Neutral Citation Number: [2023] EWHC 3210 (Admin)

Case No: AC-2022-LDS-000274

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Leeds Combined Court,
1 Oxford Row, Leeds LS1
Date: 15th December 2023

Before :

DEPUTY HIGH COURT JUDGE KAREN RIDGE

- -

Between :

THE KING

-on the application of-

LIDL GREAT BRITAIN LIMITED **Claimant**

- and -

EAST LINDSEY DISTRICT COUNCIL **Defendant**

-and-

ALDI STORES LIMITED

Interested Party

- -

Douglas Edwards KC (instructed by **Blake Morgan LLP**) for the **Claimant**
Killian Garvey (instructed by **East Lindsey District Council**) for the **Defendant**
Neil Cameron KC (instructed by **Freeths LLP**) for the **Interested Party**

Hearing date: 20 September 2023

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JUDGMENT

Karen Ridge sitting as a Deputy High Court Judge:

INTRODUCTION

1. This is a renewed application brought by the Claimant (Lidl) to seek judicial review of the decision of the Defendant local planning authority (the Council) on 4 November 2022 to grant planning permission to the Interested Party (Aldi) for development at Land Off Spilsby Road, Horncastle. Permission was refused on the papers on 23 March 2023 by HHJ Klein sitting as a High Court Judge. The Claimant challenges the grant of planning permission on four

grounds. The question at this permission stage is whether any of those grounds are reasonably arguable.

BACKGROUND

2. Within the space of a few weeks both the Claimant, Lidl, and the Interested Party, Aldi, each applied to the Council for planning permission for discount supermarkets and each of those proposals were on the outskirts of Horncastle. There followed a virtual meeting on 7 June 2022 when the Claimant contends that the Defendant's officer told the Claimant that the intention of the Council was to take both applications to the same planning committee meeting.

3. Subsequently the Claimant amended its application to reduce the floorspace of the Lidl proposal which meant that further consultation was required. As a consequence, the Lidl proposal was not ready to be considered at the Council's planning committee meeting on the 3 November 2022. Retail impact assessments had been produced by Lidl, Aldi and the Council's consultants, Nexus. Nexus had produced an addendum report for the committee meeting which the Claimant says was not made available to the public in advance of the meeting.

4. The Claimant says that it is relevant to note that the retail impact proposal in relation to the Aldi store shows the Aldi scheme having a greater impact than the Lidl scheme in terms of trade diversion away from the town centre.

5. Within the Officer Report (OR) and its addendum prepared for the 3 November meeting, there was reference to the two applications and confirmation that the Council's consultants had been requested to consider the individual retail impact of each scheme. At ¶7.15 the report says that ideally both schemes would have been considered together but amendments to the Lidl scheme had resulted in it being delayed.

6. The report summarised the retail assessments' conclusions that cumulative impact would be significantly adverse if both schemes came forward. The report goes on to confirm that there are no suitable, available or viable in-centre sites or preferable edge of centre sites and therefore the Aldi proposal satisfied the sequential test in national and local policy terms. The report then concluded regarding the Aldi store alone "…Whilst this loss of trade is a concern and could be harmful to the vitality and viability of the town centre the Council's retail consultant, Nexus, is satisfied that this would not amount to a significant adverse impact, which is the test for acceptability in impact terms". ¶7.41

7. In terms of cumulative retail impact, the OR said:

> "7.33 Retail Cumulative Impact: As set out above the Council is considering a second application for the erection of a supermarket. This has been submitted by Lidl who is also a discount retailer. The Council's consultant, Nexus, has advised that the Council must consider the cumulative impacts on

Horncastle and its catchment area of both stores coming forward and to that end Aldi has also looked at the cumulative impacts.

7.34 Aldi has advised that if 2 discount supermarkets were to be approved it is unlikely that either would be able to trade at benchmark levels within the Horncastle catchment area. The introduction of two foodstores could cause some concerns for local retailers. The cumulative impact on Tesco has been calculated at 29.3% and the Conging Street Co-op at 17%. When assessing impact, Aldi argue that it is the wider impact on the town centre that should be assessed and not the impact on any individual retailer. Whilst the impacts on these individual retailers would be high, the nature of the shops within the town itself indicate that the centre would continue to be vital and viable. In terms of comparison goods and cumulative impact Aldi do not consider there would be a significant impact on the centre as a whole due to the breakdown of uses and the high levels of comparison retailers along with other shops and services."

