

# Has Retail Planning Delivered the Goods?

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The purpose of this paper is to examine whether decisions taken by successive Secretaries of State over a 10-year period (January 1, 1998 to December 31, 2007) followed a consistent and predictable approach to the determination of planning applications for retail development.

By “consistent” I mean that in making applications developers and retailers, and in considering applications local planning authorities, should be able to tell where they stand in relation to national planning policies for retail development—of course each case will involve an exercise of planning judgment, but the ground rules should be known and predictable.

I should say at the outset that although as a practitioner I have been fortunate enough to act for a number of our leading retailers, the views expressed in this paper are my own. My starting point (which I trust will be uncontroversial) is that retailers are hugely important to our economy, to employment and to our daily lives as consumers—if nothing else, those who are most directly affected by the Secretary of State’s decisions should be able to say, if you will, “I might not agree with your decision but I can see where you are coming from”.

I have chosen the 10 years from January 1, 1998 to December 31, 2007 for my paper because this seems a long enough period to enable trends in decisions to manifest themselves and because it represents at least one cycle in the modern history of retail planning policies.

What I mean by this can best be demonstrated by considering the need test. Early in my survey period the High Court ruled in the case of *R. v Hambleton DC Ex p. Somerfield Stores Ltd*<sup>1</sup> in 1998 that the then current version of PPG6 (1996) did not require an applicant to demonstrate need for the proposal in order to obtain planning permission; this was met by the Government “clarifying” PPG6 through a ministerial statement (the Caborn Statement) in 1999 in which a test of need was introduced for edge and out of centre retail proposals unless need had been established already in an up-to-date development plan; my survey of decisions made by successive Secretaries of State shows a good deal of interpretation of this test over the ensuing years and further ministerial statements and a new version of PPS6 (2005) retained it, until the Planning White Paper in 2007 [7.53] acknowledged that the test had proven to be “a blunt instrument” with “the unintended effect of restricting competition and limiting consumer choice” and announced that the test was to be dropped. More recently in launching the consultation draft of a new version of PPS6 in July 2008 Secretary of State Hazel Blears described the need test as “dysfunctional”.

One thing that can be drawn from the need test saga is that our national planning policy system does not react rapidly to problems of its own making.

Over the period of my survey the Secretary of State responsible for planning policies and decisions has been in turn the Secretary of State for the Environment, Transport & the Regions, then for Transport, Local Government & the Regions, next the First Secretary of State/Deputy Prime

<sup>1</sup> [1999] P.L.C.R. 236.

Minister and latterly the Secretary of State for Communities & Local Government. For most of the period in question John Prescott was at the helm until a relatively short period in office by Ruth Kelly gave way to the current era of Hazel Blears.

My survey period has seen numerous policy pronouncements on the subject of retail planning, starting with the 1996 version of PPG6 (as it then was) which was in force at the outset. By the time that the current (as I write this) 2005 version of PPS6 was issued as a consultation draft in December 2003, decision letters in retail cases recited a long list of sources of Government policy including: PPG6 and ministerial statements made in 1997 (Nick Raynsford), 1999 (Richard Caborn) and 2003 (Tony McNulty) together with the Government's Responses to Select Committees in 1997 and 2000.

It seems fair to observe that this has been a restless field of policy making. As I write this paper the Government is consulting upon a new draft of PPS6 (July 2008) and pondering quite what to do in response to the Competition Commission's recommendation (April 2008) that there should be a "competition test" within the planning system. These merit a paper in their own right but what I have decided to do is to look back over the recent past in order to see whether there are things that we can usefully learn from it.

I have assumed that readers of this paper are familiar with the various development control tests set by Government policy over the years for edge and out of centre retail developments by way of requiring need for the proposals to be demonstrated, a sequential approach to be followed to examine whether there are suitable, viable and available better located (more central) sites and that the impact of the proposals on the vitality and viability of town centres must be an acceptable one.

I will not summarise these tests—I am sure that they are well-known—but rather I will examine the manner in which the Secretary of State has construed and applied these tests during my survey period. I have concentrated on cases decided by the Secretary of State (rather than by inspectors) because the tests in question were set by the Secretary of State in the first place.

