



Department for Communities and Local Government

Dr Thomas Rocke
Rocke Associates Limited
Number One
Queen Square Place
Bath
BA1 2LL

Our Ref: APP/Y1110/W/15/3005333

30 June 2016

Dear Dr Rocke

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL BY CPG DEVELOPMENT PROJECTS LTD
AT LAND NORTH OF HONITON ROAD AND WEST OF FITZROY ROAD,
EXETER EX1 3RS
APPLICATION REF: 14/1615/01**

1. I am directed by the Secretary of State for Communities and Local Government ('the Secretary of State') to say that consideration has been given to the report of the Inspector, David Nicholson RIBA IHBC, who held a public local inquiry on 1-4 and 7-8 December 2015 into your client's appeal against the decision of Exeter City Council ('the Council') to refuse planning permission for mixed use development to provide a District Centre comprising uses within some or all of Classes A1 (Retail) with associated Garden Centre, A2 (Financial and Professional Services), A3 (Restaurants and Cafés), A5 (Hot Food Takeaway), D1 (Non-residential institutions), D2 (Leisure), associated means of access, access road, car parking, infrastructure works, public realm and landscaping at land north of Honiton Road and west of Fitzroy Road, Exeter EX1 3RS, in accordance with planning application reference 14/1615/01, dated 27 June 2014.
2. On 31 March 2015 the appeal was recovered for the Secretary of State's determination in pursuance of section 79 and paragraph 3 of Schedule 6 to the Town and Country Planning Act 1990 because the appeal involves any main town centre use or uses where that use or uses comprise(s) over 9,000m² gross floorspace and which are proposed on a site in an edge-of-centre or out-of-centre location which 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 should be dismissed and planning permission refused. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, except where stated, and agrees with

his recommendation. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to the IR.

Procedural matters

4. Footnote 1 on page 1 of the Inspector's report states that the application form reads 'west' of Fitzroy Road, but that this was subsequently corrected. In fact the application form reads 'east' of Fitzroy Road, and this was subsequently corrected to 'west'.
5. On 1 June 2016, you wrote to the Secretary of State advising him that an undetermined application by British Land for a retail park development at a 3.15 hectare site currently occupied by a B&Q warehouse store (Exeter City Council ref: 15/1065/01), which was referred to in the proofs of evidence of Richard Short (paras 12.9-12.10) and Matt Morris (para. 6.35), had been withdrawn, and stated that it should therefore not be given any weight in the current decision. You also stated that since this withdrawal, interest by prospective anchor tenants, including Next, in the current appeal scheme has been consolidated, and discussions regarding heads of terms have progressed.
6. On 9 June 2016, a response was received from Exeter City Council enclosing a Certificate of Lawfulness, granted on 15 April 2016, for the proposed subdivision and use of the B&Q warehouse building for unrestricted Class A1 sales, and an email from the agent for the withdrawn B&Q planning application informing the Council that their clients will determine how to proceed with their scheme once the current appeal by CPG is determined, but that in the meantime they will submit a planning application for external alterations to initiate a fall-back position of subdividing the existing building into a number of unrestricted Class A1 non-food and drink retail units. A further letter from Next Group plc was attached which confirmed Next's interest in either the proposed retail park scheme or the proposed fall-back scheme on the B&Q site. The Council reiterated their view that should the appeal be allowed, strict controls must be placed on the retail units to ensure they will not harm centres in the catchment area of the appeal proposal, and that this does not change the position that the appeal should be dismissed.
7. On 10 June 2016 a further response was received from Steven Ardron of Next Group plc, stating that the Certificate of Lawfulness does not itself make the premises suitable for the requirements of Next, and that it has become clear to Next that the only credible and deliverable development within the vicinity of J29 is the appeal site. Terms have been agreed between Next and CPG (subject to consent) to occupy a unit with a footprint of circa 26,500 sq. ft on the appeal site.
8. The above representations were circulated to CEH on 16 June 2016, inviting their comments. A response was received on 21 June 2016, summarising the contents of the objection letter CEH had submitted in February 2016 to the application for the redevelopment of the B&Q store, in which they also doubted the viability of the fall-back position. They consider the interest now confirmed by Next confirms the degree of risk to the City Centre arising from the appeal proposal, in that it would be directly competing with the City Centre for the

same catchment area. They also note that only heads of terms are agreed between CPG and Next, and state that in their view, this non contractual interest does not add any material evidence to the CPG case. CEH continue to promote their outline application for the redevelopment of Exeter Bus & Coach Station site, with a view to confirming the formal planning permission within the next few weeks.

9. Copies of these letters are available from the address at the foot of the first page of this letter.

Policy considerations

10. In determining these applications, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004, which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. In this case the development plan consists of the Exeter Core Strategy 2026 (adopted in February 2012) and the Exeter Local Plan First Review 2011 (adopted in March 2005). The Secretary of State considers that the development plan policies most relevant to this case are those set out at IR3.2-3.9.
11. Other material considerations which the Secretary of State has taken into account include the National Planning Policy Framework (the NPPF), the associated Planning Guidance, and the other matters set out at IR3.1.

Emerging policy

12. In determining this application, the Secretary of State has also had regard to the emerging draft Development Delivery Development Plan Document. He considers that the relevant emerging policies include those dealing with sustainable development (DD1), employment allocations (DD3), provision of local services (DD4) and the Bus and Coach Station site (DD14).
13. Paragraph 216 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework. The Secretary of State agrees with the comments of the Inspector on the first two elements at IR3.10. With regard to the third element, the Secretary of State considers that at this stage the relevant policies in the emerging DPD do not appear to contain obvious inconsistencies with the Framework, but are still subject to change. Overall he agrees with the Inspector that the relevant emerging policies carry limited weight. He has also taken into account the Monkerton and Hill Barton Masterplan Study IR3.11-3.12 and the documents set out in IR3.13.

Main issues

Development plan

14. The Secretary of State has considered the Inspector's analysis at IR11.2-11.23. He agrees with the Inspector's assessment of the appellant's argument as set out at IR11.20, that it is wrong to argue that CP19 is inconsistent with

the NPPF, or that it is out-of-date, on the grounds that whether development is acceptable is now only to be determined by reference to the sequential and impact tests. He agrees with the Inspector that while the NPPF may only set two tests, it expects LPs to fill the gaps, as it were, by meeting the criteria in NPPF 23, including *a network and hierarchy of centres*, and also agrees that this is what the LP does, and that the changes over the years do not mean that the existing policies are out of date (IR11.20). He further agrees that as long as the CS is not out-of-date, which it is not as it satisfies the criteria for plan making in NPPF 23, then it is proper, indeed essential, to weigh the scheme against policies CP8 and CP19 in assessing its compliance or otherwise with the development plan. He therefore agrees with the Inspector's conclusion at IR11.22 that CP19 is not inconsistent with the NPPF, and that neither it, nor the Core Strategy as a whole, are out of date (IR11.22). He further agrees that the proposals would go well beyond any reasonable interpretation of a *local centre*, and that the scheme would therefore be contrary to policy CP19 and, albeit less specifically, to CP8 (IR11.23).

15. The Secretary of State further agrees with the Inspector at IR11.58 that the scheme would be contrary to the development plan as a whole. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

Employment land

16. For the reasons set out in IR11.24-11.26, the Secretary of State agrees that use of the site other than for offices would not be in direct conflict with policy CP19, there would be no significant harm to the supply of employment land in Exeter and no significant conflict with the development plan (IR11.26).

Sequential test

17. For the reasons set out at IR11.27-11.29, the Secretary of State agrees with the Inspector that the NPPF 24 test should apply, and that preference should be given to the Bus and Coach Station site as sequentially preferable if it is suitable and available (IR11.29).
18. For the reasons set out at IR11.30-11.37, the Secretary of State agrees with the Inspector that given no more than reasonable flexibility, the Bus and Coach Station site would be suitable for the town centre uses proposed for the appeal site (IR11.37). The Secretary of State has taken into account the Inspector's reasoning at IR11.38-11.40. He agrees that there is no rationale for concluding that the site must be on the open market to any developer, and that the new retail floorspace would be marketed to traders who would occupy it regardless of who developed or owned the scheme (IR11.39). He further agrees that the requirement for a bus station and a leisure outlet on another part of the Bus and Coach Station site does not mean that the area earmarked for retail development is not available (IR40). Overall he considers that the Bus and Coach Station site is available.
19. Overall, the Secretary of State agrees with the Inspector's conclusion at IR11.41 that the Bus and Coach Station site is relevant, highly accessible and well connected to the city centre. He concludes that it is sequentially

preferable, suitable and available. The appeal proposals therefore fail the sequential test and would be contrary to paragraph 24 of the Framework. Paragraph 27 of the Framework indicates that applications should be refused in these circumstances.

Impact test

20. The Secretary of State has considered IR11.42-11.50, and considers that the appeal proposals pose a moderate risk to planned investment with an additional risk of delay. He considers that given its size, strategic importance, and prominence in the Core Strategy, if allowing the appeal resulted in the PHL scheme being prevented, there would be a significant adverse impact on planned public and private investment. The Secretary of State agrees with the Inspector's conclusion at IR11.51 that this risk would conflict with the aims of policy CP8 for the regeneration of the BCS site.
21. However, the Secretary of State does not consider that this risk is 'likely' to occur in terms of the test in paragraph 27 of the Framework. He agrees with the Inspector that any impacts on Cranbrook and Exe Bridges Retail Park are unlikely to meet this test (IR11.53). He therefore does not consider that the appeal should be dismissed on this basis.
22. For the reasons given in IR11.43 and 11.52, the Secretary of State agrees with the Inspector's conclusion at IR11.52 that the potential harm to the vitality and liability of the City Centre in general should be given little weight.

Other matters

23. For the reasons set out in IR11.53, and subject to proposed conditions dealing with highway works and reserved matters, the Secretary of State agrees that concerns over the height and location of built development, and any risk to highway safety should not be a bar to development.

Economic, social and environmental dimensions of sustainable development

24. The Secretary of State has taken into account the economic benefits of the scheme, which include the creation of around 400 full time equivalent jobs, and facilities for local businesses (IR11.55). He gives this significant weight. However, he considers that the risks to development on the Bus and Coach Station site carry moderate weight against the proposals. Overall he considers that there is moderate weight in favour of the proposals on economic grounds.
25. The Secretary of State agrees with the Inspector that the proposals would provide accessible local services (IR11.56), but considers that this social benefit carries moderate weight in favour of the proposals rather than being broadly neutral as the Inspector suggests.
26. The Secretary of State agrees with the Inspector that while the appeal site is generally well-located for public transport, it is in a less accessible location than the sequentially preferable BCS site. The appeal scheme would include a large new car park and 'drive-through' restaurants which would be likely to encourage rather than deter the use of the private car. The Secretary of State therefore considers that the environmental harm carries limited weight against

the scheme, rather than being broadly neutral as the Inspector concludes (IR11.56).

Planning conditions

27. The Secretary of State has given consideration to the Inspector's analysis at IR10.1-10.3. He has also taken into account the recommended conditions set out at the end of the IR and the reasons for them, and national policy in paragraph 206 of the Framework, along with the relevant Guidance. He is satisfied that the conditions recommended by the Inspector comply with the policy test set out at paragraph 206 of the Framework. However, he does not consider that the imposition of these conditions would overcome his reasons for refusing this appeal.

Planning balance and conclusions

28. 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. As outlined above at paragraph 15, the Secretary of State agrees with the Inspector that the scheme would be contrary to the development plan as a whole. He has therefore gone on to consider whether there are any material considerations sufficient to outweigh the conflict with the development plan. He has considered the benefits of the scheme in terms of job creation, accessible local services and environmental considerations, and has concluded that the economic and social benefits carry moderate weight in favour of the proposals, and the environmental harm carries limited weight against the proposals.
29. However, he does not consider that the benefits of the scheme outweigh the conflict with the development plan and the environmental harm. The scheme also fails to satisfy the sequential test, and paragraph 27 of the Framework indicates that planning permission should be refused in those circumstances. Therefore, the Secretary of State finds that there are no material considerations which indicate that the proposal should be determined otherwise than in accordance with the development plan.

Formal Decision

30. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby dismisses the appeal and refuses planning permission for mixed use development to provide a District Centre comprising uses within some or all of Classes A1 (Retail) with associated Garden Centre, A2 (Financial and Professional Services), A3 (Restaurants and Cafés), A5 (Hot Food Takeaway), D1 (Non-residential institutions), D2 (Leisure), associated means of access, access road, car parking, infrastructure works, public realm and landscaping at land north of Honiton Road and west of Fitzroy Road, Exeter EX1 3RS, in accordance with planning application reference 14/1615/01, dated 27 June 2014.

Right to challenge the decision

31. 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.
32. A copy of this letter has been sent to Exeter City Council. A notification letter has been sent to all other parties who asked to be informed of the decision.

Yours faithfully

Maria Stasiak

Maria Stasiak

Authorised by the Secretary of State to sign in that behalf

Annex B

Correspondence submitted after the close of the inquiry

Correspondent	Date
Dr Thomas S. Roche, Roche Associates (CPG)	1 June 2016
Matt Diamond, Exeter City Council	9 June 2016
Steve Ardron, Next Group Plc	10 June 2016
Gary Forster, Montagu Evans LLP (CEH)	21 June 2016



Report to the Secretary of State for Communities and Local Government

by David Nicholson RIBA IHBC

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

Date: 29 February 2016

TOWN AND COUNTRY PLANNING ACT 1990

EXETER CITY COUNCIL

APPEAL MADE BY

CPG DEVELOPMENT PROJECTS LTD

Inquiry held on 1-4 and 7-8 December 2015

Land north of Honiton Road and west of Fitzroy Road, Exeter

Report APP/Y1110/W/15/3005333

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GLOSSARY

BCS	Bus and Coach Station site
CD	Core document
CS	Exeter Core Strategy
DAS	Design and Access Statement
CEH	The Crown Estate and TIAA Henderson Real Estate
CLG	Communities and Local Government
DCC	Devon County Council
dDDDPD	draft Development DPD
DL	Decision Letter
DPD	Development Plan Document
ECC	Exeter City Council
EIA	Environmental Impact Assessment
ERS	Exeter Retail Study 2008 by DTZ (CD20)
FTE	Full Time Equivalent
GEA	gross external area
GIA	gross internal area
HA	Highways Agency
IC	Examination in chief
IQ	Inspector's Questions
IR	Inspector's Report
LP	Exeter Local Plan
LPA	Local Planning Authority
MHB	Monkerton and Hill Barton
MHBMS	MHB Masterplan Study
NPPF	National Planning Policy Framework
PHL	Princesshay Leisure scheme
PPG	Planning Practice Guidance
PSA	Primary Shopping Area
RfR	Reason for Refusal
ReX	Re-examination
S106	Section 106 of the Town and Country Planning Act 1990
SoCG	Statement of Common Ground
SoS	Secretary of State for Communities and Local Government
SPG	Supplementary Planning Guidance
SPD	Supplementary Planning Document
TAA	Transport Assessment Addendum
XX	cross-examination

File Ref: APP/Y1110/W/15/3005333

Land north of Honiton Road and east¹ of Fitzroy Road, Exeter EX1 3RS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
- The appeal is made by CPG Development Projects Ltd against the decision of Exeter City Council.
- The application Ref 14/1615/01, dated 27 June 2014, was refused by notice dated 2 December 2014.
- The development proposed is mixed use development to provide a District Centre comprising uses within some or all of Classes A1 (Retail) with associated Garden Centre, A2 (Financial and Professional Services), A3 (Restaurants and Cafés), A5 (Hot Food Takeaway), D1 (Non-residential institutions), D2 (Leisure), associated means of access, access road, car parking, infrastructure works, public realm and landscaping.

Summary of Recommendation: The appeal should be dismissed

1. Procedural Matters

- 1.1 Determination of the appeal was recovered by the Secretary of State by way of a direction². The reason given for the direction was that 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 and which are proposed on a site in an edge-of-centre or out-of-centre location which is not in accordance with an up-to-date development plan document.
- 1.2 As well as the appellant and Exeter City Council (ECC), Rule 6(6) status was granted to The Crown Estate and THRE (TIAA Henderson Real Estate) collectively referred to as CEH. THRE are owners of the Princesshay retail development and, with ECC, are bringing forward proposals to develop the Exeter bus and coach station (BCS) site.
- 1.3 The Inquiry sat for 6 days on 1-4 and 7-8 December 2015. I conducted an accompanied site visit on 7 December 2015 and carried out unaccompanied site visits before, during and after the Inquiry³. I sent out a Pre-Inquiry note on 20 October 2015.
- 1.4 The application to which the appeal relates was made in outline form except for access. All other matters (appearance, landscaping, layout and scale) were reserved. A Design and Access Statement (DAS) was also submitted.
- 1.5 A revised application⁴ was submitted after the appeal was lodged. This was accompanied by revised documents⁵ but was otherwise not before the Inquiry. However, it was agreed in the Statement of Common Ground (SoCG), that the Appeal could be considered on the basis of the parameters in the revised application, although the changes do not alter the Council's objections to the proposed development. CEH also commented on the SoCG⁶.

¹ The application form reads 'west' of Fitzroy Road but this has been corrected on the Council's notice to accord with the Location Plan

² made under Section 79 and paragraph 3 of Schedule 6 of the Town and Country Planning Act 1990

³ To virtually all the centres and stores shown on Inquiry Document (ID) LP9

⁴ Ref: 15/0704/01 – see Core Documents (CD) CD33, CD35, CD43 and CD50

⁵ Retail Impact Assessment, Transport Assessment and Planning Statement

⁶ ID CEH2

- 1.6 The application was refused by ECC for six reasons⁷. In short, these relate to: loss of employment land; conflict with the retail strategy in the development plan; failure to satisfy the sequential test; harm to vitality and viability; conflict with Core Strategy (CS) policies CP8 and CP19; and impact on the highway network. Following additional details and assessments, it was common ground that the concerns in the final reason had been resolved. Subject to conditions securing the widening of Honiton Road, provision of a Toucan Crossing and improvements to the Fitzroy Road junction, the Council withdrew its objections with regard to highway safety and offered no evidence in relation to this reason for refusal.
- 1.7 The appellant requested a screening opinion under Regulation 5 of the Environmental Impact Assessment (EIA) Regulations. The Council considered this and found that the proposals did not constitute EIA development requiring an Environmental Statement⁸.

2. The Site and Surroundings⁹

- 2.1 The appeal site extends to some 3.2 hectares (ha). Its southern boundary fronts onto the A3015 (Honiton Road) which is an important arterial route into Exeter City Centre from the east, and from the M5 and A30 in particular. The site and its context are more fully described in the DAS that accompanied the appeal application, and in the officer's report¹⁰ relating to the application.
- 2.2 The site lies on the southern boundary of the *Monkerton/Hill Barton* strategic allocation (see section 3 below). Residential development is well underway. The appeal site is separated from Fitzroy Road to the east by a budget hotel (Premier Inn) and an accompanying pub/restaurant (Brewers Fayre) which have been occupied. To the north-east of the site is The Met Office, one of the City's most prestigious employers. The northern boundary of the site has an existing hedgerow which separates it from land currently in agricultural use but allocated for future housing development. The south-western boundary of the site adjoins the Exeter to Exmouth Railway Line, beyond which is residential development.
- 2.3 Vehicular access to the site, and the hotel and restaurant, is from Fitzroy Road via a new T-junction that has been constructed between the A3015 and the Met Office and ends at the boundary with the appeal site. The Sowton Industrial Estate, to the south of the application site, is one of the two major suburban industrial/employment areas in Exeter and comprises a range of employment activities including manufacturing, offices, distribution, service industries, and bulky goods non-food retailing. Exeter has three existing district centres¹¹, four out-of-centre retail parks including Sowton¹², three commitments¹³, five out-of-centre supermarkets and ten local centres¹⁴.

⁷ See tab in buff folder, main file and CD30

⁸ See Questionnaire

⁹ A simple map and a list of centres and stores are shown at ID LP9.