8. A supplementary OR was produced shortly before the committee meeting to provide an update. That report said:

"j) As there are no clear planning objections to the Aldi application it is not necessary to consider whether there are other more appropriate sites that do not contain such drawbacks.

k) Objectors have argued that the Aldi application should be delayed so that both the Aldi and Lidl applications can be considered together. There is a wealth of case law that looks at the issue of alternative schemes and whether or not such schemes need to be taken together. It has been held an alternative proposal is normally irrelevant except in exceptional circumstances, such as two rival sites for the same local need or clear planning objections to the development. Your officers have however considered the cumulative impact and conclude that it is fair and reasonable to take and determine these applications sequentially. The Aldi application was submitted first and is now ready for determination, whereas the Lidl application was submitted later and has been delayed due to revisions to the application which has necessitated the need for re-consultation. The site of the Lidl application is not an existing commitment, or an allocation in the Local or Neighbourhood Plan and as such, raises similar considerations to the Aldi application. The outcome of the Lidl application is, therefore, uncertain at this stage and therefore, it is open to the Council to consider the Aldi application on its own, provided the issue of cumulative impact is considered, which it has been. Given the aforementioned comments and the advanced stage of the Aldi application, your officers consider that it would not be reasonable to withhold determination of the Aldi application on the basis of the Lidl scheme."

9. Members considered the Aldi proposal and resolved to grant planning permission at the 3 November 2022 committee meeting.

Ground 1: Failure to have regard to a Material Consideration

10. On behalf of the Claimant, Mr Edwards contends that, as a matter of principle, where there are two rival alternative proposals in circumstances where only one can reasonably be permitted, the relative merits of each proposal are a material consideration in the determination of both applications such that both applications should be considered and determined alongside one another. It is for this reason that the Claimant contends the magnitude of the impacts of each proposal was a highly material consideration.

11. The Defendant, represented by Mr Garvey, and the Interested Party represented by Mr Cameron, contend that the need to consider alternative schemes does not arise in this case because there were no clear planning objections to the Aldi scheme when considered on its own merits. Mr Garvey submits that reliance on *R. (oao Chelmsford Car and 3 Commercial Limited) v Chelmsford BC [2006] 2 P&CR 12* is misplaced. He says that case was fact specific and turned on a specific planning policy that required the consideration of alternatives – which does not apply in this case. Mr Garvey submits that there is no legal authority for the proposition that both applications must be considered at the same planning committee. However, that is a mischaracterisation of the Claimant's primary contention that regard should have been had to the Lidl proposal as a material consideration when coming to a view on the Aldi proposal.

12. The OR makes it clear that the cumulative impact of the two proposals would have a significant impact on the Horncastle town centre (8f OR) which would not comply with local plan policy SP14 and the National Planning Policy Framework. Paragraph 8g acknowledges that cumulative impact is a material consideration, and the matter of weight is for the decision maker. The report goes on to ascribe little weight to the issue of cumulative impact on the basis that the significant impact would only arise if both supermarkets were developed. The OR says that little weight should be given to cumulative impact but that it may become 'more weighty' when the Lidl application falls to be considered.

13. Paragraph 9k of the supplemental OR tackles the issue of both applications being considered together and says:

> 'There is a wealth of case law that looks at the issue of alternative schemes and whether or not such schemes need to be taken together. It has been held an alternative proposal is normally irrelevant except in exceptional circumstances, such as two rival sites for the same local need or clear planning objections to the development.'

14. Given the prior conclusions of Officers that the cumulative impact of both proposals being developed would be significant, it is right to suggest that these two proposals, which were both sufficiently advanced to application stage, were essentially rival sites for the same local need. Whilst the OR is careful to say

that 'the outcome of the Lidl application is uncertain at this stage', it is also evident that the Council accepted the opinion of their consultants that the cumulative impact of both proposals being developed would be significant and not policy compliant. This would tend to suggest a strong possibility that the second proposal to come forward for determination would not be met with a favourable outcome, in circumstances where each individual proposal is likely to have been acceptable on its own individual merits in policy terms.

15. In the *Chelmsford* case there were two rival alternative proposals, and it was envisaged that only one could be permitted. I accept that there was a policy imperative to undertake a comparison exercise in that case, but I take Mr Edwards point that the judgment of Sullivan J. was based on the broader principle that, in circumstances where there were two competing schemes for essentially one planning consent, that a comparison between the merits of the two sites would be a material consideration. I note use of the word 'inevitably' at paragraph 14 of the judgment.

