsbury's store in Braintree Town Centre
UU	Unilateral Undertaking
XX	Cross-examination

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Department for Communities and Local Government

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS;

The decision may be challenged by making an application to the High Court under Section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

Decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged under this section. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application under this section must be made within six weeks from the date of the decision.

SECTION 2: AWARDS OF COSTS

There is no statutory provision for challenging the decision on an application for an award of costs. The procedure is to make an application for Judicial Review.

SECTION 3: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the report of the Inspector's report of the inquiry or hearing within 6 weeks of the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.