¹⁰ CD28

¹¹ ID LP9: Topsham, Heavitree and St Thomas

¹² Rydon lane, Marsh Barton and Bishops Court

¹³ Morrisons, IKEA and Aldi

¹⁴ See Morris's appendices 4-17 and listed in CS appendix 6 which are in turn taken from the plans at A2.5 to A2.14 of the Local Plan First Review (CD5)

- 2.4 The GOAD plan¹⁵ identifies the commercial premises in the City Centre and the other centres in Exeter. Virtually all the well-known High Street fashion and leisure brands are represented in the City Centre. The Council acknowledged that it is thriving and robust¹⁶. The Primary Shopping Area (PSA) covers the Princesshay and Guildhall shopping centres as well as the High Street. Adjoining the top of the High Street lies the BCS and associated retail development. This is of some age. There are a number of car parks close to the BCS¹⁷.
- 2.5 Outside the city centre, the largest areas of shops are the four retail parks and the three district centres. The majority of these have permissions which are limited by conditions to restrict the goods which can be sold. The exception to this is at Exe Bridge Retail Park (adjoining St Thomas District Centre) where a largely unrestricted, mixed use permission includes branches of Next and TK Maxx with significant area of fashion floorspace¹⁸ and extends to over 9,000 sq m¹⁹ on a former Sainsbury's site. I walked from the city centre to the Exe Bridges Retail Park and saw that the distance, topography and road layout do not encourage linked trips between these shopping areas. The ten local centres vary in size but typically comprise a string or rough grouping of small units.
- 2.6 There are ten employment centres²⁰. These include the Met Office and adjacent Exeter Business Park 'within' (i.e. to the west of) the M5 and ECC's administrative boundary. An Enterprise Zone was recently announced in East Devon²¹ encompassing Exeter Science Park, Sky Park and Exeter Gateway. To date no employment land has been developed within the strategic allocation (see below). A new rail halt is proposed nearby on the Exeter to Exmouth Railway line²². A new town known as the Cranbrook New Community is being constructed in the adjoining district of East Devon.

3. Planning Policy

- 3.1 The T&CP Act 1990, the Planning and Compulsory Purchase Act 2004, the Localism Act 2011, the National Planning Policy Framework (NPPF) and Planning Practice Guidance (PPG) are particularly relevant.
- 3.2 The development plan for the area comprises the Exeter Core Strategy 2026, adopted in February 2012 (CS), and the Exeter Local Plan First Review 2011, adopted March 2005 (LP). Both were therefore adopted before the NPPF was published although the draft NPPF was considered by the Inspector at the CS Examination. All relevant policies are listed in the SoCG²³. Particularly pertinent to this appeal are CS policies CP8 and CP19.

¹⁵ Morris's appendix 3 also shows the location of the BCS

¹⁶ Morris in XX

¹⁷ Morris in ReX: at Princesshay, behind John Lewis, and behind the Vue cinema

¹⁸ See Schedule of retail warehouse floorspace for all these centres on DI LP11

¹⁹ Ibid, total of occupiers under Exe Bridge Retail Park

²⁰ Also listed on ID LP9

²¹ ID A6 and ID A9: note on Employment Land Supply p8 para 4.1

²² CD8: Monkerton Hill Barton Masterplan p23

²³ Schedule 5.1

- 3.3 CS Policy CP8 reads: *Retail facilities will be provided so as to contribute to the delivery of sustainable growth and respond to the needs of local, including disadvantaged, communities.*
To maintain and enhance the vitality and viability of the City Centre, the provision of ... around 37,000 square metres of net retail comparison floorspace is proposed. This will include up to 30,000 square metres of comparison floorspace in the Bus and Coach Station area, to be developed as part of a mixed-use scheme by around 2016.
Retail development outside the City Centre should be located in the district or local centres. Out of centre sites will only be considered if there are no suitable sites in, or on the edge of, the City Centre, district centres or local centres and the proposal would cause no significant overall impact on the existing centres and would bring net benefits. In all cases proposals must be accessible by public transport and other sustainable modes, and be appropriate in scale and character to the role and function of the proposed location.
Local retail facilities will be required as part of the community provision at the Monkerton/Hill Barton and Newcourt urban extensions.
- 3.4 Supporting paragraph 7.8 refers to the challenge from out-of-centre shopping, and the need to match the restraint of dispersal with investment in the City Centre, while paragraph 7.11 recognises the need for some local retail facilities to serve the new development areas on the eastern edge of the city.
- 3.5 CS policy CP19 identifies 3 strategic allocations. Of these, *The Monkerton/Hill Barton area*²⁴ strategic allocation includes the appeal site. This area: *is proposed for around 2500 dwellings, around 5 hectares of employment land and all associated infrastructure including:*
 - *local centre to provide shops, doctors surgery and community facilities ... and other matters of limited relevance to this appeal.*
- 3.6 The introduction to CS section 12: *Strategic Allocations* reads: *Delivery of the Monkerton/Hill Barton, ... areas (see Policies CP1-CP3) as sustainable urban extensions is central to the achievement of the spatial strategy. It is proposed that, together, they will deliver around 21 hectares of employment land and around 6,500 dwellings (including permissions). These areas are, therefore, identified as strategic allocations (see Plans 1-3). Policies CP1-CP3 cover the overall provision of retail floorspace, employment land and dwellings. It is common ground that the strategic allocation is for mixed use development, including retail, but does not make specific land use designations and so the appeal site is not specifically allocated for employment or any other use.*
- 3.7 CS paragraphs 12.14-18, under the heading “Monkerton/Hill Barton”, continue: *... The residential development should be integrated closely with adjoining housing and should be within convenient walking distance of a primary school and community centre, and a local centre comprising a doctors surgery/polyclinic, local shops, and other appropriate facilities to meet skills, special educational and community needs.*
- 3.8 The glossary describes *district* and *local* centres as: *A group of shops normally containing at least one supermarket or superstore and a range of non-retail services and public facilities and a range of small shops of a local nature serving*

²⁴ identified on plan 2, page 101

a small catchment area respectively. Three *district* and ten *local centres* are listed in Appendix 6 to the CS.

- 3.9 The 2005 LP proposed retail development at four sites including the BCS area (Policy S1) which also aimed to protect the vitality and viability of the existing shopping centres and set out a sequential test for new development. Policy KP3 proposes comprehensive redevelopment of the Bus Station/Sidwell Street/Paris Street. In the LP, the BCS site was identified as: *The area defined by Sidwell Street, Cheeke Street, London Inn Square Paris Street, the Bus and Coach Station and Summerland Street is a highly sustainable location which, once Princeshay [sic] is fully trading, warrants the preparation of a master plan to achieve a high quality mixed use scheme. A comprehensive approach to its redevelopment is essential*²⁵.
- 3.10 The emerging draft Development Delivery Development Plan Document (dDDDPD) was published for consultation purposes in December 2013. It was common ground that part of the appeal site was shown on the Proposals Map with a key notation District and Local Centres that also applied to existing district and local centres. A revised dDDDPD was published, again for consultation, in July 2015. That allocated the whole of the appeal site for employment use. Given the early stage in its progress towards adoption, the objections that have been made to its content, not least by the appellants regarding the appeal site, and the provisions of paragraph 216 to the NPPF (NPPF 216), it was common ground that it should carry limited weight at the time of the Inquiry.
- 3.11 The Monkerton and Hill Barton (MHB) Masterplan Study (MHBMS)²⁶ forms part of the CS evidence base. It has not been adopted as either a DPD or supplementary planning document (SPD). However, the document itself records that it has been approved for development management purposes and it is intended that the Masterplan be adopted by the City Council as a SPD in due course. In accordance with the CS, the preparation of which it informed, development at the Monkerton and Hill Barton strategic allocation *should have general regard to the guidance contained within the MHBMS*²⁷. It was common ground²⁸ that the MHBMS contemplates two centres of different scales in addition to facilities for the business community on the appeal site.
- 3.12 Proposals for centres in the MHBMS area followed consideration of a range of options from which emerged: *'... a conceptual model for the development of the area to create a cohesive urban area which responds to its natural and cultural setting. It comprises: ... Creation of a new 'district' centre focused in the northwestern part of the area; Development of a more local centre focused at Hill Barton; ...'*²⁹. Later stages of the MHBMS set out framework plans for the identified centres as follows:
 - Pilton Centre (the north-western part): *is the main mixed use centre including retail, ... builds upon ... Sainsbury's ... will be a diverse and active hub for the new and existing community to the east of Exeter*

²⁵ CD5 para 14.12

²⁶ CD8

²⁷ CD3: CS para. 12.18

²⁸ SoCG para 5.10

²⁹ CD8 p36

- Hill Barton Centre (to the south-west): *is a local centre focused around the proposed railway station and includes ... a local shop*³⁰.

The appeal site, together with the adjacent site now developed for the purposes of a Premier Inn hotel and Brewers Fayre restaurant, comprises the Sowton character area for which the MHBMS anticipates *a high quality employment area, building on the established identity of Exeter Business Park. Some business community facilities such as a crèche, small gym and local shop ...*³¹.

- 3.13 The Bus and Coach Station Development Principles³² published by the Council in June 2012 relate to the provisions of LP Policy KP3 and Policy CP8 of the CS. They provide for a retail and leisure led mixed use development. The latest retail study for the City is the Exeter Retail Study (ERS) by DTZ in 2008³³. Policy on the sequential test has been interpreted by the Supreme Court in *Tesco v Dundee*³⁴. It was also considered in some detail by the SoS in the *Rushden Lakes Decision*³⁵.

4. Planning History³⁶

- 4.1 Outline planning permission³⁷ was granted for mixed use development on the appeal site subject to conditions including: restricting the total amount of class A floorspace to 1,600 sq m, that no individual class A unit size should exceed 750 sq m, and that there should be no drive-through element. The reason for each of these was to protect the vitality and viability of existing retail centres. The first phase of the permission, comprising a hotel and pub/restaurant adjoining the appeal site, has been completed³⁸.
- 4.2 Amongst other things, permission for a mixed use residential scheme within the MHB strategic allocation³⁹ included 750 dwellings and a local centre. Condition 4 requires the reserved matters applications to adhere to approved framework plans.
- 4.3 Permission has recently been granted for change of use from office to two A3 units at Broadwalk House, adjacent to the Roman Wall, and at the Guildhall Shopping Centre.
- 4.4 The Princesshay Leisure scheme (PHL) outline planning application was submitted in July 2015 and an updated form and formal amendments were submitted on 12 November 2015⁴⁰. This increased the proposed total floorspace to 25,980 sq m with between 7,294 or 8,750 sq m, up to a

³⁰ Ibid p50

³¹ Ibid p49

³² CD9

³³ CD20

³⁴ CD36: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13. At paragraph 19 this reiterates the memorable quote from *Cranage Parish Council & Ors v First Secretary of State & Ors* [2004] EWHC 2949 (Admin) (9 December 2004) that *The courts must be wary of an approach whereby decision makers can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision maker decides that it should mean.*

³⁵ CD10, particularly IR 8.36-8.39 and DL14 which accepted the analysis in IR 8.37-8.39

³⁶ See SoCG s4

³⁷ CD27: Ref.11/1619/01 dated 19 June 2012 for mixed use development comprising B1, B8, D1, C1, A1, A3, A4 and A5 uses

³⁸ SoCG section 4 and CD27 condition 17

³⁹ CD45: ref. 12/0472/01 dated 23 March 2012

⁴⁰ CD60 and CD66

suggested maximum of 11,000 sq m, of A1 retail floorspace. Some 3,780 sq m of class A1, A2 and A3 floorspace would be demolished. A potential occupier layout plan was also submitted⁴¹. The application was due to be determined during the Inquiry but the decision was deferred. The parties will need to advise the SoS direct as to its outcome. In arguing that the BCS could accommodate the appeal proposals, CEH produced overlaid plans⁴².

5. The Appeals Proposals

- 5.1 The proportion of uses described on the application, within Classes A1, A2, A3, A5, D1 and D2, would be as set out in the development parameters in the SoCG⁴³. These, and other parameters, could be controlled by conditions. The proposed access would extend the spur road between the A3015 and the Met Office. Illustrative drawings and various supporting documents are also listed in the SoCG. A Retail SoCG was also agreed. CEH submitted a note commenting on some aspects of the SoCGs.
- 5.2 In short, the maximum gross external area (GEA) of floorspace could be roughly 17,000 sq m of which the Class A1 gross internal area (GIA) of floor space would be limited to approximately 11,100 sq m, with one unit potentially up to about 5,800 sq m in size and other units of 650 sq m⁴⁴. It was acknowledged that the appeal site is out-of-centre with regard to the tests in the NPPF⁴⁵. An indicative Lettings Masterplan, with potential occupiers, was also submitted⁴⁶. The suggested conditions would also limit the extent of drive-through restaurants.
- 5.3 It was common ground with the Council that the appellant's Study Area Plan⁴⁷ should be used as a basis for determining existing shopping patterns but that this did not represent the full catchment area. The estimated comparison goods turnover from the proposals was put at £34.36m⁴⁸. The extent of trade draw and trade diversion, the existing provision trade draw from beyond the Study Area and the Impact of investment with regard to the BCS site were not agreed.
- 5.4 At the Inquiry the appellant sought to resile from the description of the proposals as a District Centre arguing that this is not defined in the NPPF and that it was therefore irrelevant.

6. The Case for Exeter City Council

The gist of its case was as follows:

- 6.1 The Inspector identified 6 main issues at the outset of the Inquiry, regarding: the development plan, employment land, the sequential test and the BCS site,

⁴¹ Chase Ax. GFC9. NB that the appellant is in discussion with Next at Home, whose format would fit the revised layout plan at GFC8

⁴² See Forster appendix 8

⁴³ Schedule 2.1 Plans and Drawings

⁴⁴ See Appellant's draft suggested conditions - nos. 18 to 25. Also the DAS: Design Proposal – Use & Amount, Schedule of Approximate GIA and GEA Areas Rev E; and Design Proposal – Layout

⁴⁵ Hughes in XX by the LPA

⁴⁶ drawing 13-170 SK-32 revision A

⁴⁷ Hughes Appendix 9 and Morris Appendix 1, (Ref AH/NR/130088/02 - Prepared to support the duplicate application)

⁴⁸ Hughes Appendix 11, Table 5, and Retail SoCG paragraph 4

impact on future investment and the vitality and viability of the city centre, sustainability, and highway safety and residential amenity. Of these, the Council is satisfied that, subject to the agreed conditions, there would be no unacceptable effects on highway safety or the amenities of future residents of adjoining land.

Development plan

- 6.2 This provides the starting point for considering the appeal proposals. Although a separate issue, the matter of whether relevant policies are up-to-date can be considered under the first main issue. It was accepted⁴⁹ that CS Policy CP19 is the most directly relevant policy. The site lies within the MHB area⁵⁰ where the CS proposes dwellings, employment land and infrastructure. As *Tesco v Dundee* reminds us: *policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context*⁵¹. The caution that *planning authorities ... cannot make the development plan mean whatever they would like it to mean*⁵² applies equally to developers. It is also important to interpret a policy having regard to the purpose it is intended to achieve⁵³ without *linguistic dissection*⁵⁴ or *forensic archaeology*⁵⁵.
- 6.3 Here, policy CP19 expects the associated infrastructure for MHB to include: *local centre to provide shops, doctors surgery and community facilities*. Guidance in CS paragraph 12.14 is that: *The residential development should be ... within convenient walking distance of ... a local centre comprising a doctors surgery/polyclinic, local shops, and other appropriate facilities to meet skills, special educational and community needs*. The development of this area should have general regard to guidance contained within the MHBMS⁵⁶. The description of local centre in the CS Glossary of terms is *a range of small shops of a local nature serving a small catchment area*, while that for a district centre is *a group of shops normally containing at least one supermarket or superstore and a range of non-retail services and public facilities*. Finally, policy CP8 expects that: *Local retail facilities will be required as part of the community provision at the Monkerton/Hill Barton and Newcourt urban extensions* and paragraph 7.11 anticipates: *a need for some local retail facilities to serve the new development areas on the eastern edge of the city and to the east ... of the city*.
- 6.4 Read as a whole, in its proper context and with regard to the purpose of CP19, it is clear that *local centre* is not some open ended retail development but a limited number of small shops serving a small catchment for local needs. *Associated infrastructure* for the strategic allocation means supporting facilities not larger retail growth for which the CS has the description *district centre*.

⁴⁹ (albeit somewhat reluctantly) by Roche in XX by ECC

⁵⁰ CS Key Diagram and on plan 2, page 101

⁵¹ *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann, Para 18

⁵² Ibid para 19

⁵³ CD41: *R (Chalfont St Peter Parish Council) v Chiltern District Council* at para 135 (per Moore-Bick LJ); at para 120 (per Beatson LJ)

⁵⁴ Ibid at para 115 (per Beatson LJ)

⁵⁵ CD42: *Phides Estates (Overseas) v SSCLG* at para 56 (per Lindblom J, referring to dicta in *R (TW Logistics) v Tendring District Council*)

⁵⁶ CS para 12.18

Neither CP19 nor its supporting text uses this term. The reference to the MHMBS adds nothing to this.

- 6.5 It is true that CP19 goes beyond the glossary description to add *a doctors surgery/polyclinic and other appropriate facilities* but not in terms of retail provision. It wanted a *local centre* with a few other facilities. Given the Sainsbury's superstore on Pinhoe Road⁵⁷, this is not surprising. The argument that the word *including* in CP19 makes it a minimum provision which does not preclude other development is at odds with the interpretation by the Courts. It simply means that if other infrastructure were needed to support the allocation then it could be provided. It cannot be sensibly interpreted to mean unlimited retail provision subject only to the limitations of the impact test. The reference in the CS Inspector's Report to a *flexible application* does not alter the requirement for a *local centre* with appropriate community facilities into a *district centre*.
- 6.6 Case law⁵⁸ has found that: *the term "local centre" is undoubtedly, in the absence of any contextual limitations, of no very precise meaning ... connotes a development comprising a shop or shops and possibly other community uses in which the shops sell primarily convenience goods and have a relatively limited catchment area*. In CP19, the context includes the glossary reference to a *small catchment area* and the existing local centres⁵⁹ which are of modest extent with modest sized retail units. The CS also lists the district centres and, with the CS Key Diagram, shows that these are larger and serve wider functions suggesting that the catchment area of a local centre is smaller than that for a district centre. Policy CP19 therefore requires the retail development within the strategic allocation to function as a *local centre* serving the day to day needs of residents and other new development areas on the eastern side of the city.
- 6.7 The size of development proposed⁶⁰ cannot be a *local centre*. Its predominantly comparison turnover⁶¹ and extensive catchment area⁶² are out of all proportion to the three higher tier district centres in the CS area with the largest⁶³ being less than a quarter of that size. While it is arithmetically correct to say that two thirds of the comparison turnover would come from the three zones 1A, 1B and 1C⁶⁴, these zones effectively embrace the whole of the built up area of Exeter⁶⁵. To regard that extensive area as the *local catchment* of a *local centre* is to rob the words of all real meaning.