> "Common sense would suggest that in these particular circumstances a comparison between the merits of the two sites would inevitably be a material consideration. Indeed, it would appear from the planning officers' reports in respect of the two applications, that the officers did think that at least some degree of comparison between the two applications was relevant in terms of criterion (ii) in Policy HO3."

16. Mr Garvey and Mr Cameron directed my attention to the case of *Secretary of State for the Environment v. Edwards (1995) 69 P & CR 607* which addressed the issue of whether the relative merits of an alternative site were a material planning consideration. Roch LJ applied the four criteria identified by Oliver LJ in *Greater London Council v. Secretary of State for the Environment and others [1986) 52 P & CR 158*, at page 172:

> "I think it may be said, as Mr. Barnes has submitted, that comparability is appropriate generally to cases having the following characteristics: First of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development, or at least only a very limited number of permissions."

17. I note that the criteria were expressly said not to be a strict test. In policy terms retail impact on town centres is clearly a material consideration. Table 6 of the Nexus Cumulative Impact Assessment sets out the solus impact of each proposal before establishing the cumulative impact. The table reveals that the solus impact from Lidl is less than that of Aldi and it therefore would have a smaller impact on the existing town centre in relation to trade draw than that of the Aldi site. This is arguably an advantage of the Lidl proposal over the Aldi proposal. It follows that the third criterion is also arguably satisfied- the Lidl

site is an alternative site for a discount supermarket which would not have the same level of impact in terms of trade draw. I have already dealt with the likelihood that there could only be one permission granted for a discount superstore.

18. In this case there were acknowledged adverse effects of the Aldi proposal in terms of trade draw from the town centre identified in the OR, albeit not a significant adverse impact, such as would be unacceptable in policy terms. I therefore conclude that the second criteria of the GLC is met. The following passage in the *Edwards* case is also instructive:

> "Crucial in this case, in my judgment, was the fact that there were not merely alternative sites, but those sites had been the subject of planning applications and were, in the case of three other applicants, the subject of appeals to the Secretary of State. These other sites were material planning considerations in the circumstances in this case, account of which would have created a real possibility that the Inspector's decisions in the RDL appeal would have been different."

19. It is relevant that both proposals were schemes with current applications for a planning permission in circumstances where the likelihood was that only one permission would be granted. Applying the dicta in *Edwards* it is arguable that if both schemes were considered together, there is a real possibility that the outcome may have been different. For all of the above reasons, I am satisfied that ground 1 is arguable and permission should be given.

Ground 2: Breach of a Legitimate Expectation

20. The Claimant says that it had initially understood that both applications would be considered at the same committee meeting. An amendment to the Claimant's scheme meant that the Lidl scheme could not go forward for consideration at the November meeting. Mr Edwards contends that, importantly neither the Claimant nor their advisors were told that the determination process would be anything other than both applications being considered together.

21. The legal principles relating to legitimate expectation (to be applied in a planning case) were summarised by Holgate J in *R (Gosea Ltd) v. Eastleigh BC [2022] EWHC 1221 (Admin)* at paragraph 32:

> "32 A claim to a legitimate expectation can be based upon a promise (or representation) made by a public authority, provided that the promise was "clear, unambiguous and devoid of relevant qualification" *(R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569*

22. In her witness statement for the Claimant, Ms Bleloch confirms that at the 7 June 2022 meeting, the Council's case officer stated that it was the Council's intention to take both the Aldi and the Lidl applications to the same committee. That is supported by the evidence of Mr Huteson who attended the same meeting and says that he and Ms Bleloch were informed that both applications would be heard at the same planning committee meeting.

23. On behalf of the Council, Ms Stuart says that she indicated that 'it was likely or ideal (words to that effect) that both the Aldi and Lidl applications would be heard at the same planning committee'. Those comments are echoed in the OR which reported that 'Ideally the Council would consider both applications at the same Planning Committee meeting'.

24. Taking the Claimant's claim at its highest, the evidence of Ms Bleloch and Mr Huteson does not support a conclusion that there was a clear and unambiguous promise made on behalf of the Council. Ms Beleloch spoke of an 'intention' which is much less certain than a promise. Neither, in my view, does it constitute an implied representation that both applications would go to the same committee meeting. Whilst the Claimants were not specifically informed of the Aldi application committee date, the Council did publicise the committee agenda and there was no obligation on the Council to notify the Claimant as to the progress of the competing proposal.