My survey is of English decisions and I have used Compass Online as my research tool<sup>2</sup>. The Secretary of State decides such cases either where he/she has exercised the power to "call-in" an application for his/her own decision thus removing the case from the local decision making process, or where an appeal is "recovered" by the Secretary of State so that the inspector who has been appointed to conduct the examination of the appeal reports to the Secretary of State, who makes the final decision.

Over the survey period most of the decisions made by the Secretary of State have been in call-in cases rather than recovered appeals. In cases that have been called in, in all but the most exceptional circumstances, the local planning authority would have granted the permission sought had the decision been left in its hands and so it is interesting to pause to consider the extent to which the intervention of the Secretary of State has led to applications being refused that would otherwise have been granted. In similar vein, given that most appeals are decided by inspectors it is interesting to consider the extent to which the Secretary of State has disagreed with the recommendation of the inspector who heard the evidence and the arguments first hand.

184 predominantly retail cases (100 per cent) were decided by the Secretary of State during the ten years in question. In 163 (89 per cent) of these the Secretary of State agreed with the inspector's

<sup>2</sup> I have not burdened my paper with the long and unwieldy PINS reference numbers but rather have given enough detail by way of place name and date to enable the decisions to be found with ease in a Compass Online search.

recommendation; in 104 (94 call-in and 10 recovered) of these cases permission was granted, whereas in 59 (46 call-in and 13 recovered) permission was refused. In 21 (11 per cent) cases the Secretary of State disagreed with the inspector's recommendation; in 16 cases (12 call-in and 4 recovered) to refuse permission whereas the inspector had recommended that it should be granted and in five (all call-in) cases, to grant permission against the inspector's recommendation to refuse.

In terms of overall rates of success, of the 157 (100 per cent) decisions in applications called-in by the Secretary of State, 99 (63 per cent) were granted permission and 58 (37 per cent) refused; whereas of the 27 (100 per cent) decisions in appeals recovered by the Secretary of State, the rates of success and failure were exactly the other way around such that 10 (37 per cent) were allowed and 17 (63 per cent) dismissed.

Combining all the 184 (100 per cent) cases in which the Secretary of State was involved, 109 (59 per cent) were permitted and 75 (41 per cent) refused.

I have sought to draw out pertinent observations and points of approach from the decisions made by the Secretary of State over these 10 years. I have not drawn out issues from every decision for the simple reason that not every case has something new or interesting to say on the subject! Indeed it might be fair to comment that if a policy is clearly set out, decisions which apply the policy should not really have much if anything of interest to say about it. However, many of the decisions do shed useful—and often contradictory—light on what various aspects of the Government's retail planning policies are thought by the Secretary of State to mean and how they should be applied.

For some half of the survey period (until late 2002) decisions were made by the regional Government Offices but in the second half they have been issued by the Secretary of State's Planning Central Casework Division. The PCCD should have led to greater consistency between decisions—we will see in what ensues whether it has or not.

I will begin my analysis of the Secretary of State's decisions with the “blunt instrument” of the need test.

#### **The need test—from decisive to derided**

There is a certain irony in recalling the words of an inspector who had the foresight to point out—as long ago as 2002—that to insist on there being sufficient capacity to support a proposed store would be “inimical to competition”; needless to say, the Secretary of State disagreed and drove the point home by stating that: “Evidence of quantitative need . . . is fundamental” (Tesco Walsall 4/11/02: the inspector recommended permission, the Secretary of State refused the application).

I wonder whether that inspector felt vindicated when first the White Paper (2007) and then the Secretary of State (2008) agreed.

But what was the need test meant to entail? The 10 years in question began unpromisingly with the Secretary of State agreeing with his inspector in the Corby Factory Outlet Centre decision (27/1/98) that it was “difficult to accept the notion that ‘need’ is the same as capacity”.

In fact, as the cases unfolded and the concepts of quantitative need and qualitative need were introduced and elaborated over time, whether there was expenditure capacity for a new store became an important question.