⁵⁷ within the defined extent of the strategic allocation – see Plan 2 of the CS

⁵⁸ Morris appendix 25, p333: *Braintree v Secretary of State for the Environment and Others Queen's Bench Division (George Bartlett Q.C., sitting as a Deputy High Court Judge): September 29, 1995*

⁵⁹ listed in CS appendix 6 and illustrated on the plans in Morris appendices 8 to 17 which are in turn taken from the plans at A2.5 to A2.14 of the Local Plan First Review (CD5)

⁶⁰ See Appellant's draft conditions: Maximum Floorspace 16,933 sq m GEA of which 11,102 sq m class A1 retail

⁶¹ £34.36m comparison out of £44m – see Retail SoCG, Table 5

⁶² 80% of its comparison goods turnover comes from beyond the study area zone (Zone 1A) where it is located - Comparison turnover from Zone 1A as per Hughes appendix 11, Table 17 (£6.6m) is 19.24% of total comparison turnover of £34.36, therefore turnover from other Zones and inflow is £27.75 (80.76%)

⁶³ St Thomas (including the Exe Bridges Retail Park) £8.54m - Hughes POE, Table at para 5.130, and Retail SoCG Table 5

⁶⁴ By reference to Hughes appendix 11, Table 17

⁶⁵ some 130,000 people and some 56% of the study area's 2020 population - see the study area map at Morris appendix 1 and the population figures at Table 1 of the Retail SoCG

- 6.8 Next it was argued that the proposal could be a local centre under CP19 and also fulfil a wider role for a wider catchment. This was rejected in the 1995 *Braintree* Judgment and, while the policy context was different, the judgment did not turn on policy or guidance but makes the point that a local centre is different to a district or a city centre, and that larger centres do not become local centres simply because some shoppers use them to meet local needs. Otherwise the city centre would also be a local centre, as it provides for the day to day shopping needs of those living there, and the hierarchy in the CS would be meaningless. The application is for a district centre and so cannot be for the local centre sought by CP19.
- 6.9 Reference to other Decisions does not show that CP19 should not limit the amount of floorspace. The outline permission⁶⁶ which included the appeal site limited the total Class A floor space to 1,600 sq m, with no more than 900 sq m of Class A1, while condition 18 set a maximum unit size of 750 sq m, and condition 19 precluded drive-through elements. This was seen as an alternative to the Hill Barton local centre in the MHMBS not an addition⁶⁷. The scale exceeded what was needed but not by so much that it was possible to *identify such harm to the established retail hierarchy which would justify refusal*⁶⁸. This does not suggest that CP19 allows large scale retail development but shows that departure from policy may be justified if there would be no harm. That is not the case here.
- 6.10 Outline planning permission for a mixed use scheme, including a *local centre*, was granted on land to the north and north-west of the appeal site⁶⁹. Conditions limited the class A units to 750 sq m and provided an effective limit on the overall retail size through a tie to the Masterplan⁷⁰ to ensure that it would not be more than a local centre. Neither the Council nor the developer expects the local centre to come forward if the already approved retail units at the appeal site proceed⁷¹. Rather, the two permissions were seen as alternative means of meeting the retail requirements of CP19⁷² not as accepting that larger retail development would be appropriate or acceptable. Even if the permissions were regarded as cumulative, they would together provide no more than local centre facilities. The appeal scheme would be of quite a different order of magnitude to these and even to a flexible approach to CP19.
- 6.11 If the appeal is allowed, neither of these local centres would be likely to proceed. The scheme would also frustrate the provision of employment land. The conclusion must be that the proposals would not accord with CP19 as they would not be a *local centre* and because they would prevent the required local centre and the provision of employment land.
- 6.12 Turning to CS policy CP8, *local retail facilities* must be a cross-reference to *local centre* in CP19. With regard to the opening requirement to respond to the *needs of local ... communities* and later direction that *proposals must be ...*

⁶⁶ CD27

⁶⁷ CD28: officer report, foot of p28

⁶⁸ Ibid p29

⁶⁹ CD45 - November 2013

⁷⁰ CD46

⁷¹ Ibid including the resulting s106 agreement

⁷² Morris in RX: *The committee report and s.106 contemplate that there will only be one local centre within the strategic allocation*

appropriate in scale and character to the role and function of the proposed location reinforce the above conclusions under CP19. Concerning the BCS site, the capacity figures are not relied upon by the Council and no issue was taken⁷³ with the objective of CP8 to enhance the vitality and viability of the city centre being achieved by promoting the development of the BCS site. Overall, the proposals would not accord with CP8 or with the development plan as a whole.

6.13 The appellant also argued that the NPPF has rendered out-of-date any policy which seeks to limit retail development, by reference to anything but the sequential and impact tests, and that the use of the term *local centre* in policies CP19 and CP8 makes these inconsistent with the NPPF. It was accepted that it is wholly legitimate, and not inconsistent, for a development plan to set out a retail hierarchy which differentiates between centres⁷⁴. However, the appellant then claimed⁷⁵ that in a development management context such a hierarchy does not need to be reinforced and is not relevant where the plan is not up-to-date as the NPPF does not distinguish between centres. On this *Catch 22* approach, a policy which set out a hierarchy could never be up-to-date and so could never be used when making decisions.

6.14 Alternatively, it was argued⁷⁶ that retail should be limited by reference to need. On this basis, this issue would not be whether policies are up-to-date but whether the scale of development would be commensurate with the needs of that *local centre*. Once it is agreed that acceptable scale can be assessed other than just by the impact test, the debate over *Rushden Lakes* becomes academic. The reasons for this are:

- *Rushden Lakes* was an appeal Decision not a policy statement. This turns on its own facts as presented. The SoS has other mechanisms for clarifying policy. At most, the Decision can illustrate the application of policy;
- The retail issue was dealt with solely by reference to the NPPF as the SoS had already concluded that the development plan was not up-to-date. While he correctly found that the NPPF does not include a test of hierarchy or scale (other than as part of flexibility), he made no finding on whether retail hierarchies in development plans are consistent with the NPPF, only that the one before him was not up-to-date⁷⁷. His comments on NPPF 23 must be seen in that context. *Rushden Lakes* is simply a decision that turns on its own particular facts, which are rather different from those in the present appeal.

6.15 There is no sound basis for regarding CP19 or CP8 as out-of-date because they refer to a *local centre* or because (in the case of CP8) it expects development to be of an *appropriate scale* to the *role and function of the proposed location*. Nor is CP19 out-of-date because the evidence base dates from 2008. Nothing turns on the capacity estimates. The Council's objection is not that the scheme would take up capacity ear-marked for the BCS site, but that the proposals would be of an inappropriate scale for the function required in the strategic allocation and

⁷³ By Hughes or Chase

⁷⁴ Hughes in XX by ECC

⁷⁵ Ibid and in XX by CEH

⁷⁶ Roche in XX by ECC

⁷⁷ CD10, paras: 8.9, 8.11, 8.16-17, 8.19, 8.21-22, 8.24-27, 8.29-30, 8.34, 8.36-37 and 8.39.

would fail both the sequential and impact tests. So far as it is relevant, CP8 is up-to-date.

- 6.16 It was also argued⁷⁸ that the CS envisages retail provision meeting wider needs, that as CP19 limits retail to a *local centre* it is out-of-date, and that local businesses support greater provision. This argument, in trying to establish material considerations to *indicate otherwise*, is not supported by the facts. While there is a wider residential population in Exeter, nothing in the CS suggests that there is a retail deficiency. Cranbrook new town will have its own town centre. The expenditure by the residential population within the strategic allocation, particularly on comparison goods, would represent less than 8% of the comparison turnover of the proposal⁷⁹. This significant imbalance suggests the retail provision would be over-sized.
- 6.17 The evidence does not support the notion that the shopping needs of the local workforce are unmet as, for both convenience and comparison, expenditure associated with work is a very small part of the total⁸⁰. It is common sense that comparison shopping (which would account for most of the proposal's retail turnover) is not a significant activity for people at work, going to work or immediately after work. There is already a reasonable spread of shops on the eastern side of Exeter, both convenience provision and class A3/A4/A5 facilities for lunchtime refreshments⁸¹. The proposals would take most of its comparison turnover from retail outlets in the city centre⁸². The reality is that not much comparison shopping takes place during the working day compared with other times such as weekends. Rather than meeting the needs of those on the eastern side of the city, the scheme would draw the bulk of its trade from a catchment extending across the whole of Exeter and that trade would mostly be diverted from the city centre. The proposals would be over-sized if they were just for the needs of new residents of workers in eastern Exeter.
- 6.18 A smaller proposal, such as the *local centre* sought by CP19 would be adequate to meet the needs of eastern Exeter. This could be either on the appeal site or at the Hill Barton centre. Whether or not the current permission is valid is not critical as there is no reason to think that a further proposal would be unacceptable. In these circumstances, neither CP19 nor CP8 is out-of-date. The appeal would be contrary to both policies and should be refused unless material considerations indicate otherwise.

Employment land

- 6.19 As well as precluding a *local centre*, the proposals would remove the last practical opportunity for employment floorspace from the strategic allocation. The strategic allocation will now under-deliver on employment floorspace

⁷⁸ Rocke

⁷⁹ Retail SoCG, Table 1 gives a 2020 population for Zone 1A of 27,232. The strategic allocation is 2,500 dwellings so (say) 7,500 population. This is 28% of the Zone 1A population. ADH11, Table 17 shows that the proposal draws £6.61m comparison turnover from Zone 1A, so 28% of that would be £1.85m. This is less than 8.0% of the comparison

⁸⁰ Morris para 5.17

⁸¹ Illustrated by Morris appendix 18, and explored in the XX of Stevens

⁸² Hughes appendix 11, Table 18: Diversion of £16.80m comparison turnover from the City Centre (out of a total comparison turnover for the development of £34.36m, or 49%)

anyway but the site could provide some 2.2-3.2ha out of the 5ha originally expected. This could equate to 8-13,000 sq m of office floorspace.

- 6.20 There is at least 15 years supply of employment land but the quantitative argument overlooks the need for the right choice and quality for the market. A range of different opportunities is required including the important office component. The appeal site is prominent, near to Exeter Business Park (by the prestigious Met Office), 'within' the M5 boundary and the City's administration, free from the restrictions at Exeter Science Park or Exeter Gateway, at a mature location rather than a 'pioneer' site such as Sky Park, and could be marketed for self-build or owner-occupied buildings which are in limited supply elsewhere.
- 6.21 There are outstanding requirements for larger areas of office floor space which the current stock cannot meet⁸³. Other sites do not provide a sufficient range to meet all likely needs. Regardless of the parties' scoring, and the announcement of an Enterprise Zone, the key factors of location, accessibility and developability for the type of office space in demand show that the appeal site is one of the best options available⁸⁴. If the appeal is dismissed, there is every reason to think that the owners would take a commercial view and wish to see the site developed. There would be real harm to the objectives of policy CP19 if there is no employment development within the strategic allocation.

Sequential test

- 6.22 To re-interpret the *Plymouth* Decision⁸⁵ as meaning that the sequential test does not apply, as the site lies within an area identified for a new centre, is mistaken as NPPF 24 requires the test for all proposals which *are not in an existing centre and are not in accordance with an up-to-date Local Plan*. The appeal site is not in an existing centre and cannot be within a centre without a review of the CS⁸⁶. As above, the proposals do not accord with the CS which is up-to-date. At *Plymouth* the development in question was not the right size for the role of a new centre as required by the development plan⁸⁷. Here it is over-sized and so has to comply with the sequential test, as accepted⁸⁸.
- 6.23 The appellant argued that flexibility need not play a part in framing the proposals but only in whether those already set could be accommodated elsewhere⁸⁹. When considering *suitable* in the Scottish version, the Supreme Court found in *Tesco v Dundee* that, *subject to a qualification*, it meant *suitable for the development proposed by the applicant*. However, the *qualification*⁹⁰, explains that *the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities ... 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*

⁸³ Pearce appendix 4

⁸⁴ Pearce, with an undisputed knowledge of the local market, garnered over 25 years of experience

⁸⁵ CD31: APP/N1160/A/12/2169472, North West Quadrant, Derriford Road, Plymouth

⁸⁶ Or the production of some other DPD. See the glossary definition of "Town centre" in the NPPF

⁸⁷ CD31: at DL15.15, 15.21 and 15.22

⁸⁸ Hughes in XX by ECC

⁸⁹ Hughes POE, paras 5.44 and 5.45 and his answer in XX (to ECC): "The only scale that has to apply is what the applicant has proposed. Otherwise, inconsistent with national policy."

⁹⁰ by Lord Reed in paras 28 and 29

their scale may fit better with existing development in the town centre. ... [the applicant] 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.

- 6.24 The Supreme Court did not find that a site which could not accommodate the applicant's proposal in the form in which it was proposed could be automatically disregarded. *Tesco v Dundee* makes it clear that a developer's proposal can only be used to set the parameters for "suitable" sites if that proposal properly demonstrates flexibility in its formulation (having regard to the "real world" in which all retailers operate).
- 6.25 At *Rushden Lakes* the Inspector considered that: *what the sequential test seeks is to see whether the application i.e. what is proposed, can be accommodated on a town centre site. There is no suggestion here that the sequential test means to refer to anything other than the application proposal*⁹¹ and: *if a site is not suitable for the commercial requirements of the developer in question then it is not a suitable site for the purposes of the sequential approach.* It would be to misinterpret the decision in *Tesco v Dundee* to suggest that this means that the commercial requirements do not have to take account of the requirement for flexibility⁹². To do otherwise would undermine the test if not render it entirely nugatory.
- 6.26 Moreover, the SoS clearly had the new PPG in mind at *Rushden Lakes* where his decision echoes consideration of *flexibility* and whether there is scope for this in the format and/or scale of a proposal⁹³. The decision maker needs to consider whether that has been properly addressed. Under the PPG⁹⁴ there is no question of looking at *suitability* solely from the perspective of the applicant's commercial requirements. The PPG reference to *precisely* acknowledges the point in *Tesco v Dundee* that the developer had not limited its *assessment to sites which could accommodate the development in the precise form in which it has been designed*⁹⁵. In *Rushden Lakes* the degree of flexibility had been shown having regard to the somewhat bespoke nature of the hybrid retail and leisure uses being proposed there.
- 6.27 It follows that *Rushden Lakes* does no more than illustrate that, if a developer does satisfy the *Tesco v Dundee qualification* by showing flexibility in how the proposals are formulated, then the decision maker should ask the question: is it *suitable for the development proposed by the applicant?* However, if the flexibility has not been shown, then the qualification has not been satisfied and the proposal in its precise form cannot be used to set the parameters for a *suitable* site.
- 6.28 Turning to the proposals here, by insisting that its retail formulation must be 11,000 sq m of class A1 space, with at least one large comparison goods store, surface level parking and drive-through restaurants, the appellant has not

⁹¹ CD10: IR8.46

⁹² See *Tesco v Dundee* paras 28-29

⁹³ CD10: DL paragraph 15

⁹⁴ see CD2: Ref. ID2b-010-20140306

⁹⁵ *Tesco v Dundee* para 30

shown the requisite degree of flexibility. The scale of provision is not justified by the original Retail Statement but by the size of the site, a parameter selected by the appellant. The suggestion⁹⁶ that this is the minimum to achieve the CS objectives of a *local centre* (or even a *district centre*) is misconceived. No attempt has been made to show that a smaller development would be insufficient to meet the identified needs, excessive reliance has been placed on support from local businesses and there is no substantive evidence that those businesses have been hampered by the existing retail facilities. Finally on this point, the drive-through facilities would be an optional element which could be dispensed with.

Suitability

- 6.29 The BCS site counts as edge-of-centre for the sequential test and is in a sequentially preferable location to the out-of-centre appeal site. It is large enough for the amount of floorspace proposed⁹⁷. Given its central location, close to existing public parking and a public transport hub, there is no need for the retail/restaurant/leisure development to provide bespoke parking. This would not be disaggregation as the Council is not suggesting that parking should be provided elsewhere but that it's not needed.
- 6.30 The argument that the BCS cannot be suitable as it is not in or near the strategic allocation can have no force as it would not be focused on the needs provided by a local centre but would be out of all proportion to such needs. A local centre at Hill Barton or as the existing permission for the site could provide for these needs. Given the catchment area that it would draw from, and the anticipated turnover, location cannot be part of the sequential test. Relying on *Braintree ex parte Clacton Common Developments*⁹⁸ is misplaced as that related to the former PPG6 when the BCS site is within the proposals' catchment. With regard to the current PPG advice⁹⁹ there is no justification for saying the scheme could only be accommodated on the eastern side of Exeter.
- 6.31 Next it was argued that the BCS site could not be suitable because it must provide for the bus station and a leisure centre neither of which feature in the appeal proposals. However, these can be accommodated and still leave space for the retail/restaurant/leisure proposals¹⁰⁰. There would be no requirement for the retail developer to provide or fund these elements which would be the responsibility of the local authority. While these are an integral feature, the BCS site could accommodate both the commercial and other elements. A sequentially preferable site need not be a mirror image of the less central site. Addressing the particular attributes of a more central site, that would not affect an out-of-centre site, is part of flexibility. Providing the constraints of the more central site could be addressed, to still allow the out-of-centre proposals on it, the more central site could still be suitable. The bus station and leisure centre may make programming more complex but do not make the BCS site unsuitable.

⁹⁶ CD56A, original Retail Assessment, paras 6.2 and 6.6

⁹⁷ Hughes in XX by ECC. Even with the appellant's conditions, the appeal proposals could be accommodated on the BCS site.

⁹⁸ CD37: *Braintree ex parte Clacton Common Developments Limited* CO/1614/98

⁹⁹ CD2: ID2b-011-20140306

¹⁰⁰ Hughes para 5.58

Availability

- 6.32 This concept is not elaborated on in either the NPPF or the PPG. It does not have to be available either to the particular applicant or immediately¹⁰¹. While other Decisions turn on their own facts, *Bath Press*¹⁰² and *Sainsbury's Braintree*¹⁰³ are relevant as both were made in the context of the NPPF. The former accepted that available could mean several years' hence while in the latter case no steps at all were made to make the putative sequential site available. The terms: not available *generally*, or *in the market*, do not feature in the PPG. The BCS site is available for development and in a form that, with flexibility, could accommodate the appeal proposals.
- 6.33 The limitation of one developer¹⁰⁴ does not make it unavailable for development. The proposals would not be occupied by the appellant but by retailers, restaurateurs and leisure operators. The BCS site is just as available for these as the appeal site. Whether it is developed by the appellant or CEH is academic. The onus is on the appellant¹⁰⁵ to show that there is no suitable and available site which is sequentially preferable. It has not done so.

Impact test

- 6.34 While there would be trade diversion, the Council does not suggest that the trading impacts of the scheme would have a significant adverse impact on the vitality and viability of the town centre. However, there would be an impact on planned investment that on its own would be sufficient to breach the first part of the NPPF 26 test¹⁰⁶. Again, the onus is on the appellant¹⁰⁷. The test should take into account the local context of both the proposal and the investment that may be affected.
- 6.35 The impact test on *investment in a centre or centres* does not necessarily exclude an edge-of-centre site if, as with the BCS, it is seen as a planned extension to the centre. Here, the BCS would be the major part of the 37,000 sq m proposed by policy CP8 with the express purpose of *maintaining and enhancing the vitality and viability of the city centre*. It was similarly recognised in the LP¹⁰⁸. The fact that the BCS is not yet part of the PSA is not significant; such an adjustment should come after development not before.
- 6.36 While each case turns on its facts, the judge in *Milton Estates*¹⁰⁹ noted the argument that an edge-of-centre site could never be protected by NPPF 26 as it had not been developed but found: *that is an interpretation of the policy*

¹⁰¹ Hughes in XX by ECC. Also compare para 24 of the NPPF on sites being well-connected to town centres with Hughes' evidence

¹⁰² LP/2: decision 18 December 2013

¹⁰³ CD32: decision APP/Z1510/A/14/2219101 *Sainsbury's Supermarket Ltd – Broomhills Industrial Estate, Braintree* 25 June 2015

¹⁰⁴ ID A4: email of 24 August 2015

¹⁰⁵ Or applicant under the PPG, see CD2: ID2b-010-20140306

¹⁰⁶ NPPF 27 refers to "significant adverse impact on one or more of the above factors"

¹⁰⁷ PPG ID2b-015-20140306 it is "for the applicant to demonstrate compliance with the impact test"

¹⁰⁸ CD5, paras 14.12 to 14.14: "close proximity to the primary shopping area"; "seen as an integral part of the City Centre"

¹⁰⁹ ID LP1: *R (Milton (Peterborough) Estates Company) v. Ryedale District Council* [2015] EWHC 1948 (Admin), Mr Justice Dove, para 27, quoting para 6.69 of the officer report

*which is difficult if not impossible to sustain ...*¹¹⁰. The reference in [NPPF] 26 to 'committed and planned public and private investment in a centre or centres' clearly contemplates developments which are planned for and have yet to materialise on the ground. In this appeal, CS policy CP8 already sees the BCS site as something that would maintain and enhance the city centre and so there is no reason to disregard it.