25. Mr Edwards contends that, in the alternative, it was procedurally unfair and unreasonable of the Council not to have determined the two applications at the same Committee Meeting given that the Council had expressed a prior intention to do so; no notice was given to the Claimant to 'decouple the applications' and Lidl had not felt the need to make representations to this effect.

26. I do not accept that the two applications were coupled together such as to warrant a decision to 'decouple' them. It is for the Council to determine whether a given application was ready to be determined by its planning committee. The Lidl application was delayed because of the need for further consultation and comment. At the date of the committee meeting, the consultation exercise had been completed but the Council was awaiting comments on the retail assessment.

27. I have concluded that it is arguable that the Defendant erred in not fully taking into account the Lidl proposal in circumstances where the likelihood was that only one permission would be granted. In the event that that exercise is required, it would no doubt be logical to consider both applications at the same meeting. Indeed, the outcome of the consultation on the revised Lidl submission would be highly relevant as part of that exercise. If the Claimant succeeds on ground 1, I conclude that there is an argument that it was procedurally unfair to determine the Aldi application until the outcome of the comments on the Lidl retail assessment were known and the schemes could be considered together. To that limited extent I conclude that ground 2 is arguable in terms of procedural unfairness.

Ground 3: Failure to Consider Impacts on Protected Species

28. The Wildlife and Countryside Act 1981 provides at section 9(1) that it is an offence to intentionally kill, injure or take any wild animal included in Schedule 5, and 9(4) that it is an offence to intentionally or recklessly damage or destroy any structure or place which any wild animal specified in Schedule 5 uses for shelter or protection. Aldi submitted a Preliminary Ecological Appraisal in support of its application for planning permission. In relation to the impact on protected bat species, the report advised that the dwellinghouse which was to be

demolished as part of the Aldi proposal was "considered to have suitable roosting features due to the construction of its roof". It went on to recommend that "a Preliminary Bat Roost Assessment is undertaken to assess the bat roost potential of the building".

29. The OR at 7.70 advised members that the ecological appraisal "notes that the dwellinghouse on site has the potential to provide a bat roost due to construction of its roof and a preliminary bat roost assessment is recommended prior to the demolition of this building." The report is silent as to the timing of any assessment, although the Planning and Retail Statement anticipates that the assessment would be undertaken during the application process.

30. After noting that the house was in a good physical condition with UPVC soffits and facias making the presence of bat roost within the roof space unlikely, the Officer goes on to recommend the imposition of a condition in the following terms:

> "*No demolition works shall be carried out on the dwelling known as "Gaylon" until a preliminary bat roost assessment has been undertaken and then, along with details of any necessary mitigation measures, has been submitted to and approved in writing by the Local Panning Authority. The development shall only be undertaken in accordance with that approval*."

31. The Planning Practice Guidance says if the proposal is likely to affect a protected species you can grant permission following appropriate surveys. Mr Edwards directed my attention to the DEFRA guidance on protected species and development: advice for local planning authorities. In relation to planning conditions, that guidance says:

> "In exceptional cases, you may need to attach a planning condition for additional surveys. For instance, to support detailed mitigation proposals or if there will be a delay between granting planning permission and the start of development"

32. In this case the Ecology Report did not suggest that the proposed development is likely to affect a protected species, it only suggests that the house may provide shelter opportunities/could offer suitable roosting opportunities. The Officer sets out a cogent rationale for concluding that the building was unlikely to provide roosting space for bats due to access issues and for requiring a survey to inform mitigation measures. The imposition of a planning condition was a matter of planning judgment and a proportionate response to the limited likelihood that bats could be roosting in the building.

33. The OR records the recommendations and comments at paragraph 7.70 and at paragraph 7.71 she goes on to give her own advice to members. I am satisfied that the report did not seriously or significantly mislead members. Any criticism that the report did not accurately record the Ecological Report recommendations is ill-founded and rests on a hypercritical scrutiny of the OR of the type deprecated in S*t Modwen Developments Limited v. SSCLG [2017] EWCA Civ 1643.*

34. It is not arguable that there was a misapplication of policy SP24 of the East Lindsey Local Plan. This policy contemplates that damage to the nature conservation value of a site will be kept to a minimum and that appropriate mitigation, compensation or enhancement will be ensured through the use of planning conditions. The imposition of a condition was consistent with policy SP24.