It must surely have been an inevitable and foreseeable consequence of setting a test of need for edge/out of centre retail proposals that the planning profession would develop a variety of

mathematical methodologies in order to seek to demonstrate the presence or absence of quantitative need in any given case. After all, similar models had been used for many years before to assess the issue of retail impact. Early in my survey period we find the Secretary of State refusing an application for an out of centre Tesco superstore in Hull (15/12/98) on the basis of a conclusion that there was a net deficit of available expenditure to support the proposed new store, with the inspector bemoaning the “computational jungles” that he had been faced with. Five years later (Tesco Stafford 29/9/03) the Secretary of State was concerned that “evidence presented on need is becoming increasingly and unnecessarily complicated”.

It is hard not to sympathise but then again a number of applications were refused on the basis that the assessment of need had been too broad-brush to satisfy the Secretary of State.

Attempts to link need and retail impact failed: the Secretary of State disagreed with his inspector in a Factory Outlet Centre case in Grantham (28/2/02) who had concluded that “as a matter of principle, that the less harm that a proposal would cause, the more limited is the level of need required to be established”. “Need. . .” it was said “. . . is not merely a question of avoiding harm.”

The Caborn Statement explained that need was required to be demonstrated for edge and out of centre proposals where this had not been established in an up-to-date development plan. Over the survey period most efforts to argue that there was such a plan in place failed to win the day although a rare example of the argument succeeding came with the grant of permission for an out of centre retail warehouse development (proposed by Tesco) at Digby in Exeter (9/12/99) where the Secretary of State concluded that there was no requirement to demonstrate need as the site was allocated in a recent development plan. (See also the permission granted for an edge of centre retail scheme in Cheltenham 12/9/00.)

The effect of failing to demonstrate need where the test applied was reiterated by the Secretary of State in his decision to permit an out of centre Homebase store in Tamworth (20/3/00) namely that “there have to be weighty material considerations to overcome the planning policy presumption against it” [the proposal].

#### **Does “clawing back” expenditure “leaking” from a catchment area constitute need?**

Early in the survey period, in deciding to grant permission for an out of centre retail warehouse development in Hereford (19/10/98) the Secretary of State concluded that the stemming of expenditure leakage from the catchment area constituted a “real need”.

After this decision the argument that need can be shown where the shops in a catchment area do not “retain” (or capture) as much of local residents’ expenditure as it is considered they should, so that local residents are spending more than it is considered they should in shops further afield outside their home catchment area, had something of a stop/start history. (Although in the Tesco Cullumpton decision (28/1/02) a 100 per cent retention rate was considered unrealistic.)

It proved a successful argument when the Secretary of State decided to grant permission for an out of centre Tesco superstore in Redruth (3/12/98) in which he acknowledged that there was a need “for a foodstore . . . of a sufficient size to function as a counter-attraction, drawing trade back to the Redruth area”.

However, later on (25/5/00) in refusing an out of centre Tesco superstore in Quinton (Birmingham) the Secretary of State disagreed with his inspector who had concluded that a 97.3 per cent leakage of food trade from the catchment constituted a “strong quantitative need”—the Secretary of State

would only acknowledge it as “a factor” but not a strong one. A few months afterwards in deciding to permit an edge of centre (the store was some 640 metres from the defined prime shopping area but the inspector concluded that local residents were “used to walking significant distances to shop”) Asda superstore in Bishop Auckland (10/8/00) the Secretary of State agreed with his inspector that the desirability of clawing-back trade and retaining it within the catchment area constituted “an element of need”. By the time of a decision to permit a B&Q Warehouse store in Bexley (8/3/01) the Secretary of State found that very substantial leakage of DIY expenditure from the catchment area constituted quantitative need.

But then just a few months later (19/10/01) the Secretary of State concluded in deciding to allow an out of centre Tesco superstore in Bordon that claw back of leaking expenditure and the sustainability benefits of providing stores closer to peoples’ homes did not constitute need in the context of the Caborn Statement (although they were treated as material considerations which were sufficient to overcome the policy objection of having failed to demonstrate need). A similar line was taken in the Tesco Chichester decision (30/5/02) where the Secretary of State made a point of stating that he did not consider claw back to “constitute an element of retail need” (the proposed extension was permitted for other reasons).