- 6.37 As with the appeal proposals, the PHL application is in outline form. Both offer considerable flexibility and could come forward in a variety of forms with a variety of uses including a substantial element of Class A1 retail space. The BCS site could accommodate the appeal proposal's floorspace as a whole and its key components. Given this similarity, it is not surprising that CEH is concerned about the impact on investment.
- 6.38 Re-development of the BCS site is supported by the CS. Negotiations between the Council (as landowner) the main tenant (Stagecoach) and the developers (CEH) are at an advanced stage, steps have been taken to secure vacant possession without the need for compulsory purchase and progress has been made towards a development agreement. The Council should not be criticised for not undertaking an assessment of the effects on turnover when the onus is on the appellant which did not request such information on the BCS scheme. Moreover, the concern is not about turnover but about securing the right tenants to raise the necessary investment.
- 6.39 The argument that the appeal proposals and the PHL scheme are *different animals*, with different retailers for in-town and out-of-town markets not competing with each other, is unsupported by credible evidence. While the appellant's suggested list of potential occupiers might not overlap with those for PHL, any permission would run with the land with no control over the marketing of a consented scheme. There are no retail Heads of Terms and it is likely that contact has been on hold since the appeal was called in. The *Farnborough* and *Fort Kinnaird* decisions¹¹¹ emphasise that prospective occupiers can change at any time and so there can be no assurance over potential tenants¹¹². The lettings strategy¹¹³ shows that the likely tenants would overlap with those who would be targeted for PHL. There was no evidence that the outdoor leisure operators who might come to Exeter¹¹⁴ would do so on a multi-locational basis. Those already in the High Street in the City Centre might well want better configured space.
- 6.40 None of the appellant's proposed conditions would confine the scheme to identified retailers. They would give broad flexibility to vary the composition including size and number of units. The limited restrictions on ranges would allow further scope. Having regard to the NPPF tests, there are no alternative conditions that could satisfy the concerns over the impact test or be both reasonable and so different that the scheme would not compete with or jeopardise investment in the BCS site. A large food store anchor has been

¹¹⁰ Ibid para 54

¹¹¹ MM26 paras 13 and 14 and MM27 paras 49 and 53

¹¹² Conceded by Chase in XX by ECC

¹¹³ By letting agent BNP – see GFC 9: BNP letter and Mr Chase's supporting list

¹¹⁴ Evans Cycles and Cotswold Outdoor Leisure were identified

rejected as not deliverable and conditions could not overcome the overall scale or the failure to deliver a local centre. No condition could bind future occupiers.

- 6.41 There would remain a real risk that both schemes would target the same tenants and risk investment in the BCS site. This amounts to a significant adverse impact. The appellant has not satisfied the impact test with regard to the effect on planned investment in the BCS site.

Sustainable development

- 6.42 The presumption in favour of sustainable development in NPPF 14 is not engaged. The proposals would not accord with the development plan which is neither absent nor silent. Policies CP8 and CP19 are not out-of-date insofar as they apply to either the appeal or the BCS sites. The appeal should therefore be determined in accordance with the development plan (unless material considerations indicate otherwise).
- 6.43 Even if NPPF 14 were engaged, its balancing exercise would point to refusal. NPPF 27 spells out that a breach of either the sequential or impact tests would significantly and demonstrably outweigh the benefits. Prejudice to the objectives for the strategic allocation should carry significant weight. The benefits have been over-stated as future needs for residents and employees could be adequately addressed by a CS-compliant development. The benefit of additional jobs could be provided on the sequentially preferable site¹¹⁵. There is no reason to think that plan-led development would not be sustainable and follow national and local policy. By contrast, the appeal proposals would produce a large out-of-centre retail park which would harm the City Centre and the success of the strategic allocation; they should be dismissed.

7. The Crown Estate and TIAA Henderson Real Estate (CEH)

The gist of its case was as follows:

- 7.1 CEH objected on 3 grounds: conflict with the development plan; that there is a sequentially preferable site; and that there would be a significant adverse impact on investment in the city centre including, of most concern, the Princesshay Leisure scheme (PHL). It argued that other material considerations would not outweigh the conflict with policy and that if the tests in NPPF 27 were failed the application should be refused.

Conflict with the development plan

- 7.2 To allow the substantial amount of main town centre floorspace proposed for this out-of-centre site would make a mockery of NPPF 23 and the development plan strategy. But for the *Rushden Lakes* Decision, on which such reliance has been placed, the appeal might not have been made. However, both the context and the conclusions in that case have been misunderstood.
- 7.3 CS policy CP19 and Paragraph 12.14, under the heading "Monkerton/Hill Barton", require a local centre and employment land. To reinterpret the word "including" as meaning that a local centre is the minimum but that any retail

¹¹⁵ CEH/8: closing para 22, and *Stoke* decision AA/3 IR286 and DL19

development is acceptable provided that the sequential and impact tests are satisfied, is wholly unsustainable. Indeed, the appellant seems unable to decide whether to pretend that it would be a local centre or to admit, as the application calls it, that it would be a district centre. It would not be a local centre as defined in the CS or be comparable with Exeter's existing district centres. Rather it would be an out-of-centre development of main town centre uses. The likely expenditure draw was not agreed. Rather than being local, the potential tenants would have a sub-regional draw which would be wider than any district centre and within the regional draw of the city centre.

- 7.4 It is misguided to use the glossary to argue that policy CP19 is out-of-date because the NPPF treats all centres as town centres. All the glossary does is explain that this is shorthand for all the types of centres mentioned while NPPF 23 bullet 2 sets out the need for local plans to define a hierarchy. Hence policy CP19 is not out-of-date for identifying a local centre. Nor should this be interpreted as allowing unlimited retail and leisure floorspace. The argument that even if these considerations are relevant to plan-making they are not relevant to decision-taking is equally misconceived as, if it is not at odds with the NPPF which it is not, it should be given full weight.
- 7.5 The *Rushden Lakes* Decision does not support the argument that the hierarchy of centres is no longer relevant. There the Inspector correctly said that NPPF 23 did not provide: *some form of additional test for decision-taking that a proposal must honour the hierarchy of town centres still less some form of test of 'appropriate scale' which is not mentioned in NPPF [23]. Plainly, if the two tests [sequential and impact] are passed an application will be consistent with the NPPF*¹¹⁶. What the Inspector did not say was that a proposal would be consistent with the development plan if that plan contains policies which are themselves consistent with national policy and which require provision of a particular type of centre in a particular location. That is the case here where the appeal should be dismissed not simply on the grounds of scale¹¹⁷ but due to conflict with policy CP19. The CS Inspector's conclusion on flexibility¹¹⁸ does nothing to detract from the policy requirement for a centre which would serve local needs.
- 7.6 The proposals would not amount to *sustainable development* within the meaning of the NPPF because the majority of customers would arrive by car and as it would draw trade from the city centre which is highly accessible by non-car modes. Sustainable development could be achieved by building a local centre on the site, complete with a surgery and community facilities. While the appellant's scheme would bring a much higher land value, it does not try to show that a local centre would not be viable. The late attempt¹¹⁹ to claim that a local centre would not be viable has no sound basis and should be given no weight.
- 7.7 The benefits relied upon as material considerations are essentially convenience for those who live and work locally. It is therefore unsurprising that local

¹¹⁶ CD10, DL14 (NB in his DL the SoS did not expressly agree with IR 8.36. Rocke PoE para 7.42 relies on IR 2.27-28 but this was part of the Appellant's case, not the Inspector's conclusions.)

¹¹⁷ Ibid IR8.38

¹¹⁸ CD4 p.13 para 48

¹¹⁹ By Mr Chase

businesses are supportive. However, these benefits would be provided by a policy compliant development. If the effect of the scheme would be to prevent PHL going ahead, then very little weight can be given to economic benefits. Consequently the benefits claimed could not outweigh the conflict with the development plan.

The BCS site and PHL scheme / sequential test

- 7.8 The CS provides for comparison goods retailing to take place primarily in the city centre, for some retail warehouse provision after 2015 and limited new local centres under policy CP19. CS paragraph 7.4 and policy CP8 identify additional comparison floorspace capacity in the city centre of 37,000 sq m by 2021 to *include up to 30,000 sq m of comparison floorspace in the Bus and Coach Station area, to be developed as part of a mixed-use scheme by around 2016.* This proposal was essentially carried forward from the LP in which the area was described¹²⁰ as that *defined by Sidwell Street, Cheeke Street, London Inn Square[,], Paris Street, the Bus and Coach Station and Summerland Street.*
- 7.9 There was some dispute over what area of land constituted the BCS site. The LP description, on the face of it, included the bus depot site and other uses between Cheeke Street and Summerland Street while the proposals map shows the 'BC' area finishing at Cheeke Street. On the other hand, the Masterplan¹²¹ shows the area extending to Summerland Street. It is therefore probable that the 30,000 sq m in the CS includes the PHL site and the land to the east.
- 7.10 The CS drew on the 2008 ERS. This anticipated a third department store but did not take account of the approaching recession¹²². Since the CS, the department store has been realised¹²³ but not as the anchor to a major retail development¹²⁴. Policy CP8 cannot be said to be out-of-date. The capacity identified will shortly all be taken up¹²⁵. If IKEA is counted as taking up capacity, there is no more room for the appeal proposals; if it is discounted as out-of-centre then the appeal scheme should be as well.
- 7.11 Next is the question of whether the BCS site is within the town centre. In the LP it is partly within and partly outside the secondary shopping area. In the emerging DPD it is partly within and partly outside the primary shopping area (PSA)¹²⁶. It is within the City Centre boundary as defined on the LP Proposals Map and the emerging DPD¹²⁷. Chapter 14 of the LP and the CS refer to or treat it as being within the City Centre¹²⁸. Even if it were not, it should be

¹²⁰ CD5 para 14.12

¹²¹ the document anticipated by paragraph 7.10 of the Core Strategy – namely, “a Masterplan for the site [that] is in preparation” – that was published 4 months after the adoption of the Core Strategy; and Bus and Coach Station – Development Principles”: CD9

¹²² CD20 pp.29-30 para 5.4: *therefore a matter of some conjecture as to how deep the recession will be or how long it will last*; unlike the effects of internet shopping, which were taken into account in the Study, as is apparent from the same paragraph. See also CD3 para 7.1

¹²³ By John Lewis in the significantly extended old Debenhams store

¹²⁴ CD3 p.35 para 7.4

¹²⁵ 37,000 sq m total by 10,000 sq m in John Lewis; say 22,000 sq m net at IKEA and say 7,000 sq m net by PHL

¹²⁶ CD5 Appx 2, A2.1; Forster Appx 6

¹²⁷ CD 5 Proposals Map; Forster Appx 7 (city centre boundary is defined by the red line)

¹²⁸ CD5 paras 14.5, 14.14; proposal KP3

treated as such¹²⁹ as it would function as part of the city centre and as a logical extension to the primary shopping area. Even the appellant accepted that it would form a natural extension to the primary shopping area¹³⁰. In any event, the sequential test at NPPF 24 still protected an edge-of-centre site, not within the PSA.

- 7.12 There was no doubt that PHL constitutes 'planned investment' under NPPF 26. Significant weight should be given to the PHL scheme as: a planning application has been submitted; it would accord with the development plan; the area needs regeneration, additional retail and leisure floorspace which would function as part of the city centre; Heads of Terms for a Development Agreement have been agreed with the Council, which owns the freehold; CEH has a long leasehold interest in much of the commercial part of the site; the bus station lease will terminate in 2016¹³¹; occupational leases can also be terminated in 2016; leases to 160 and 167-8 Sidwell Street would be unaffected; compulsory purchase powers will not be needed; and CEH has huge combined experience in projects of this kind and would not have invested in the project if it did not intend to deliver it¹³². PHL is likely to be delivered unless it is put at risk by the appeal being allowed.
- 7.13 It was agreed that the BCS site is sequentially preferable to the appeal site. 'Suitable' in NPPF 24 means for the proposed development, applying flexibility. 'Flexibility' includes format and scale as set out in *Tesco v Dundee*¹³³:
[developers and retailers] 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 comment in the *Rushden Lakes* Decision that *the question is not whether the proposed development can be altered or reduced so that it can be made to fit the alternative site* also comes from the Supreme Court Judgment¹³⁴. Flexibility is therefore in the context of the likely greater constraints with a town centre or edge-of-centre site.
- 7.14 The context of *Rushden Lakes* is also important: it was for a unique range of uses, at the outer edge of the catchment, where the catchments did not overlap and there were aspirations of self-containment¹³⁵. Those circumstances are quite unlike the present case and so *Rushden Lakes* adds little to an understanding of the sequential test beyond that already interpreted by *Tesco v Dundee*.
- 7.15 At BCS, flexibility should be applied to car parking as none is proposed for PHL since there is adequate parking already in the city centre which is highly accessible by non-car modes (including the bus station). Some reconfiguration would be appropriate, so long as a similar quantum and type of floorspace could

¹²⁹ See the way the Inspector treated the sequentially preferable (LMS) site in Malton in *R (Milton Peterborough Estates) v Ryedale DC*: LP1 paras 13 (IR43), 53, 54

¹³⁰ Chase XX NK; also CD20 p. 37 para 5.26 Scenario

¹³¹ notices have been served on Stagecoach

¹³² Through the planning application, revisions, objecting to the appellant's planning application and appeal, and commencing discussions with potential key tenants. Also agreed by Chase in XX by NK

¹³³ CD36: Supreme Court Judgment para 28

¹³⁴ Ibid para 29

¹³⁵ CD10: IR p.190 para 8.3; p.201 para 8.51

be provided, which could be subject only to limited reorganisation¹³⁶. Nearby car parks usually have considerable capacity. It would be feasible to have parking underneath. Flexibility should not mean that two drive-through units would have to be included in a city centre site. The quantum of floorspace could be accommodated¹³⁷ and higher maxima have been sensitivity tested in the revised transport assessment. PHL could provide similar amounts of class A1 and D2 floorspace and additional A3 floorspace. The inclusion of a local authority leisure centre and bus station within the overall application should not exclude the BCS site from consideration as these are effectively separate elements, albeit ones to be provided at the same time. The BCS site would be suitable.

- 7.16 With regard to being available, this surely means for the development proposed not for an alternative landowner as the *Bath Press* case indicates¹³⁸. There is a current planning application for PHL due to be determined while the Decision on this appeal is likely to be another 8-12 months¹³⁹. There is no sound basis for concluding that the BCS site is not available and the appeal scheme should fail the sequential test.

Impact

- 7.17 The onus is on the appellant to demonstrate compliance with the impact test¹⁴⁰ and key considerations include: the extent to which an application is likely to undermine planned developments based on the effects on current/forecast turnovers, operator demand and investor confidence. Here the confidence that matters is in PHL. Although it has asked for viability information which is confidential, it has not attempted to forecast the turnover of PHL. It is not necessary to do so as it is not about turnover but about investor confidence in an important scheme for Exeter City Centre. If the appeal is allowed, there is a real risk that PHL will not proceed and that the (uncontested) benefits in extending and improving the PSA and the leisure offer in the city centre, as well as improving the appearance of the site its surroundings, would be lost.
- 7.18 The PHL scheme is likely to proceed, unless the appeal is allowed, even if there is some concern over funding for the leisure centre¹⁴¹. It is likely that it would be in competition for at least some of the same tenants as the appellant has identified for the appeal site¹⁴² although, understandably, none of these is yet known¹⁴³. Consequently it cannot be safely concluded that there would be no

¹³⁶ Forster Ax 8. This was not an attempted design but simply to show that it could fit – Forster in XX.

¹³⁷ Main SoCG para 2.8 and CD66. This excludes the bus station (760 sq m) local authority leisure centre (6,100 sq m) and A2, A5 and D1 floorspace (316, 116 and 975 sq m respectively) proposed on the appeal site as these are required as part of a local centre under policy CP19.

¹³⁸ The cancellation of the Practice Guidance since that case was decided does not of course mean that the policy as set out in the NPPF has changed as a result.

¹³⁹ Based on the *Plymouth* Decision (where the Inquiry closed on 16 October 2012 and the SoS's Decision was issued on 5 August 2013)

¹⁴⁰ PPG: CD2 "Ensuring the vitality of town centres" para 16

¹⁴¹ Raised by Chase (PoE para 9.42) but this is to be funded and delivered by the Council and so would not affect the viability of the commercial element of PHL

¹⁴² GFC9; letter of 9 November 2015. TK Maxx, one of the Arcadia fascias, M&S Simply Food, Evans Cycles or similar, Cotswold Outdoor or similar, Pizza Express, Chiquito, Costa, and Frankie and Benny's

¹⁴³ Chase IC acknowledged that there might be a bit of a fight over 1 or 2 traders but thought that overall the scheme would not have one jot of impact on PHL

substantial competition between the schemes for tenants. Both would be after the same type of well-known High Street fashion and leisure brands.

- 7.19 The exact traders proposed for the appeal site are unknown but a number of the most likely tenants are already in the city centre. If they take floorspace on the appeal site they might move out of the city centre or reduce their floorspace there when leases come up for renewal of break clauses become operational. This would significantly damage and undermine confidence in the centre. The appellant has forecast a substantial draw to the appeal site from the city centre. If the traders are the same, there would be direct competition for customers as well as traders leading to a substantial negative effect on trade in their existing shops. Some may open stores at both locations but others may not.
- 7.20 These issues also apply to existing and committed investment in the city centre including Princesshay, the recent permission for Broadwalk House, and investment at the Guildhall Shopping Centre. Competition which has implications for covenant strength and lease terms at PHL therefore apply to the city centre as a whole. The SoS should not take the risk that PHL would still proceed if the appeal is allowed despite the likely impact on this critically planned investment in the heart of Exeter.

Conditions

- 7.21 Even if the appellant's proposed conditions were attached and enforced, the scheme would still compete substantially with PHL for tenants and customers. There is a significant risk that even these could be relaxed in the face of arguments that the floorspace could not be let with such conditions in place. The 68% net:gross floorspace ratio suggested for the anchor store¹⁴⁴ would be surprisingly inefficient and it would be hard for the Council to resist an extended sales area coming forward.

Conclusion

- 7.22 The appeal proposal would be: in substantial conflict with the development plan; fail to meet the sequential test; and be likely to have a significant adverse impact on investment in Exeter City Centre. For these reasons the appeal should be dismissed.

8. The Case for CPG Development Projects Ltd Limited

The gist of its case was as follows:

Development plan

- 8.1 The starting point is the development plan and whether its relevant policies, particularly CP8 and CP19, are up-to-date. It was held in *Tesco v Dundee* that: *policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context and that planning authorities ... cannot make the development plan mean whatever they would like it to mean.* The CS has broad objectives consistent with its vision to: *embrace its role in the region as an area of growth: ... through sustainable*

¹⁴⁴ Condition 22(a)

*urban extension to the east, at ... Monkerton/Hill Barton ...*¹⁴⁵. Context is important, including the specific reference to the MHB masterplan (which is not just part of the evidence base¹⁴⁶), and the words *local centre* should not be construed as a statute or contract.

- 8.2 Policies CP8 and CP19 recognise the need for new retail facilities as part of the MHB strategic allocation. The appeal site is well placed to meet this need and so the starting point is the acceptability of town centre uses on the appeal site. It is now the only site in the locality available to accommodate a new centre. Policy CP8 includes provision for about 8,500 sq m gross comparison goods floorspace based on the ERS 2008¹⁴⁷ and not only in the City Centre. CS paragraph 7.11 notes: *a need for some local retail facilities to serve the new development areas on the eastern edge of the city.*
- 8.3 The requirement is not just the MHB allocation in CP19 and adjacent business park, but also the developing Science Park and Sky Park with their recent Enterprise Zone status. There is a remarkable level of significant, strong and continuing support for the proposals from businesses on the eastern side of Exeter. Employment land which extends beyond the City's administrative boundary into East Devon underlines that the new facilities would be sustainable.
- 8.4 Policy CP19 proposes a *local centre* at MHB. The CS Glossary describes this as: *A range of small shops of a local nature serving a small catchment area.* The appeal site is not allocated for anything specific¹⁴⁸. The proposals would accord with the requirements for a *local centre* in CP19 as:
 - they are inclusive not exclusive, i.e. they set a minimum for infrastructure with no cap on floorspace or facilities;
 - the policy list is longer than the glossary description of a *local centre*¹⁴⁹ so it must have been intended to provide more;
 - the MHBMP contemplated more than one centre, that at Pilton being referred to as a *district centre*;
 - the outline permission for the site has been partly implemented by a hotel and a pub/restaurant which were not listed in CP19;
 - the Council interpreted the policy flexibly when it granted permission for a second centre at Hill Barton;
 - the above and the discussion in the CS Inspector's Report show that the context for the policy was one of flexibility and a minimum requirement;

¹⁴⁵ CD3, CS para 3.2

¹⁴⁶ See CD42: *Phides v SoSCLG, Shepway District Council and David Plumstead CO/4792/20014*

¹⁴⁷ CD20, while out-of-date this gave a clear indication of the need for facilities at the eastern edge of Exeter - See Hughes para 4.23-4.32 and 5.11-5.25

¹⁴⁸ While the draft DDD proposes to allocate it, this is subject to objection and thus, pending examination, carries little weight.

¹⁴⁹ The discussion of "local centre" in *Braintree DC v. Secretary of State* (1995) 71 P&CR 323 in MM25 was against the background of policy and practice at least 20 years ago (the outline permission was granted in 1989, see p.324) and concerned the scope of a planning permission and the validity of a reserved matters application, not the interpretation of current policy. There is no evidence of regard to the *Braintree* approach in the ECS. It is of little more than historic interest.