35. For these reasons ground 3 is not arguable.

Ground 4: Breach of the Local Government Act 1972

36. Section 100D of the Local Government Act 1972 requires Councils to provide access to reports and background papers which are referred to in agenda reports to enable members of the public to be informed and to enable them to participate in decision making by providing informed representations. In this case the Council did not list the following documents as background documents:

- June 2022 Planning Potential Planning and Retail Statement;
- the Nexus September 2022 Appraisal; and
- The Nexus "Appraisal of Retail and Town Centre Policy Issues-Addendum" (the Nexus Addendum report)

37. The first two documents were posted on the Council's website prior to the committee meeting. The OR does not contain a specific list of all relevant background documents. It does however contain references to some important documents within the body of the report and a hyperlink to the planning application page where background documents and other representations can be viewed.

38. The Nexus Addendum report was not uploaded to the website until 12 December 2022, even though it had been received on the 2 November 2022. The failure in relation to the Nexus Addendum report meant that it was not available in any form at the date of the committee meeting.

39. In *R (Kinsey) v. Lewisham LBC [2021] EWHC 1286 (Admin)* at paragraph 103 Lang J. stated that it is necessary to consider the significance of the failure (to include a document as a background document) having regard to the purpose of the duty.

40. More recently, in *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC and others [2023] EWHC 1995 (Admin)* Holgate J. confirmed that there are two aspects to be considered: firstly, whether there has been substantial compliance with the legislation and secondly, whether the claimant has suffered substantial prejudice from any non-compliance. He emphasised that these tests are fact sensitive and went on to say:

> "Plainly, it is unnecessary for a request to see a document to have been made for a breach of s.100D(1)(b) to have occurred. On the other hand, when it comes to material prejudice, a person who was

> aware of a reference in a committee report to a background paper but who has never shown or had any interest in inspecting the document is unlikely to get very far in a claim for judicial review"

41. The Council did not comply with the requirement to list background documents relied on in the OR and the addendum report. In relation to the documents specifically referred to in the body of the reports I am satisfied that there was substantial compliance with the duty in relation to those particular documents. They are sufficiently identifiable for interested persons to make a request to inspect the document. However, the Nexus September 2022 appraisal was not specifically referred to in the OR, although its advice was quoted. The OR merely says "The company preparing the latest retail report for the Council, Nexus...". That report was important because it advised on the individual impacts of the Aldi and Lidl applications and the cumulative impacts of both supermarkets.

42. The Nexus Addendum report was not referenced in the addendum OR by its title and it was not available on the website at the time of the committee meeting. These documents underpinned the Officer's consideration of cumulative and individual impacts of the proposals. It is of note that the Nexus Addendum report was only received on the day before the committee meeting and the addendum OR was produced shortly before the meeting.

43. Mr Garvey contends that section 100D expressly refers to members of the public and not to members of the planning committee. This is, he says, to enable members of the public to request copies to inform their representations. I accept that interpretation but the consequence of background papers only being available to members of the public, without being available to planning committee members, would mean that a representation could be made by a member of the public on a background document to the committee without the committee having the benefit of the document. That would be illogical in my view. The consequence of the requirement to list background documents is to enable an open process such that all parties, including decision makers, have access to the documents which underpin the recommendations within the report.

44. In my view the failures in relation to the Nexus Addendum report were arguably significant given the nature of the advice within that document and the reliance placed upon it by the Council in making its recommendation.

45. There is then the dispute as to whether the Claimant suffered substantial prejudice in relation to the non-compliance with section 100D. Mr Garvey and Mr Cameron say there cannot be any material prejudice because the Claimants did not read the OR and the addendum OR and they did not make a request to see the document. I accept that the Claimant was in the same position as any member of the public and the Council were not under a duty to send information on a rival application. However, it is equally apparent that the Claimant would have been interested in the reports and would have wished to have seen any background documents, given the history of the applications.

46. The updated appraisal on cumulative impact confirms the earlier position insofar as significant cumulative impact reported in the OR. Therefore, even

though the Claimant lost the opportunity to make representations on the updated report, I conclude that they would not have been materially different to the representations previously made and therefore the Claimant did not suffer substantial prejudice.

47. For these reasons I conclude that ground 4 is not arguable.