- the proposals would provide the minimum local facilities required by CP19.
- 8.5 The retail analysis¹⁵⁰ does not support the concern that the scheme would function as a sub-regional centre. The fact that a few elements within the scheme would have a wider catchment than the smaller, more local facilities, would not make it a sub-regional centre. The crude comparison of 30% from beyond the study area with 50% for Exeter City Centre¹⁵¹ should be rejected because:
- The Council's figure of 50% represents the huge draw of the City Centre, with its successful regeneration, range of traders and a turnover of some £400-500m. The 30% from beyond the study area for the appeal proposals is highly unlikely to draw from as far as the City Centre and its turnover would be in the range of £10m;
 - the size of the facilities on the appeal site cannot sensibly be compared with the City Centre offer. Rather they would be similar in size to St Thomas district centre/Exe Bridges Retail Park combined which is both much closer to the City Centre and largely benefits from open A1 use;
 - the effect of the proposals would be broadly local in trading terms and would serve the needs for the local area¹⁵².
- 8.6 Even if, incorrectly, CP19 is construed as seeking to limit development, then it would be inconsistent with the NPPF and out-of-date as the acceptability of development is now to be determined by reference to the sequential and impact tests. It is out-of-date as the terminology of *local* and *district* centres is not part of the NPPF which simply considers town centres and town centre uses. There are no longer requirements to consider disaggregation, scale, need or viability in applying either the sequential or impact tests. Issues of relative size are now subsumed into the impact test and it would be wrong to reintroduce them by reference to the hierarchy reference in NPPF 23. That relates to the requirement to plan positively rather than to development control decisions. This interpretation was accepted by the SoS in *Rushden Lakes*¹⁵³. The CS is also out-of-date as the CP19 allocation will not achieve its target of 2,500 houses or, absent the appeal site, the retail and community facilities required. It cannot provide 5ha of employment land in any event.
- 8.7 Policy CP8 does not set an upper limit in floorspace on out-of-town or City Centre developments. From the Council's decisions, it does not represent a basis for rejecting out-of-town retail floorspace either¹⁵⁴. The now out-of-date figures in CP8 are not intended to be prescriptive or fetter the growth promoted by the CS.
- 8.8 Turning to the BCS, it is worth noting that the maxima figures for floorspace proposed would be gross as there would also be a loss of floorspace¹⁵⁵. This site should be treated as edge-of-centre as, based on LP policies S1 and KP3, it

¹⁵⁰ By Hughes, supported by Chase's likely trading profile

¹⁵¹ Put forward by Morris

¹⁵² Chase in XX and ReX

¹⁵³ See in particular CD10, IR 8.36-8.39 and DL14 which accepted this analysis

¹⁵⁴ Hughes Proof 5.17-5.20, the discussion above, and his oral evidence

¹⁵⁵ See section 10 of updated application form CD60

is beyond the defined PSA although once constructed it would function, at least in part, as within it. The Council was mistaken to rely on *Milton*¹⁵⁶ as it was not concerned with the merits but whether officers had misled members.

- 8.9 The development plan is out-of-date not least with regard to the NPPF. In particular, the evidence base dates from the early part of the recent recession, before Princesshay was fully established and John Lewis opened. The ERS 2008 could not have regard to these and was conservative with regard to the recession. Expenditure forecasts have changed which might affect capacity. As the CS is limited to the needs to 2021, it does not meet the full needs required by NPPF 23 bullet 6.
- 8.10 The plans for the BCS have changed significantly from that anticipated in 2008. The BCS now proposes around 7,500 sq m of class A1 rather than 30,000 sq m. The PHL is leisure rather than retail led as expected by CP8. Permission has been granted for an out-of-centre branch of IKEA¹⁵⁷. Recent Experian figures provide a picture of further growth in available expenditure and trading¹⁵⁸.
- 8.11 As the development plan is not up-to-date, the appeal should be determined in accordance with NPPF 14, that is permitted *unless: any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole ...*. No impact arising would meet this threshold.

Significance of previous Decisions cited

- 8.12 The parties relied upon several Decisions. First and foremost, *Rushden Lakes* was a seminal Decision by the SoS with regard to the approach to be taken to policy in the NPPF. The Inspector's Report specifically addresses points of principle on the application of NPPF town centre policy. The Decision post-dates the PPG. The SoS expressly adopts the Inspector's views on policy and principle. When considering the development plan in the context of the NPPF¹⁵⁹ he found that, in applying the law as reiterated in NPPF 2, the presumption in favour of sustainable development means that: *The development plan is now to be seen through the prism of the NPPF...*
- 8.13 The *Bath Press* case is of limited relevance as it relied on the former guidance in PPS4. *Sainsbury's Braintree* endorses *Rushden Lakes* as more than just a decision on its facts. Although specifically dealing with disaggregation, the comments apply equally to other considerations of principle and show the continued importance of the *Rushden Lakes* Decision. If a development plan is out-of-date or inconsistent with the NPPF, or both, then that is an important material consideration supporting departure from it.

¹⁵⁶ LP1: *R (Milton (Peterborough) Estates Company) v. Ryedale District Council* [2015] EWHC 1948 (Admin) paras 47,48,51 and 58

¹⁵⁷ permitted in part because it was not considered to impact adversely on the city centre and would generate jobs, but equivalent or fewer than the 400 jobs FTE that would be generated by the appeal proposals

¹⁵⁸ see LP5: the agreed note and Experian Briefing Notes 12.1 and 13

¹⁵⁹ CD10: IR8.13 approved by DL11

Employment land

- 8.14 The objection is inconsistent with the reason for refusal. It is common ground that there is an ample supply of employment land until at least 2030 and the quantitative supply is not at issue. The qualitative analysis is wrong as well since, on the appellant's analysis, some 40ha, or 88% of the total, is of better or equivalent quality. At worst, some 70% is at similar or equivalent quality¹⁶⁰. In any event, the site cannot contribute the 5ha referred to in CP19. It does not have permission for pure office development which means that it has been over-scored as those in the market for offices are unlikely to wait more than 2 years for a site.
- 8.15 The proposed retail development would be important not only to the future housing but for the business parks and employment uses whose representations support the proposed hub of facilities, including the gym¹⁶¹. Policy CP19 will not provide the full target for housing or employment in any event. The above factors would outweigh any theoretical loss of employment land.

Sequential test

- 8.16 The NPPF simplified the sequential test as one of suitability and availability. Only the BCS is possibly sequentially preferable. The purpose of flexibility is not to require the application to be transformed into something significantly different. This was confirmed in *Tesco v Dundee*¹⁶² and reiterated in *Rushden Lakes*¹⁶³. The sequential test relates entirely to the application proposal. In *Braintree*¹⁶⁴, the SoS considered *Rushden Lakes*, found it of more than general application and that *the sequential test relates entirely to the application proposal and whether it can be accommodated on an actual alternative site*.

SUITABILITY

- 8.17 While in theory the quantum of floorspace in the appeal proposals could be accommodated on the BCS site, in practice there has been no attempt to show a workable scheme¹⁶⁵, with servicing and access, and it is wrong to assume that a foodstore would not need any parking or that the 'drive-through' restaurant can be omitted. This form of disaggregation is no longer appropriate under the NPPF.
- 8.18 Moreover, any development on the BCS site is required to provide a replacement bus station and new leisure facilities. This would be contrary to *Tesco v Dundee* as it would require the appeal proposals to be programmed in with the non-commercial elements which are not part of the scheme. The outline application does offer reasonable flexibility. However, to limit the class A3 uses, remove all car parking, and add in a replacement bus station and a leisure centre, is to require a materially different form of application. The BCS site is not sequentially preferable.

¹⁶⁰ Pearce in XX

¹⁶¹ A summary of letters of support is at Rocke appendix 1

¹⁶² CD36 paras 21, 24 and 28

¹⁶³ CD10 paras 8.45-8.46

¹⁶⁴ CD32 DL9 and IR paras 449-452

¹⁶⁵ See Hughes paras 5.55-5.68

AVAILABILITY

- 8.19 The BCS site is being brought forward for development and so, given its ordinary meaning, it is not available. *Rushden Lakes* confirms¹⁶⁶ that NPPF 24 simply asks if a better site is available, not whether such a site might come forward over a period of some years. The purpose, in the NPPF context of promoting economic growth and jobs, is to ensure that any sequential alternative could actually deliver the scheme proposed. The notion that a site could still be available when it is only available to one developer would not satisfy the NPPF. It can only mean available to be acquired or leased for the proposed development.
- 8.20 The BCS site is not available as: ECC owns the freehold and will not make it available to another developer; CEH also owns other leases and would be unlikely to allow others to develop here given its ownership of Princesshay; a development agreement is being negotiated; and CEH intends to proceed with redevelopment. As the proposal for PHL is very different to that for the appeal site, as it includes a new bus station and leisure centre, the site is not available in the terms in the NPPF.

Impact on vitality and viability

- 8.21 Government policy on potential impact is set out in NPPF 26-27. The evidence shows that there would not be any impact, still less a significant one, on the City Centre or on investment. Neither the Council nor CEH contends that the proposals would have a significant impact on the vitality and viability of the City Centre. Rather, there is only weak and vague evidence, which is neither independent nor objective, of an adverse impact on investment.
- 8.22 The key considerations in the PPG¹⁶⁷ are the policy status of the investment (i.e. whether it is in the development plan), the progress towards securing it (e.g. established contracts), and the extent to which it would be likely to undermine planned investment based on turnover, demand and confidence. There must be sound objective evidence to conclude that there would be a significant adverse impact of such magnitude as to outweigh the weight to be placed on supporting economic growth as required by NPPF 19.
- 8.23 The confidential nature of CEH's evidence is understood. Nevertheless, this means that the evidence is limited, its witness was not independent (but employed by the Crown Estate) and had misunderstood the position with regard to lease renewals and rent reviews¹⁶⁸.
- 8.24 The Council's evidence¹⁶⁹ was limited to comparing the catchments, and the 30% of trade that the appeal proposals would draw from beyond the study area with the 50% for the city centre, and suggesting that this would harm investment. How was not clear as:

¹⁶⁶ CD10 para 8.55. See also CD32: *Sainsbury's Braintree* para 447 (and DL9): 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

¹⁶⁷ Reference ID: 2b-016-2014030

¹⁶⁸ As explained by Chase of Grinnell's evidence

¹⁶⁹ By Morris

- no assessment or assumptions were made of the PHL turnover figures (unsurprisingly as none was made available by CEH);
- the 50% relates to a turnover of some £400-500m from a far wider catchment as a regionally important centre compared with 30% of around £10m for the site for which even the largest unit would only reflect the catchments for other retail parks in Exeter¹⁷⁰;
- the evidence was not directly from a commercial property agent¹⁷¹. By contrast, the appellant's agents¹⁷² had not been called as the site and negotiations had been discussed, there was a letter considering possible occupiers, heads of terms had been reached¹⁷³, and it did have an independent expert commercial witness¹⁷⁴.

8.25 There was little objective evidence to support the reasons for refusal on investment confidence and the concerns fell well short of evidence of significant adverse impact under NPPF 27. Indeed, the PHL scheme may be more robust than suggested as:

- the outline application is now in terms of likely and maximum uses;
- work has been done on the development agreement with mutual obligations for the private and public aspects;
- CEH has spent a 7 figure sum over the last 3 years, and probably the last year, in progressing the scheme;
- agreement on pre-lets is expected in the first quarter of 2016;
- the PHL scheme has not been put on hold but has advanced despite knowledge of the appeal proposals and their likely timescales¹⁷⁵. This is not consistent with the concern expressed and is more suggestive of being anti-competitive than legitimate protection.

8.26 The PHL scheme is not as far progressed as required by the PPG, having been significantly amended, with terms yet to be agreed, a development agreement not concluded, details not yet fixed, and only soft marketing undertaken. No occupier has been identified and not even illustrative turnover or other economic material has been provided. Despite the arguments about competition, the Transport Assessment Addendum shows a high likelihood of linked trips with the City Centre¹⁷⁶.

¹⁷⁰ Contrary to the Council's closing, 80% of the comparison turnover is not drawn from beyond the study area

¹⁷¹ Although Morris is not a commercial property agent, and though he had agency colleagues, he said that he had not consulted them but that he was sure what they would have thought

¹⁷² BNP Paribas

¹⁷³ With four occupiers, The Gym, Costa, McDonalds and Frankie and Bennys

¹⁷⁴ Chase

¹⁷⁵ Of 8-12 months by reference to the *Plymouth* case, where the Inquiry closed on 16 October 2012, the Inspector's Report was sent in on 5 February 2013, and the Decision was issued on 5 August 2013.

¹⁷⁶ CEH's TA Addendum Ax E [ID A7] states at 6.9 and 6.10: The current masterplan show [sic] that all unit sizes proposed are below 4,000m² which is likely result [sic] in higher pass-by trips which are linked to the current city offer. This implies that the proposed uses are more likely to produce linked trips.

8.27 CEH's case is little more than *'trust us – we are experienced – we know best'*. This should be rejected as to do otherwise would support an anti-competitive and protectionist approach. Despite frequent requests, the appellant has no information to inform the PPG exercise. The original application form was not informative and it is nearly impossible for the appellant to assess any economic impact. It is known that there would be no significant trading impact on the City Centre which must inform the issue of confidence. If PHL trades as the City Centre, it is even more difficult to understand how there would be an issue of confidence.

8.28 It is wrong to argue that there is no need to address the PPG¹⁷⁷ or to ignore objective factors despite the time available. The only independent commercial evidence¹⁷⁸ found:

- the smaller units, class A3 outlets and the gym would serve the local catchment while the larger anchor and warehouse type units would serve a wider catchment but would not cause damaging diversion from the city centre;
- the retail format of the anchor store would differ from that if it were in the city centre and no anchor would consider the site as a proxy for the city centre. The only exception might be Cotswold Outdoor but that is partly due to extensive competition already in Exeter. TK Maxx would want both a fashion offer in the city centre and a Home Sense in an out-of-centre location;
- all the potential traders for the appeal scheme already have at least one branch in central Exeter¹⁷⁹ so a presence on the appeal site would be in addition to the city centre;
- there is demand for the site which would be seen as a district retail hub which would serve the needs of this suburb and the growth of business and residential development in the area;
- CEH's concern with regard to the floorspace ratio for the anchor store overlooks the fact that Next-at-Home needs more space for display and storage than its other stores;
- the site would roughly replicate St Thomas's and Exe Bridges Park together. The Council was happy with 3 large stores there¹⁸⁰, despite its proximity, and it has not had any adverse impact on the City Centre. Nor would the appeal site;
- PHL would be leisure led with the majority of other space taken by restaurants but possibly another large corner store opposite John Lewis¹⁸¹. The appeal site offers nothing comparable;

¹⁷⁷ As Morris did in ReX

¹⁷⁸ Of Chase

¹⁷⁹ Indeed Boots has 5, Costa Coffee has 8 in the centre (17 in total), M&S has several sites (indeed, it was variously described by Chase, who ultimately settled on the description: a retailer with multiple location requirements)

¹⁸⁰ M&S Simply Food, Next and TK Maxx

¹⁸¹ Block A CD61 at p. 46

- CEH's concerns are inconsistent with its expenditure on the BCS site where demand is strong for retail, leisure and restaurants;
- Exeter is a robust city that survived the recession well, despite Princesshay opening in the depth of the recession, and its (very low) 6% vacancy rate is less than half the national average;
- although the proposed corner store at PHL would be prime retail space, and likely to be a single large store, there is no known suitable anchor nor could 50 prime shop units support it given the proximity to Princesshay and the High Street;
- there are already other gyms in Exeter¹⁸² so one on the appeal site would not be a threat;
- IKEA is not a threat to Exeter and the appeal proposal should be seen in the same way as providing facilities, an economic boost and the creation of around 400 FTE jobs;
- the proposals would not disadvantage investment with regard to rent reviews and lease renewals for existing tenants as terms for out-of-centre schemes are of a different character.

Sustainable development

8.29 As defined by the NPPF, the proposals would amount to sustainable development because:

- they would comply with policies for town centres in NPPF 24-27 and those supporting a positive approach to economic development such as NPPF 17-19;
- while the scheme would not secure specific employment development, it is not allocated for this use and the Council no longer expects to achieve the CS policy CP19 targets for housing and employment land;
- a similar number of jobs would be secured as will arise from the approved IKEA development.

8.30 The scheme would also be sustainable as it is located within the CP19 allocation, close to homes and businesses, and target the areas of new development on the eastern edge of the city¹⁸³, particularly for lunchtime or travel to/from work purchases or use of facilities. The proposals would be accessible by bus, footpath, and cycle routes¹⁸⁴ with a new rail halt proposed for the adjoining Hill Barton development, and would be well positioned in terms of public transport and sustainable transport options¹⁸⁵.

¹⁸² including a David Lloyd, described by Stevens as upmarket as opposed to the smaller and more modest operation proposed

¹⁸³ referred to in CS para 7.11

¹⁸⁴ See the appeal TA [CD58] sections 3.3, 3.4, Table. 3.1, and section 5 (accessibility) plus Appendix A figs. 5.1 and 5.2

(footpaths and cycleways) and Appendix B (Exeter cycle map)

¹⁸⁵ CD58: TA para 5.4

Other issues

8.31 The highway reason for refusal has now been resolved, subject to the imposition of conditions. Amenity concerns are not supported by the Council and can be dealt with by conditions controlling detailed design and boundary conditions¹⁸⁶.

Benefits

8.32 These would include:

- the provision of important facilities for the locality, which includes planned housing and businesses;
- providing these facilities east of the city centre with easy access from housing and businesses;
- that there is already outline permission for mixed use recognising that the site could provide the local centre on the masterplan with the first phase of a hotel and pub/restaurant having been completed.

Conclusion

8.33 The proposals would provide sustainable town centre uses where they would serve a local catchment of existing and planned residential, business and employment uses to the east of Exeter City Centre. The site is part of a wider allocation to include town centre uses. The scheme would not seriously compete with the successful and robust city centre, or threaten investment in that centre or at its edge. There is no sequentially suitable site, having regard to flexibility, and there would be no significant trading impact. The proposals would not deter investors from the BCS site¹⁸⁷ or from present investment. The PHL scheme is not protected by policy in any event as it is edge-of-centre¹⁸⁸ but even if it were there would be no significant adverse impact. There would be sustainability in terms of investment, job creation and support to growth in employment and residential development on the eastern side of Exeter. These benefits would not be significantly and demonstrably outweighed by any adverse impacts and the presumption in favour of sustainable development should be applied and permission should be granted.

9. Written Representations

Many of the written representations also echoed the major concerns raised by the Council and CEH. Additional points made are summarised below.

- 9.1 **Elizabeth Wright** expressed concern about residential amenity and the proposed location of the tall 2 storey building with regard to her house and others nearby. She commented that the shops would make little difference to her but the chemist and bank would be convenient.
- 9.2 **Des Furness** thought it a good idea to have small retail area on the city edges. In his capacity as Chair of the **Wilton Way Residents Association**, he

¹⁸⁶ As explained by Rocke in answer to IQs

¹⁸⁷ CD61: DAS. See the "justification" Section 1.4 p. 15, "The Vision" at p. 39 and complementing Princesshay and increasing attractiveness and dwell-time in Exeter at p. 46

¹⁸⁸ Hughes 4.14-4.19

confirmed that the overwhelming majority of residents support the opportunity for much needed facilities within walking distance as well as employment opportunities. Finally, he reiterated the Association's more general concern over road safety on Wilton Road.

- 9.3 **CBRE** wrote on behalf of John Lewis to object that the proposed quantum of retail development would not accord with the development plan allocation of a local centre. It highlighted the existing permission, restricted to 1,600 sq m of retail floors, and the committee report which acknowledged that this exceeded the amount envisaged by the MHBMS but could not justify refusal on that basis. The appeal proposal would exceed this by over ten times while there has been no site designation. It raised other arguments summarised above and confirmed that it had no concerns with regard to a local centre but did object to the inappropriate scale of development now proposed.
- 9.4 **David Lock Associates** wrote on behalf of the developers of the Cranbrook New Community. They updated their original concerns, adding that Cranbrook has permission for 2,900 dwellings and 6,700 sq m retail floorspace and that no issues to either were raised in the independent examination of the new East Devon Local Plan. Early provision of retail facilities at Cranbrook is a policy requirement in order to anchor the new town centre. The appeal proposals would undermine the positive strategy for Exeter and East Devon, be contrary to the development plan, fail to comply with the sequential test in the NPPF with regard to Cranbrook, have a major impact on delivery of Cranbrook town centre and would detract from, and undermine, investments in the delivery of Cranbrook.
- 9.5 **Nathaniel Lichfield & Partners** represented the owners of Exe Bridges Retail Park. Having reviewed various documents they followed up their earlier objection adding that the proposals would be contrary to adopted and emerging policy, and that the appellant has not addressed concerns regarding the retail assessment and retail impact. As well as arguments covered above, they commented that the appellant's response, that Exe Bridges is out-of-centre, is wrong since it lies entirely within the boundary of St Thomas District Centre and the two form an integrated whole. The appellant's retail assessment was flawed due to the sample sizes in the household survey data which were too small to provide a reliable basis. The assessment did not consider the impact on the St Thomas District Centre. In particular, it stated that the offer would be different when it then showed a potential line-up of tenants all of which are represented at Exe Bridges.
- 9.6 **Turley Associates** wrote on behalf of the Hill Barton Consortium which owns the adjoining land allocated for residential development. While recognising the existing permission, the current proposals would be a significant departure from this and the change in scale and function would have a significant impact on residential amenity. In particular, the proposed continuous building parallel to the boundary would significantly reduce connectivity and light penetration to the approved, forward-facing residential development to the north and risk delivery of the southern side of the site. They proposed a substantial buffer along the boundary between the proposed dwellings and any development on the appeal site and emphasised the desirability of safe pedestrian and cycle links between the sites. On the basis of the information available at that time, Turley Associates also raised concerns with regard to highway safety.

10. Conditions

- 10.1 The suggested conditions were discussed at the Inquiry¹⁸⁹. Many of these were agreed between the Council and the appellant and, following a few changes, these are set out at Appendix C. Except as explained below, or as modified by me for clarity, should planning permission be granted for the proposals, for the reasons accompanying the attached conditions, I recommend that they should be imposed.
- 10.2 Conditions 1 to 9 are more or less standard conditions and, for the reasons given, should be attached. Condition 10 provides an agreed form of words to require the appellant to comply with policy with regard to district heating with the proviso that it is viable and feasible. Condition 11 sets out the policy compliant requirement for the Building Research Establishment Environmental Assessment Methodology (BREEAM) but acknowledges that only the shell would be within the appellant's practical control. Conditions 12 and 13 cover noise and wildlife, again for the reason given. Conditions 14 to 17 are slightly simplified Highway Authority requirements and the reasons explain why the requirements for highway, cycling and travel planning are needed.
- 10.3 Conditions 18 to 25 are the appellant's suggestions for controls over the uses of the proposed floorspace. The Council accepted that there was nothing incomprehensible in the wording but otherwise they were not agreed. The Council's position, as above, was that no amount of control over use could satisfactorily ameliorate the extent of floorspace proposed and that none of the anchor unit should be used for the sale of clothing and footwear. I discuss the merits of these below.

¹⁸⁹ ID A11 and CD25 – signed hard copy

11. Inspector's Conclusions

From the evidence before me at the Inquiry, the written representations, and my inspection of the appeal site, its surroundings, and the majority of other retail outlets in the greater Exeter area, I have reached the following conclusions. The references in square brackets [] are to earlier paragraphs in this report.

Main considerations

11.1 The main considerations in this appeal are as follows:

- i) whether the proposals would accord with the development plan;
- ii) the effect of the proposals on the supply of suitable employment land;
- iii) whether there is a sequentially preferable site;
- iv) whether there would be a significant adverse impact on investment in Exeter City Centre, with particular regard to the PHL scheme for the BCS site;
- v) the impact of the proposals on the vitality and viability of Exeter City Centre;
- vi) whether there would be any other significant harm, specifically to highway safety and/or residential amenity; and
- i) whether the proposals would amount to sustainable development as set out in the NPPF, having regard to the above matters and any benefits of the scheme.

Development plan

11.2 Two CS policies are of particular relevance: CP19 and CP8. The latter makes particular reference to the BCS site, as well as requiring local retail facilities at MHB, and so the overall conclusions on CP8, and the development plan as a whole, follow consideration of the other issues. As above, policy CP19 is specific to 3 strategic allocations of which MHB includes the appeal site. The CS *Glossary of terms* contains descriptions for local and district centres. The requirements for MHB's *local centre* go beyond the description in the glossary by adding community facilities and a health centre. [3.3,3.5,3.8]

11.3 The context for the allocations in policy CP19 is set out in CS paragraph 12.1 which emphasises that the strategic allocations are central to the spatial strategy and refers back to policies CP1-CP3. To this extent, delivery of the strategic allocations should be given considerable weight. However, consistent with policies CP1-CP3, there is overt flexibility regarding the area of employment land, while the number of dwellings is expressed as a minimum and the area of net retail floorspace for the city is identified as a maximum (*up to* in CP1). Beyond the reference to MHB as a mixed-use urban extension, there is no allowance for retail outside the City Centre in CP1 (whereas it makes specific reference to employment land and housing in the urban extensions). There is no slack between the provision of up to 37,000 sq m net retail comparison floorspace (plus 3,000 sq m convenience) in the City Centre, in CP1 and CP8, and the 40,000 for the city as a whole. Beyond the *local retail facilities* in CP8, and the *local centre* in CP19, there is no provision for additional retail floorspace in the CS. [3.6]

CS policy CP19

- 11.4 The arguments between the parties on this policy turned on whether the proposals could fall within the requirements of CP19 and those for a *local centre* in particular. There is no doubt that the CS has broad objectives, including new facilities on the eastern side of Exeter, that it intends flexibility, and should not be interpreted rigidly. The additional requirements for community facilities and a health centre, as well as a local centre, are consistent with this approach and with the function of the local shops to be within convenient walking distance. On the other hand, there would be no point in the policy descriptions, which as above are part of the spatial strategy that should be given considerable weight, if they had no parameters at all. There is nothing in the CS to suggest that the reference to retail at MHB should be unlimited. [3.5]
- 11.5 The proposals would be predominantly for comparison goods shops and, with the suggested conditions, these would be restricted to around 11,000 sq m GIA of Class A1 floorspace with the net sales area (excluding any garden centre) limited to about 7,200 sq m. There is no similarity between this size of provision and that at any of the ten existing local centres in Exeter which are of limited extent with modestly sized retail units. While none of these comparisons should be seen as determinative, they do give an indication of what the CS might have had in mind as a *local centre*. Any proposal falling within the range of existing local centres could legitimately be viewed as one. A proposal falling outside this range should be given due consideration. The size of the appeal proposals falls a very considerable way outside the range of existing local centres. [2.5,5.2]
- 11.6 The existing out-of-town retail premises include three district centres listed in the CS and four retail parks. The extent of floorspace proposed would compare with the largest of these at the combined St Thomas District Centre/Exe Bridges Retail Park. On this comparison as well, it would be stretching the most flexible interpretation of *local centre* in the CS far too far to incorporate the whole of the appeal proposals. While conditions could regulate the development to prevent any specific excesses, given that the parameters are set out in the DAS, they could not be used to reduce the overall provision. [2.5,3.8]
- 11.7 It was agreed that the turnover for the proposed units is anticipated to be some £34m and that its catchment area would be extensive. None of the figures for diversion, or the impact of such diversion, were agreed but it would undoubtedly have a significant trade draw from existing trade nearby and further afield, including some from the City Centre. Although the catchment areas would be different, the proposals would therefore be within the catchment area of the City Centre. To refer to the proposals as a sub-regional centre would be an overstatement but it is not unlikely that a large individual anchor store could result in a sub-regional draw for a certain section of trade in the way that the proposed IKEA might well do in due course. The fact that the Council has, on occasion, departed from policy CP19 where other considerations were weighed in the balance, shows use of flexibility not a total disregard for policy. An alternative permission on land to the north and north-west of the strategic allocation does nothing to justify more than a *local centre* on the appeal site. [3.12,5.3]
- 11.8 The site itself is has no specific allocation in the CS at the moment but is simply part of the wider MHB designation. However, this of itself offers no support to

the appellant as the only basis for a retail development within MHB is as a *local centre*. Although adding little, the reference to *local retail facilities* in policy CP8 can only support the wording in CP19. The appellant acknowledged that the smaller units, the class A3 outlets, and the gym would serve the local catchment while the larger anchor and warehouse type units would serve a wider catchment. It also accepted that there would be demand for the site which would be seen as a district retail hub. In effect it did not deny that it would be more than a local centre and this is consistent with the description in the original application. On this point, the proposals could not reasonably be described as a *local centre* as referred to in CP19. [3.3,3.5,3.6]

- 11.9 Nevertheless, the appellant argued that the scheme would accord with the requirements for a *local centre* in CP19 for several reasons. First, that the requirements are inclusive, not exclusive, with no cap on floorspace. However, as above, the overarching policy CP1, specifically referred to in the introduction to CS section 12, does set a cap on retail floorspace, albeit across the whole of the City. While the cap should be treated flexibly, it would be to misinterpret the CS to conclude that CP19 sets no cap at all on retail floorspace. The suggestion that paragraph 7.11 supports anything beyond the facilities referred to in CP19 is without foundation. [8.4]
- 11.10 Next, it was argued that as the CP19 requirements go beyond the glossary description of a *local centre*, to include community facilities and a health centre, more than just a *local centre* must have been intended. This is correct but is also consistent with the notion of flexibility. The long list of requirements for MHB does not include any increase in retail floorspace. It follows that some other provisions could be added to the local centre without it breaching the policy. This could be taken to apply to the hotel and pub/restaurant and arguably some of the other non-shop facilities such as the proposals for a garden centre, financial and professional services, restaurants and cafés, hot food takeaways, non-residential institutions, and leisure (i.e. the gym). What the additions to the term *local centre* do not do is suggest further Class A1 retail provision beyond that which could be reasonably interpreted as falling within the glossary description. [3.3,3.5,8.4]
- 11.11 It is true that the MHMBs contemplated more than one centre and referred to a *district centre*. However, this was envisaged to the north-west, towards Pinhoe, rather than on or close to the appeal site. In any event, while the MHMBs is more than just part of the evidence base, the requirement to deliver the strategic allocations in accordance with their respective Masterplans was deleted from the final CS, and paragraph 12.18 only requires development at MHB to have general regard to this. Granting permission for a second centre at Hill Barton does not make the scheme more closely compliant with CP19 than otherwise. As above, the implementation of the hotel and pub/restaurant is consistent with flexibility in the requirements for MHB, particular given that the list is not limited to a *local centre* but embraces additional facilities other than shops. [2.3,2.5,3.11,8.4]
- 11.12 The arguments with regard to the local workforce and the support from local businesses lend weight to the need for flexibility and additional facilities (perhaps including restaurants or a gym) as well as a policy compliant *local centre*. What they do not do is provide persuasive evidence of a need for a substantial retail development of the sort normally found on a high street.

While the proposals would certainly provide the minimum requirement for a *local centre*, so would a policy compliant development. [8.3]

- 11.13 The appellant is justified in countering the suggestion that the scheme would operate as a sub-regional centre by comparing it with St Thomas District Centre/Exe Bridges Retail Park. However, this is, as its name suggests, very much a district centre with the addition of a retail park. No evidence was put forward to suggest that, when the retail park was permitted by the Council on the former Sainsbury's site in 1999, it was contrary to the provisions of the development plan at that time. Rather, the argument reinforces the comparison between the appeal proposals and centres of a higher order than the *local centre* required by the CS. [2.5,8.5]
- 11.14 The discussion in the CS Inspector's Report does show that the context for the policy was one of flexibility but this was centred on discussions of employment land and should not provide *carte blanche* for an unlimited retail element. There was no disagreement that the proposals would provide the minimum local facilities required by CP19 but that would not make them into the *local centre* intended by the policy. Case law confirms that *local centre* has no very precise meaning so even if the CS tried to be more prescriptive it would be to no avail. Nevertheless, unless the CS is to be rendered meaningless, there must be some limits. The term *local centre* in CP19 should be interpreted flexibly but not allowed to mean something completely different. There is a strong probability that a policy compliant local centre could come forward. Turning to the NPPF, while it is true that this does not contain a hierarchy of centres, nor does it preclude them. Indeed, amongst other criteria, NPPF 23 expects LPAs to: *define a network and hierarchy of centres*. That is what the CS does. There is nothing inconsistent about that. [6.6,7.5,8.4]
- 11.15 Finally, with regard to policy CP19, it was argued that this is out-of-date as, following *Rushden Lakes*, the NPPF only seeks to limit retail development by reference to the sequential and impact tests. *Rushden Lakes* was a Decision, on a 'called-in' planning application supported by the local planning authority, not a statement of policy nor a High Court Judgment, let alone one in the Supreme Court. The SoS agreed with the Inspector with regard to the tests in the NPPF: *Plainly, if the two tests are passed an application will be consistent with the NPPF*. However, it is worth noting, as CEH pointed out, that he was silent on the weight to be given to any conflict with the development plan on this issue. [6.13,7.4,8.6]
- 11.16 There is probably no error here but paragraph 8.36 of the *Rushden Lakes* Inspector's Report must be read with care. Its conclusion: *if a proposal meets these two tests then necessarily it is consistent with the town centres first approach* is entirely within the context of applying the NPPF where the development plan is not up-to-date. There is nothing to explain why the SoS was silent as to his views on this paragraph but, if it was to avoid it being taken out of context, then he was wise to do so. While what the Inspector meant to say was correct in the context of the NPPF, the absence of a reference to this in the last sentence could be seen as excluding the development plan from the process. I have no doubt that the Inspector recognised this and only drew this conclusion for his particular case where the development plan was out-of-date. This is hardly surprising as it should not be for an Inspector at a section 78 Inquiry to decide on what the retail hierarchy

should be; that is for the LP. If the retail policies are out-of-date in a LP then, as stated in *Rushden Lakes*, the NPPF tests are the only ones left. [6.14,7.14,8.6]

- 11.17 It is also worth noting that, while the Inspector at *Rushden Lakes* found that a need and scale test could not be re-introduced into the NPPF, and that the sequential test in the NPPF should not have regard to hierarchy, he emphasised that this was because the adopted settlement hierarchy as it applied to *Rushden Lakes* was out-of-date. What he did not discuss, because it was not relevant to his applicaiton, was the approach that must be followed where the LP is not out-of-date and includes a hierarchy, as the NPPF expects it to. It is understandable that, through the NPPF, the government wants to avoid decisions on retail hierarchies being made at appeal. That is not the same as saying that policy soundly made at the LP stage should be ignored. Although the paragraph 7.12 to policy CP8 refers to the needs to 2021, there is no evidence, from the Experian data or otherwise, to suggest that there will be such dramatic growth over the next 5 years that it does not meet the full needs required by NPPF 23 bullet 6. [6.14,7.14,8.6]
- 11.18 Similarly, although the SoS did adopt the Inspector's reference to the Council's interpretation, that *the development plan is now to be seen through the prism of the NPPF*, he only did so with regard to the spatial strategy, and two policies in particular, whereas other paragraphs are adopted in full and more than once. He did not endorse a generalised interpretation of the Council's submission as meaning that any view of the development plan should be distorted and, in the light of the primacy of the development plan, the SoS was again wise not to do so. In fact, the Council's comment was once more in the context of a case where it had found that the scheme there would amount to sustainable development and so the presumption in its favour should be applied. It would be quite wrong to extend this view to cover development which would not be sustainable but would conflict with the development plan as a whole. [6.14,7.5,8.12]
- 11.19 The SoS's Decision in *Sainsbury's Braintree* does indeed endorse the *Rushden Lakes* interpretation of the NPPF with regard to disaggregation, and possibly on scale and form, but again that is no surprise. For the above reasons on flexibility, it is of limited relevance here where no disaggregation of main town centre uses would be required. The only separation required would be of parking and access including that to the restaurants (see below). What is worth noting is that in *Sainsbury's Braintree* the SoS dismissed the appeal despite finding that it would pass the sequential test. The Decision also confirms that the *Bath Press* case is of little assistance. [6.32,8.13]
- 11.20 The appellant is therefore wrong to argue either that CP19 is inconsistent with the NPPF, or that it is out-of-date, on the grounds that whether development is acceptable is now only to be determined by reference to the sequential and impact tests. If the LP were out-of-date, as was found at *Rushden Lakes*, that would be true. Here it is not. While the NPPF may only set two tests, it expects LPs to fill in the gaps, as it were, by meeting the criteria in NPPF 23, including *a network and hierarchy of centres*. The above is precisely what the LP does, including CP8's support for the City Centre and CP19's strategic allocations. While there have been changes over the years, such as the new John Lewis store and the Enterprise Zone, which are likely to be taken into

account in the new DDDPD, none of these mean that the existing policies are out-of-date. There is nothing inconsistent about the LP specifying the appropriate hierarchy in the way that was missing at *Rushden Lakes*. When read in context, *Rushden Lakes* adds little to an understanding of the sequential test as interpreted by *Tesco v Dundee*. [6.23,7.14,8.16]

- 11.21 In arguing that NPPF 23 is about plan making misses the point. While weighing the merits of the proposals against the sequential and impact tests in the NPPF does not need to take account of NPPF 23, this does not negate a separate assessment against the development plan. Indeed, as this is the starting point, and the NPPF a material consideration, the reverse is true. So long as the CS is not out-of-date, which it is not as it satisfies the criteria for plan making in NPPF 23, then it is proper, indeed essential, to weigh the scheme against policies CP8 and CP19 in assessing its compliance or otherwise with the development plan. This approach is further endorsed by the PPG 2b paragraphs 001-003. [8.6]
- 11.22 The argument that the CS is also out-of-date, just because the policy CP19 allocation will not fully achieve its targets for housing, retail and employment, is a poor one and should not be used to justify a development which would leave it even further adrift from its targets. Here, for the above reasons, CP19 is not inconsistent with the NPPF. Neither it, nor the CS as a whole, is out-of-date. The term *local centre* is perfectly valid in a LP. The *Rushden Lakes* Decision does not alter this. Extending the argument to the whole of the CS with regard to the NPPF is no more convincing. The fact that PHL proposes less than the 'up to 30,000 sq m' in CP8 is not inconsistent with that being expressed as a maximum. The BCS site is proposed for mixed use in CP8 and in PHL. The shift to a greater emphasis on leisure is not inconsistent with this and does not make the CS out-of-date. [3.3,3.5,6.13,7.4,8.6]
- 11.23 For all the reasons given above, the proposals would go well beyond any reasonable interpretation of a *local centre*, as generally understood or as described in the CS glossary. The scheme would therefore be contrary to policy CP19 and, albeit less specifically, to CP8. The overall conclusion on the development plan as a whole follows consideration of the other issues below.

Employment land

- 11.24 It was agreed that, in broad terms, there is no need for additional employment land in Exeter. Rather, the arguments turned on whether there was a need for land for high quality offices and to satisfy the policy requirements of policy CP19. The appeal site lies close to the Met Office and other prestigious employers. It has excellent vehicular access, can be reached by sustainable means of transport and may soon be close to a new rail halt. It would make an excellent site for new high quality offices and would probably be in demand for this use if it were offered for sale or lease. Policy CP19 anticipates 5ha of employment land, which can no longer be met in full, and the appeal site could make a useful contribution towards this. Use of the site for employment would therefore gain support from CP19. [3.5,3.6]
- 11.25 Limited need for employment land is not the same as little demand. Indeed, despite extensive efforts, the appellant's evidence did little to dispel the Council's assertion that the appeal site is one of the best options available for office development. The appeal scheme would have the effect of removing all

employment floorspace from the strategic allocation. While no significant harm would result from the loss of potential employment land, because there is a good supply, this does not mean that the CS is out-of-date in allocating employment land within MHB; there is an evident demand and there is no imperative to depart from the CS. [6.19-21,8.14-15]

- 11.26 On the other hand, the 5ha allocation in policy CP19 is approximate and there is no minimum requirement for employment land in the CS. Although the appeal site is one of the few areas left within the strategic allocation that could be developed for employment, CP19 does not direct employment use to the site. There was no evidence to show that any specific potential office occupiers would be deterred from setting up in Exeter just because the appeal site was unavailable or that other employment sites could not meet most requirements. Unlike the proposed retail floorspace, which depends on the policy requirement for a *local centre* to have any justification, use of the site other than for offices would not be in direct conflict with policy CP19. On this issue, there would be no significant harm to the supply of employment land in Exeter and no significant conflict with the development plan.

Sequential test

- 11.27 Three points arose: whether the NPPF 24 test should apply and, if so, whether the sequentially preferable site would be either suitable or available. For the appeal scheme to fail the test, all three points would need to apply. NPPF 24 requires the test for all proposals which *are not in an existing centre and are not in accordance with an up-to-date Local Plan*. The appeal site is *not in an existing centre* and, as above, it should be concluded that the scheme would not comply with CP19 which is not out-of-date. In the SoS Decision for *Plymouth* the proposals were not the right size for the role of a new centre as required by the development plan; here they would be significantly over-sized. [6.22,7.8,8.16]
- 11.28 It was agreed that the only possible sequentially preferable site is the BCS. This is currently edge-of-centre in the saved LP and the CS. While the catchment areas for PHL and the appeal proposals would be different there would be a substantial overlap. NPPF 24 requires flexibility to be shown on both sides. Arguments were heard on the difference of wording between the two policy documents and the possible differences in boundaries. These are nuances which should fall within the need for flexibility providing the required site could be developed. With this in mind, any discrepancies between the wording of policies of different ages and of detailed boundaries should be given little weight. [3.3,3.9]
- 11.29 The argument over whether the BCS site is part of the city centre is somewhat irrelevant as it was agreed that, once constructed, it would function as part of the PSA. It is certainly arguable that the figures in CP8 have been overtaken by events as they relate to the BCS site. However, that is more a matter for the PHL application, currently before the Council, than for the sequential test. In essence, there was little doubt that, under PPG 2b-010, the BCS is an *accessible site* (it contains a bus and coach station) *that is well connected to the town* (here, city) *centre* as it adjoins the end of the High Street. The NPPF 24 test should therefore apply to the appeal site and preference should therefore be given to the BCS as sequentially preferable if it is suitable and available. [6.29,7.9-11,8.18]

SUITABILITY

- 11.30 The DAS includes a plan of possible tenants. Some of these have expressed interest but, unsurprisingly prior to planning permission being granted, none has yet entered into a contract. The appellant acknowledged that the quantum of retail floorspace proposed would fit within the area of shops proposed for the BCS site in the PHL scheme. However, it would need to be slightly differently configured. Furthermore, BCS could not accommodate the proposed access road, parking areas or the drive-through aspect of these proposed restaurants, and the BCS site is also required to provide a new bus and coach station, and a new leisure centre. [6.31,7.15,8.18]
- 11.31 The Glossary at Annex 2 to the NPPF provides definitions including: *Main town centre uses: Retail development (including warehouse clubs and factory outlet centres); leisure, entertainment facilities the more intensive sport and recreation uses (including cinemas, restaurants, drive-through restaurants, bars and pubs, night-clubs, casinos, health and fitness centres, indoor bowling centres, and bingo halls); offices; and arts, culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities).*
- 11.32 *Tesco v Dundee* looked at how the policy should be interpreted including flexibility. As above, it found that the question of suitability does require judgement but also that the purpose of flexibility is not to require the application to be transformed into something significantly different. Here, the proposed retail elements could be accommodated without disaggregation but the configuration of floorspace would need to be different to take account of the relative size of adjacent properties (their scale) and the floorspace would most likely need to be concentrated nearest to the existing PSA for commercial reasons. This would be no more than showing reasonable flexibility. [6.31,7.15,8.17-18]
- 11.33 To insist on the same requirement for parking and access in a town centre, which has ample existing parking, service roads and excellent links to public transport, would be unreasonable. *Drive-through restaurants* do feature within the definition of a town centre and so, to be suitable, it must be possible for these to be accommodated. Nevertheless, as with general access requirements for servicing and other vehicular needs, it would be no more than showing reasonable flexibility to accept that existing streets and access arrangements could provide part of the *drive* element of such a proposal if not the restaurant area. Moreover, *drive-through restaurants* are not fixed elements of the proposals as they do not feature specifically in the description of development, would not be a requirement of the suggested conditions, and could easily be varied to another use. The scheme would also include a gym which would fall within the *health and fitness centres* part of the NPPF definition. However, the Council's contribution to the PHL as a whole includes a leisure centre. It was not suggested that an operator who might occupy the gym proposed for the appeal site would not be interested in a City Centre location, and there are already other gyms in Exeter. [6.29,7.15,8.17-18]
- 11.34 The Judgment in *Tesco v Dundee* found, at paragraph 28 that: *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 in the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

- 11.35 PPG 2b-010 confirms that it is for the applicant to show that it has complied with the sequential test which should be proportionate and appropriate for the given proposal. It provides a checklist of considerations including that: *preference should be given to accessible sites that are well connected to the town centre, that scope for flexibility in the format and/or scale of the proposal, and that it is not necessary to demonstrate that an alternative site could accommodate precisely the scale and form of development being proposed.* Against these factors as well, the BCS site would be preferable.
- 11.36 Finally, it was argued that the BCS site would not be suitable as it is not within the strategic allocation. While it would be unreasonable to require consideration of a sequentially preferable site in another town, the appeal site and the City Centre are both within Exeter and the catchments overlap considerably. This suggestion gains no support from either the development plan or the NPPF and should be disregarded. [6.30]
- 11.37 On this part of the NPPF test, given no more than reasonable flexibility over the arrangement of units, the use of existing access and parking, and the occupier of the proposed gym, the BCS site would be suitable for the town centre uses proposed for the appeal site.

AVAILABILITY

- 11.38 The NPPF and the PPG both refer to availability with regard to the sequential test but neither clarifies how this should be defined. The appellant argued that the BCS is not available since CEH and the Council have agreed on a way forward and are unlikely to allow other developers a look in. The purpose of retail policy in NPPF 23 is to promote competitive town centre environments and manage the growth of centres. The NPPF test should not be used to prevent development unless a sequentially preferable site could actually deliver the proposals. [6.32-33,7.16,8.20]
- 11.39 However, there is no sound basis for finding that the BCS site is not available to traders and no rationale for concluding that the site must be on the open market to any developer. Providing PHL goes ahead, the new retail floorspace would be marketed to traders who would occupy it regardless of who developed or owned the scheme. The need for flexibility in the Judgment in *Tesco v Dundee* refers to retailers as well as developers and this strengthens the conclusion that *available* means for the development proposed not for the landowner hoping to carry out the development. Although on the separate point of specific locational requirements, the PPG does state that land ownership does not provide a justification for excluding a site. [6.32,7.16,8.19]
- 11.40 In the absence of any clearer interpretation, the preference in NPPF 24 should refer to availability to traders. It follows that it doesn't matter who develops the site so long as it can provide the proposed level of shop floorspace. As above, the requirement for a bus station and a leisure outlet on another part of the BCS site does not mean that the area earmarked for retail development is not available. On this point as well, the BCS would be sequentially preferable.

CONCLUSION ON THE SEQUENTIAL TEST

11.41 In conclusion on this issue, the NPPF test should be applied to the appeal proposals. The BCS site is relevant, highly accessible and well connected to the city centre. It is sequentially preferable, suitable and available. The appeal proposals therefore fail the sequential test and would be contrary to NPPF 24.

Impact test

INVESTMENT

11.42 The CS supports the re-development of the BCS site. The outline planning application for PHL has been submitted and will almost certainly be determined before the SoS reaches his Decision on this appeal. CEH argued that the appeal scheme would pose a direct threat to investment in PHL and so to its proceeding. The evidence was equivocal. As the Council noted, it is not surprising that CEH is concerned about the impact regardless of whether delivery of the scheme is truly in doubt. What is less clear is whether CEH's concern is a planning one, regarding investment and/or vitality and viability, or a purely commercial one to do with the impact on future turnover at PHL, its existing Princesshay outlets, and the knock-on effect on leases and rents. The likelihood is that it is concerned about both and that the two are hard to disentangle. Consequently, while its specific concerns require careful consideration, by itself the fact that CEH was fully represented at the Inquiry, or may or may not have rushed to submit an outline planning application in response to the appeal proposals, proves very little. [6.35,7.17,8.25]

11.43 Some of the CEH evidence related to Princesshay and the city centre in general, including concern over rent reviews and lease renewals. Given the common ground between the appellant and the Council regarding impact on the city centre (see below), supported by the very low vacancy rate, the potential harm from this proposal alone to the vitality and viability of the city centre as a whole should be given little weight. [7.17,7.20,8.21]

11.44 As with the appeal proposals, the evidence concerning possible future tenants for the PHL scheme was complicated. Most of the national retail chains are already represented in Exeter; some have multiple outlets. The proposed corner anchor store would therefore be unlikely to be taken by a major department store as the most probable contenders are already represented. The few traders not in the city, Cotswold and Evans for example, might well look at the largest unit on either the appeal site or PHL but would not be ideal tenants in any case. Next and TK Maxx are already in Exe Bridges Retail Park and so are less likely to replicate their provision at PHL than on the appeal site though the distance, and difficulty with linked trips between the two ends of the city centre, may affect this probability. Neither the appellant nor CEH could provide definite line-ups of likely occupiers. This may mean little since, as the move by John Lewis illustrated, the retail world is dynamic, retail decisions are not always predictable, and the most that CEH could say was that it would be likely that PHL would be in competition with the appeal proposals for at least some of the same tenants. [6.39,7.19,8.23]

11.45 There was speculation as to the likely tenants at PHL and no details were provided on the grounds of confidentiality. This compares with the appeal site

where future occupiers have been suggested but none has signed up. However, these have changed since the application was submitted and may change again before the SoS's Decision is published. No occupier will agree terms without a planning permission being in place and the trading environment is likely to change between the Inquiry closing and the Decision being issued. None of the suggested conditions would restrict the occupation to specific retailers. It is possible that a trader might want to occupy premises in both locations at roughly the same time but this seems unlikely given the required levels of investment. Very little can be deduced from the evidence on future occupiers of either scheme. Consequently, the likelihood that investment can be raised for the PHL must be in doubt as must the possibility that the appeal proposals would have a significant effect on this. [6.37,6.39,7.19,8.26,8.28]

11.46 Nevertheless, regardless of the precise trading climate and profitability for any future occupiers of the BCS site, the overall confidence in the success of PHL is likely to affect the ease with which it can sign up potential tenants. If there are doubts over the deliverability as a result of perceived competition then there are likely to be doubts over whether to commit investment to this scheme rather than to another town centre or development. The ease with which CEH can sign up potential tenants at PHL would translate into the ease with which it can raise the capital to allow the development to go ahead. The proposed public investment in a new bus and coach station, and in a new leisure centre, would also appear to be contingent on the PHL proceeding. [6.41,7.18,8.28]

11.47 The evidence suggested three main possible outcomes for the PHL scheme if the appeal proposals go ahead. These are: that PHL may well go ahead regardless, in which case the effect on investment would be limited; it may not go ahead in any event for reasons unconnected with the appeal proposals; or, it may not go ahead as a direct result of the overlapping competition for future occupiers from the appeal scheme, particularly for the anchor unit in each of the proposals. A further possibility which could apply to any of the above would be that any decision on redevelopment of the BCS site, including public investment, would be delayed. [6.41,7.20,8.27-28]

11.48 In its closing submissions, the appellant suggested that PHL was both more robust than CEH admitted, but also that it was not as far progressed as it claimed. The evidence and expert judgements before the Inquiry were so diametrically opposed that none of these outcomes appears much more or less likely than any of the others. Overall, the best prediction is therefore that the appeal proposals pose a moderate risk to planned investment with an additional risk of delay. Given its size, strategic importance, and prominence in the CS, if allowing the appeal resulted in the PHL scheme being prevented, the effect would be dramatic and amount to substantial harm to planned public and private investment. In other words, there is a moderate risk of a major adverse outcome. Further harm would be likely to flow from a significant delay. [6.41,7.18,8.25]

11.49 The relevant test in NPPF 26-27 is whether the proposals would be likely to have a significant adverse impact on planned investment. Under PPG 2b-016, the considerations with regard to investments are: *the policy status of the investment (i.e. whether it is in the development plan); the progress towards securing it (e.g. established contracts); and the extent to which an application*

would be likely to undermine planned investments based on the effects on current/forecast turnovers, operator demand and investor confidence. [8.28]

11.50 Here, development of the BCS site is an expectation of the CS, an outline application has been submitted, Heads of Terms for a Development Agreement have been reached between the developer and the landowner and there is no need to use compulsory purchase powers. While contracts have yet to be signed, as the landowner is a public body, and the developer has a strong track record in delivering such proposals, even allowing for some unresolved matters, significant weight should be given to the progress that has been made. As the appellant has identified, the effect of the likely draw on turnover is hard to gauge as the available comparisons are between the appeal proposals and the whole of the City Centre rather than just the PHL scheme. Nevertheless the competition for occupiers, and for a tenant for each of the proposed anchor stores in particular, could have a substantial effect on operator demand and so on investor confidence. While hard to quantify, CEH may well be right that the greatest risk to PHL proceeding is if this appeal is allowed. [3.3,4.4,6.38,7.12,8.26]

11.51 The conclusions to be drawn from the evidence are that there is a moderate risk of a substantial adverse impact with further weight to the risk of delay. Overall, this equates to a significant, if not substantial, adverse impact on planned investment and so, following NPPF 27, the proposals should be refused. For similar reasons, on balance, the risk of a serious impact as a result of the appeal scheme would conflict with aims of policy CP8 for the regeneration of the BCS site.

Vitality and viability

11.52 Even if the Council's figure for draw from the City Centre is accepted, on its own this would be a tiny proportion of its overall turnover while there is a very low vacancy rate. Adding the common ground between the appellant and the Council on this point, the potential harm to the vitality and viability of the city centre in general should be given little weight. While CEH added Princesshay, Broadwalk House, and the Guildhall Shopping Centre to locations where investment might be affected, there was little evidence of direct impact on these let alone that such impact would be significant to the city centre as a whole. On balance, apart from the BCS site, the appeal proposals would not cause a significant adverse impact on the vitality and viability of the City Centre or conflict with the NPPF or the development plan on this point. [6.34,7.20,8.28]

Other matters

11.53 Taking account of the written representations of interested parties, and subject to proposed conditions dealing with both highway works and reserved matters, it was common ground between the main parties that there were no outstanding issues with regard to impact on the highway network or residential amenity. Subject to these conditions, concerns over the height and location of built development, and any risk to highway safety, should not be a bar to development. With regard to Cranbrook and Exe Bridges Retail Park, any impact would be unlikely to reach the hurdle of significant adverse impact in NPPF 27. In any event, impact on these centres would be less than that which

might arise for PHL and so should not alter the outcome of this appeal.
[1.6,8.31,9.1-2,9.6]

Sustainable development

- 11.54 Notwithstanding the primacy of the development plan, the NPPF is a material consideration in planning decisions. In particular, the NPPF explains that the purpose of the planning system is to contribute to the achievement of sustainable development. It defines the Government's view of this, and summarises three dimensions to sustainable development leading to three roles for the planning system to perform. The proposals should therefore be assessed against these roles. [6.42]
- 11.55 First, weight should be given to the economic benefits of the scheme including the creation of around 400 full time equivalent jobs and facilities for local businesses which support the proposals. However, a scheme which satisfied the requirements of policy CP19, for example by providing a compliant local centre and employment uses, would also be expected to create a substantial number of jobs and there was little persuasive evidence that such a scheme would not be viable. Moreover, in the event that the proposals prevented or delayed development of the BCS site, there would be substantial economic disadvantages to the City Centre. On balance, the alternatives for the appeal site would balance each other out while the risk of hindering development on the BCS site means that the economic role weighs against the proposals. [6.43,8.29]
- 11.56 On the social role, the proposals would provide accessible local services but, as above, so could an alternative scheme. On the environmental role, while the appeal site is generally well-located for public transport, it is in a less accessible location than the sequentially preferable BCS site. Moreover, the appeal scheme would include a large new car park and 'drive-through' restaurants which would be likely to encourage rather than deter the use of the private car. By contrast, the PHL proposals include an integral bus and coach station and would be located on the edge of the PSA where linked trips would be very easy. At the very best, the appeal proposals would be neutral with regard to mitigating climate change and moving to a low carbon economy. [6.43,8.30]
- 11.57 Overall, the economic role weighs against the appeal proposals while on the social and environmental roles the scheme would be broadly neutral. On balance, the proposals would not amount to sustainable development and this is a material consideration which weighs against allowing the appeal.

Conclusions on the development plan

- 11.58 For the above reasons, the proposals would conflict with CS policy CP19 and, to a lesser extent, with CP8. No development plan policy support would outweigh this conflict and so the scheme would be contrary to the development plan as a whole. It should therefore be dismissed unless material considerations indicate otherwise.
- 11.59 The appellant has argued that the *Rushden Lakes* decision means that this development plan must also now be seen through the prism of the NPPF, that is to say refracted, bent or distorted, by it. Whether or not that was the Inspector's meaning, given the primacy of the development plan, as confirmed

in NPPF 2, that must be read with caution. Indeed, it should be noted that there is nothing to suggest that the SoS necessarily accepted this interpretation as meaning that all development plans must now be read as being biased towards the presumption in favour of sustainable development, rather than just those which are absent, silent or whose relevant policies are out-of-date. In any event, the presumption in NPPF 14 turns on the definition taken from NPPF 6 which refers to NPPF 18-219 as a whole, including NPPF 210, so this adds little. [6.25-27,7.5,7.14,8.12-13]

- 11.60 Rather, the requirement to consider sustainable development in most decisions is a factor to be balanced with any other material considerations. Frequently this will overlap with the balancing exercise when looking at the requirement to consider the development plan as a whole. In the *Rushden Lakes* decision the relevant hierarchy in the development plan as it applied to Rushden was out-of-date and so that decision has limited bearing on the conclusions to be drawn here. The SoS's Decision in *Sainsbury's Braintree* does not alter this.
- 11.61 The NPPF recognises the importance of town centres but also promotes competition within them. It also expects a hierarchy of centres, with clear definitions, to be established in local plans. That is what ECC has done through the CS and, as a result, there is no reason why the findings in this appeal should ignore the conflict with the CS.

Overall conclusions

- 11.62 As set out above, the appeal proposals would conflict with the development plan as a whole and so should be dismissed unless material considerations indicate otherwise. The NPPF is a material consideration but, on balance, the benefits of proposals would not outweigh the harm so as to amount to sustainable development and so this also indicates that the appeal should fail. Although of some age, the CS is not out-of-date. Nevertheless, given the above conclusion, even if it were out-of-date and/or inconsistent with the NPPF, and so to be given reduced weight under NPPF 215, the balance on sustainable development means that it would not alter the overall decision. Equally, if the relevant policies are given substantial weight, as they should be, even if the proposals passed the sequential and impact tests they should still be refused. As above, the suggested conditions which could be applied to control the use of the proposed floorspace would not alter this conclusion.
- 11.63 For the above reasons, the appeal proposals would not accord with the development plan as a whole. On balance, they would also conflict with the NPPF so that no material considerations arise that would outweigh the requirement to determine the appeal in accordance with the development plan.

12. Inspector's Recommendations

- 12.1 The appeal should be dismissed.

David Nicholson

INSPECTOR

Appendix A

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Michael Bedford of Counsel	instructed by the Head of Legal Services, Exeter City Council
He called	
Richard Short BA MBA	Exeter City Council
Matthew Morris BSc (Hons) DipTP MRTPI	Bilfinger GVA
Andrew Pearce BA RICS	Jones Lang Lasalle

FOR CPG DEVELOPMENT PROJECTS LTD:

David Elvin QC	instructed by Dr Tom Roche
He called	
Arfon Hughes BSc (Hons) LLB (Hons) DipEngLaw MRTPI	Mango Planning & Development Limited
Tom Roche BA (Hons) PhD BTP (Dist) MRTPI	Roche Associates
Graham Chase FRICS C.ARB FRSA FInstCPD	Chase & Partners
Noel Stevens BSc MRICS	Alder King

FOR THE CROWN ESTATE AND TIAA HENDERSON REAL ESTATE:

Neil King QC	instructed by Wragge Lawrence Graham & Co
He called	
Gary Forster BA (Hons) MPhil MRTPI	Montagu Evans
John Grinnell	the Crown Estate

Appendix B.

Inquiry Documents (ID)

Local Planning Authority (LP)

- 1 Judgment in *R (Milton (Peterborough) Estates Company) v. Ryedale District Council* [2015] EWHC 1948 (Admin)
- 2 *Bath Press* Decision and Report dated 18 December 2013
- 3 Opening Statement on behalf of Exeter City Council
- 4 Letter of notification of the Inquiry and its date and venue
- 5 Experian Retail Planner Briefing note 13, October 2015
- 6 IKEA Outline Planning Permission ref. 13/4525/01 dated 26 November 2014
- 7 ALDI Full Planning Permission ref.14/2083/03 dated 30 June 2015
- 8 Email dated 27 November 2015 and plan for Sainsbury's store
- 9 Site visit plans and lists
- 10 Answers to IQs to ECC re the BCS redevelopment
- 11 Schedule of permissions and conditions for existing retail developments
- 12 Closing submissions on behalf of Exeter City Council

The Crown Estate and THRE (TIAA Henderson Real Estate) (CEH)

- 1 Opening Statement on behalf of CEH
- 2 Rule 6 party Position Statement on Statement of Common Ground
- 3 Position Statement on Statement of Common Ground on Retail Matters
- 4 Transport Assessment Addendum Technical Note TN7 dated November 2015
- 5 Email dated 2 December 2015 with adjusted cinema flows
- 6 Table relating to ID CEH5
- 7 Extract from Next plc Annual Report and Accounts
- 8 Closing submissions on behalf of CEH

CPG Development Projects Ltd. (A)

- 1 Opening submissions on behalf of the appellant
- 2 Retail Assessment by Bilfinger/GVA for *Firepool, Taunton*, November 2015
- 3 *Tesco Springfields* Decision and Report
- 4 Email dated 1 December 2015 regarding the ownership of the BCS site
- 5 Email and formal response from national express dated 24 August 2015
- 6 Press cutting regarding proposed Enterprise Zone
- 7 Transport Assessment Addendum Appendix C to F dated November 2015
- 8 Briefing note regarding ID LP5
- 9 Note on Employment Land Supply
- 10 Summary of letters of support
- 11 List of proposed conditions
- 12 Closing submissions on behalf of the appellant

Core Documents (CD)

CD1	National Planning Policy Framework
CD2	Planning Practice Guidance
CD3	Exeter Core Strategy 2026
CD4	Exeter Core Strategy Examination Inspector's Report
CD5	Exeter Local Plan First Review 2011 (including Proposals Map)
CD6	Draft Development Delivery DPD 2013: Proposals Maps 8 & 10
CD7	Publication Development Delivery DPD 2015: Proposals Map 12
CD7A	Publication Development Delivery DPD 2015: Text
CD8	Monkerton and Hill Barton Masterplan Study
CD9	Exeter Bus and Coach Station Development Principles (June 2012)
CD10	Secretary of State Call-In Decision (Ref: APP/G2815/V/12/2190175) relating to land at Skew Bridge Ski Slope, Northampton Road, Rushden
CD11	Appeals Decisions: Baltic Wharf, Peter's Street, Maidstone
CD12	Retail Impact Assessment prepared by GVA accompanying Application Ref: 13/4073/03 for a convenience store at Middlemoor, Honiton Road, Exeter
CD13	Officer's Report to Committee in respect of Application Ref: 13/4073/03 for a convenience store at Middlemoor, Honiton Road, Exeter
CD14	Officer's Report to Committee in respect of Application Ref: 13/4525/01 for a non-food retail store for IKEA at Rydon Lane, Exeter
CD15	Application (Ref: 15/07091/01) for redevelopment of Exeter Bus and Coach Station: Application Forms
CD16	Application (Ref: 15/07091/01) for redevelopment of Exeter Bus and Coach Station: Masterplan / Parameter Plans
CD17	Application (Ref: 15/07091/01) for redevelopment of Exeter Bus and Coach Station: Transport Statement
CD17A	Letter from Montagu Evans to appellant dated 6 November 2015 regarding floorspace figures for Bus and Coach Station application
CD17B	Decision Notice on planning application 15/0387/03 relating to relocation of Bus depot and stabling from Bus and Coach station
CD18	Letter from GVA dated 24th February 2015 in respect of Application (Ref: 14/2083/03) for a foodstore for Aldi at Exeter Road, Topsham
CD19	Officer's Report to second Planning Committee in relation to Application (Ref: 14/2083/03) for a foodstore for Aldi at Exeter Road, Topsham
CD20	Exeter Retail Study 2008 prepared by DTZ
CD21	Officer's Report to Planning Committee on 1st December 2014, and Update Sheet, in respect of the Appeal Application
CD22	Rule 6 Statement of Case on behalf of the Appellants
CD23	Rule 6 Statement of Case by the Council
CD24	Rule 6 Statement of Case on behalf of The Crown Estate / TIAA Henderson Real Estate
CD25	Statement of Common Ground
CD26	Supplementary Statement of Common Ground in relation to Retail Matters
CD27	Decision Notice relating to Outline Planning Permission (Ref: 11/1619/01) granted in relation to the Appeal site
CD28	Officer's Report to Committee in relation to Application (Ref: 11/1619/01) for Outline Planning Permission in relation to the Appeal Site
CD29	Advice letter (undated) from GVA to Exeter City Council in respect of the Appeal Application
CD30	Decision Notice (Ref: 14/1615/01) refusing to grant Outline Planning Permission for the Appeal Application
CD31	Secretary of State Call-In Decision (Ref: APP/N1160/A/12/2169472/01) relating to land at Derriford Road, Plymouth
CD32	Secretary of State Call-In Decision (Ref: APP/110/A/14/2219101) relating to land at Broomhills Industrial Estate, Braintree

CD33	Representations in support of the revised Application (Ref: 15/0704/01)
CD34	Updated response from the Highway Authority to the Appeal Proposals
CD35	Officer's Report to Planning Committee and Update Sheet in relation to the revised Application (Ref: 15/0704/01)
CD36	Legal Judgement: Tesco Stores v Dundee City Council
CD37	Legal Judgement: R v Braintree District Council ex parte Clacton Common Development Limited
CD38	Decision notice for Planning Application (Ref: 13/5218/03) varying Condition 29 of Planning Permission Ref: 11/1619/01
CD39	Extract from ECC Employment land Supply report April 2010
CD40	Highways England Direction for Planning Condition on Appeal Application
CD41	Chalfont St Peter Parish Council v Chiltern District Council 2014 EWCA Civ 1393
CD42	Phides Estates (Overseas) Ltd v SSCLG 2015 EWHC 827
CD43	Decision Notice relating to Revised Application (Ref: 15/0704/01) dated 9 November 2015
CD44	Officer's report to Planning Committee re Application (Ref: 12/0472/01) on land to the north by Hill Barton consortium
CD45	Decision Notice on Application Ref: 12/0472/01C
CD46	Illustrative Layout Plan relating to Application Ref: 12/0472/01 showing location of Local Centre
CD47	Planning application (Ref: 15/1065/01) by British Land for B&Q Site: Quod Planning & retail assessment Section 4 Proposed Development and Prospective Tenants
CD48	Planning Application (Ref: 15/1065/01) by British Land for B&Q Site: Proposed Development Parameters Plan
CD49	Planning Application (Ref: 15/1065/01) by British Land for B&Q Site: Plans showing fallback position
CD50	Advice Letter (August 2015) from GVA to Exeter City Council in respect of Revised Application (Ref. 15/0704/01)
CD51	Application form re. Planning Application Ref. 11/1619/01
CD52	Practice Guidance on Need, Impact and the Sequential Approach
CD53	Appeal Application: Application Forms
CD54	Appeal Application: Plans and Drawings
CD55	Appeal Application: Design and Access Statement
CD56	Appeal Application: Retail Statement
CD57	Appeal Application: Planning Statement
CD58	Appeal Application: Transport Statement
CD59	Revised Application: Agreed Highway Works (Dwg. Ref. 2176_PHL_007C)
CD60	Bus and Coach Station Application Revised Letter, Forms and Docs List
CD61	Bus and Coach Station Application Revised DAS Complete
CD62	Bus and Coach Station Application Revised Location and Existing Plans
CD63	Bus and Coach Station Application Revised Demolition and Parameter Plans
CD64	Bus and Coach Station Application Illustrative Scheme Plans
CD65A	Bus and Coach Station Application Transport Assessment Addendum Drawings
CD65B	Bus and Coach Station Application Transport Statement Addendum Text
CD66	Bus and Coach Station Application Supplementary Note re Application Amendments
CD68	Revised Appeal Application Design and Access Statement
CD69	Revised Appeal Application Appendix 4 to Planning Statement Appellants' Suggested Conditions

Appendix C.

Suggested conditions

- 1 Approval of the details of the layout, scale, appearance of the buildings, and the landscaping of the site (hereinafter called "the reserved matters") shall be obtained from the Local Planning Authority (LPA) in writing before any development is commenced.

Reason: To safeguard the rights of control by the LPA in respect of the reserved matters.

- 2 Application for the approval of the reserved matters shall be made to the LPA before the expiration of three years from the date of the permission and the development hereby permitted shall be begun before the expiration of five years from the date of the permission, or before the expiration of two years from the date of the approval of the last of the reserved matters to be approved whichever is the later.

Reason: To ensure compliance with section 91 - 93 of the Town and Country Planning Act 1990.

- 3 The development hereby permitted shall not be carried out otherwise than in general accordance with the submitted details received by the LPA on 1 July 2014 (2176-PHL-001 revision D: Proposed Access Plan) and introduced at the subsequent appeal the approved Parameter Plan to the duplicate application (Drawing PR719_PL07) as modified by other conditions of this consent.

Reason: In order to ensure compliance with the approved drawings.

- 4 Samples of the materials to be used to use externally in the construction of the development shall be submitted to the LPA. No external finishing materials shall be used until the LPA has confirmed in writing that their use is acceptable. Thereafter the materials used in the construction of the development shall correspond with the approved samples in all respects.

Reason: To ensure that the materials conform to the visual amenity requirements of the area.

- 5 A detailed scheme for landscaping, including the planting of trees and/or shrubs and hard landscaping including boundary screen walls and fences shall be submitted to, and agreed by, the LPA as part of the submission of reserved matters; such scheme shall specify types and species, and any earthworks required, together with a programme of planting and the timing of implementation of the scheme. The scheme shall be implemented in accordance with the approved details.

Reason: To safeguard the rights of control by the LPA in these respects and in the interests of amenity.

- 6 In the event of failure of any trees or shrubs, planted in accordance with any scheme approved by the LPA, to become established and to prosper for a period of five years from the date of the completion of implementation of that scheme, such trees or shrubs shall be replaced with such live specimens of such species of such size and in such number as may be approved by the LPA.

Reason: To safeguard the rights of control by the LPA in these respects and in the interests of amenity.

- 7 No materials shall be brought onto the site or any development commenced, until the developer has erected tree protective fencing around all trees or shrubs to be retained, in accordance with a plan that shall previously have been submitted to and approved in writing by the LPA. This plan shall be produced in accordance with BS 5837:2012 - 'Trees in Relation to Construction'. The developer shall maintain such fences to the satisfaction of the LPA until all development the subject of this permission is completed. The level of the land within the fenced areas shall not be altered without the prior written consent of the LPA. No materials shall be stored within the fenced area, nor shall trenches for service runs or any other excavations take place within the fenced area. Where such permission is granted, soil shall be removed manually, without powered equipment.

Reason: To ensure the protection of the trees during the carrying out of the development.

- 8 No development shall take place until a Construction and Environment Management Plan (CEMP) has been submitted to, and approved in writing by, the LPA. Notwithstanding the details and wording of the CEMP the following restrictions shall be adhered to:
- a) There shall be no burning on site during demolition, construction or site preparation works;
 - b) Unless otherwise agreed in writing, no construction or demolition works shall be carried out, or deliveries received, outside of the following hours: 0800 to 1800 hours Monday to Friday, 0800 to 1300 on Saturdays, and not at all on Sundays and Public Holidays;
 - c) Dust suppression measures shall be employed as required during construction in order to prevent off-site dust nuisance.
- The approved CEMP shall be adhered to throughout the construction period.

Reason: In the interests of the occupants of nearby buildings.

- 9 Prior to the commencement of the development a Sustainable Urban Drainage Scheme (SUDS) to deal with surface water associated with the development shall be submitted to and approved in writing by the LPA (in consultation with Devon County Council as the Lead Local Flood Authority). The said scheme shall include details of the on-going maintenance arrangements associated with any drainage system to be installed. The development shall be implemented strictly in accordance with the approved scheme.

Reason: To ensure the satisfactory drainage of the development.

- 10 Unless it is agreed with the LPA in writing prior to commencement of development that it is not viable or feasible to do so, the buildings comprised in the development hereby approved shall be constructed so that their internal systems for space and water heating are capable of being connected to the proposed decentralised energy (district heating) network, and in accordance with the Heat Networks: code of practice for the UK (CIBSE). Prior to occupation of the development the necessary on site infrastructure shall be put in place to enable connection of those systems to the network.

Reason: To ensure that the proposal complies with CS Policy CP13 and paragraph NPPF 96 and in the interests of sustainable development.

- 11 The development hereby approved shall be constructed to achieve a minimum rating for BREEAM 'Excellent' for shell only, and within 3 weeks of practical completion (or within an alternative timescale to be agreed) the relevant application for construction certification, demonstrating that BREEAM 'Excellent' (shell only assessment and certification) has been achieved, shall be submitted to, and approved in writing by, the LPA.

Reason: To ensure that the proposal complies with Policy CP15 of Council's Adopted CS and in the interests of delivering sustainable development.

- 12 The applicant shall submit for approval a management plan for the development. This should describe the steps that will be taken to ensure that noise from use of the development does not have an adverse effect on local amenity. It should include, but not be limited to, the hours of use of the development (including deliveries), supervision and any noise mitigation measures that are appropriate. The use of the development shall subsequently be carried out in accordance with the approved details.

Reason: In the interests of local amenity.

- 13 Prior to any building hereby approved being brought into use a Wildlife Plan which demonstrates how the proposed development has been designed to enhance the ecological interest of the site, and how it will be managed in perpetuity to enhance wildlife has been submitted to and approved in writing by the LPA. Thereafter the development shall be carried out and managed strictly in accordance with the approved measures and provisions of the Wildlife Plan.

Reason: In the interests of protecting and improving existing, and creating new wildlife habitats in the area.

- 14 No Class A1 unit hereby approved shall be occupied until the widening of Honiton Road, provision of a Toucan crossing and improvements to Fitzroy Road junction, as indicated on the Proposed Site Parameters Plan (Drawing 13-170 PL-16 Revision A), have been provided and retained for that purpose at all times.

Reason: To prevent a severe impact on the local transport network and ensure that safe and suitable access is provided for vehicles, in accordance with Section 4 of NPPF.

- 15 The vehicular connection to the northern boundary of the application site shall be constructed in accordance with the submitted details received by the LPA on 1 July 2014 (Drawing Ref: 2176_PHL_001 revision D – Proposed Access Plan) to the adoption standards of the Highway Authority, and be available for public use, at a date no later than 4 months following the completion and availability for public use of a new full vehicular link and connection between both Hill Barton Road and Oberon Road on adjoining land to the north of the application site in accordance with Planning Permission Ref: 12/0472/01, or any planning permission by which it may be amended and/or superseded.

Reason: To ensure the approved retail/leisure facilities may be conveniently accessible from the proposed development to the north, with appropriate trigger for timing of the link to ensure the Fitzroy Road junction operates in a safe and suitable manner.

- 16 No Class A1 unit hereby approved shall be occupied until the three pedestrian/cycle connections of at least 3.0 metres width from the northern boundary of the site to a point on the footway on Honiton Road on the southern boundary adjacent the Toucan crossing, as indicated on the Proposed Site Parameters Plan (Drawing 13-170 PL-16 Revision A), has been provided to a standard approved in writing by the LPA and made available for public use and such connections to be maintained for this purpose at all times.

Reason: To provide adequate facilities to promote the use of sustainable modes in accordance with Section 4 of the NPPF.

- 17 A comprehensive Framework Travel Plan for the site, to reflect the objectives set out in Section 8 of the Framework Travel Plan forming part of the Transport Statement accompanying the application, shall be submitted to and approved in writing by the LPA in advance of occupation of the development. The approved travel plan measures shall be implemented to the satisfaction of the LPA.

Reason: To ensure that the development promotes all travel modes reliance on the private car, in accordance with paragraph 36 of the NPPF.

- 18 The overall floorspace to be comprised in the development hereby permitted, and the quanta per Use Class, shall not exceed the gross maxima set out in the Schedules below:

Development Parameter	Quantum
Maximum Floorspace (sq m GEA)	16,933
Maximum Floorspace (sq m GIA)	16,127
Maximum Building Height (m AOD)	53.4

Use Class	Maximum (sq m GIA)
A1 (Shops)	11,102
A2 (Financial & Professional Services)	316
A3 (Restaurants and Cafes)	1,509
A5 (Hot Food Take-away)	116
D1 (Non-residential Institutions)	1,138
D2 (Assembly and Leisure)	1,946

Reason: To define the terms of the permission and to ensure that the development comprises an appropriate mix of uses to serve its intended purposes.

- 19 The net sales area of the retail (Class A1) floorspace (excluding Garden Centre) hereby permitted shall not exceed 7,217 square metres.

Reason: To ensure that the trading impacts of the proposals are acceptable.

- 20 The reserved matters to be submitted pursuant to this planning permission for the 'retail block' (Use Class A1) as shown on the approved Parameter Plan to the duplicate application (Drawing PR719_PL07) adjacent to the western site boundary shall comprise a maximum gross floor area of 8,734 sq m limited as follows:

- a) An anchor unit of between 3,252 - 5,807 sq m (gross) (excluding Garden Centre) with a maximum net sales area of 3,948 sq m for the purposes of non-food retailing; no more than 60% of the net sales area of this unit shall be used for the display and sale of clothing and footwear;
- b) Additional units each of not less than 650 sq m (gross); the retail floorspace to be comprised in these units shall not be occupied by retailers whose operation is predominantly the sale of clothing and footwear (but not so as to restrict the sale of clothing and footwear for the purposes of sports and/or outdoor pursuits).

Reason: To ensure that the complexion of the development is in accordance with the purposes prescribed in the application and reflects the complexion of the proposals upon which the assessment of impact was based.

- 21 The reserved matters to be submitted pursuant to this planning permission for the 'mixed use' block shown on the approved Parameter Plan to the duplicate application (Drawing PR719_PL07) adjacent to the northern site boundary shall include the following:

- a) a single unit of not less than 1,000 sq m (gross) for predominantly convenience retailing; up to 20% of the net sales area may be used for ancillary comparison goods sales;

- b) a single unit of up to 1,946 sq m (gross) for the purposes of a gymnasium (Class D2);
- c) a minimum of one unit each for purposes within Use Classes A2 (Financial and Professional Services) and D1 (Community Use);
- d) not more than a single 'in-line' unit (maximum 455 sq m gross) for purposes within Class A3 (Restaurants and Cafes).

Reason: To ensure that the complexion of the development is in accordance with the purposes prescribed in the application and reflects the complexion of the proposals upon which the assessment of impact was based.

- 22 With the exception of the 'in-line' restaurant allowed for in accordance with Condition 21 above, uses within Class A3 (Restaurants and Cafes) shall be comprised in a maximum of three freestanding 'drive-to' units, with optional 'drive-thru' facilities, as shown on the approved Parameter Plan to the duplicate application (Drawing PR719_PL07).

Reason: To ensure that the complexion of development is in accordance with the purposes prescribed in the application.

- 23 Except where otherwise permitted in accordance with Conditions 20 and 21 above, no individual unit within the 'mixed use' block shall exceed 511 sq m (gross).

Reason: To ensure an appropriate range and mix of unit sizes.

- 24 Further to any approval of reserved matters pursuant to this planning permission, there shall be no subsequent amalgamation or sub-division of units.

Reason: Any changes will require further consideration by the LPA to ensure that the impacts are acceptable.

- 25 The floorspace to be used for purposes within Class D2 hereby permitted shall not be used other than for the purposes of a gymnasium (which shall not include provision for a swimming pool), and shall not be used as a cinema or for any other purpose(s) within Class D2 of the Town and Country Planning (Use Classes) Order 1987 (as amended), or any Order by which it may be revoked and re-enacted.

Reason: To ensure that the leisure uses are complimentary to the City Centre offer.



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 for permission 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

With the permission of the High Court 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. 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 for leave under this section must be made within six weeks from the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: 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 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.