By the time of the Bell Green (Lewisham) decision (29/10/03) arresting leakage was seen as a type of qualitative need although in permitting an out of centre Safeway extension in Hinckley (22/6/04) the Secretary of State indicated that “whilst reducing the need to travel is an aim of PPG6, it does not override the priority of providing comparison retailing in existing centres.” The wheel turned again and the next month (29/7/04) the Secretary of State accepted that arresting leakage can constitute quantitative need and residents being able to shop without travelling outside their catchment area, a qualitative need in a decision permitting an extension to the Peel Retail Park in Washington. Come the Haden Way Birmingham decision (14/2/06) clawback was considered to be an indicator of both quantitative and qualitative need.

**What is quantitative need? What is qualitative need? Will either do or are both required?**

At the most basic level, it seems to me that a quantitative need can be demonstrated where there is sufficient expenditure capacity to support a new store and a qualitative need, where existing stores are outmoded and provide a poor shopping environment. (The Court of Appeal appears to have agreed in *R. (on the application of Sainsbury’s Supermarkets Ltd) v First Secretary of State* [2005] EWCA Civ 520) However the approach to quite what is capable of making good one or other category of need has been the subject of considerable debate in many of the decisions.

Before we get to that there is a prior question, namely whether in order to make good a case that there is a need for a new store is it necessary to demonstrate either a quantitative or a qualitative need or both?

Shortly after the Caborn Statement in the Aldi Hexham decision (12/11/99) in which an edge of centre store was permitted on the basis of a quantitative need, the Secretary of State set out his disagreement with his inspector’s conclusion that a strong qualitative need for the proposal was sufficient on its own.

In due course, the McNulty Statement (April 2003) explained that the Secretary of State would place more weight on quantitative rather than qualitative arguments. Although just a few months later (29/9/03) the Secretary of State concluded that overall, need had been demonstrated for an out of centre Tesco superstore in Stafford, despite there not having been a convincing demonstration

of quantitative need for the size and scale of store proposed, on the basis that there was a strong qualitative need for a 3rd store to serve the town. By the time of the Secretary of State's refusal of an extension to an out of centre Sainsbury superstore in Kidlington (10/12/03) the decisive objection was that although qualitative need had been demonstrated, quantitative need had not. (Sainsbury overcame this in a repeat application two years later: 13/10/05.)

As for quite what constitutes quantitative need, the decisions have swung back and forth. (I have discussed the question of stemming leakage and increasing retention rates earlier on.) In deciding to grant permission for an out of centre DIY Warehouse store in Bamber Bridge, South Ribble (10/2/00) the Secretary of State concluded that: "the need for the retail warehouse is demonstrated by the growing demand for goods in this sector of the market."

A very broad (and short-lived) approach in which the different types of need were lumped in together, alongside a number of other factors which later came not to be recognised as evidence of need at all, is seen in the Secretary of State's decision to permit an out of centre retail warehouse park near the Metro Centre in Gateshead (23/2/00) in which he concluded that: "there is a need for the development in terms of retail capacity . . .; retailer demand; employment generation; development of a brownfield site; facilitating the development of adjoining land and improving the opportunities for access by means other than the private car".

Sometimes a retailer was able to create capacity for a new store by agreeing to close a less well positioned store thus releasing expenditure. An example of this is provided in the Secretary of State's decision to permit an edge of centre Asda in Widnes (12/9/00) on the basis that capacity would be released by the closure of an out of centre Asda superstore. A similar argument worked for Tesco in Stafford (29/9/03) although in that case the store to be closed was located in the town centre and the proposed new store which took the benefit of this release of capacity was out of centre; permission was granted on the basis that there was a strong qualitative need to provide a better store for the shopping public.

Following the McNulty Statement in April 2003, a host of decisions concerning retail warehouse and similar insisted upon need being assessed for comparison goods, and not some or other category of goods such as "bulky goods": see for example Aylesbury (8/9/03); Kendal (17/9/03)—it became customary for the Secretary of State to include a passage in decision letters making the point. In the Bell Green (Lewisham) decision (29/10/03) the Secretary of State explained that he did "not consider that bulky goods is a category that should be assessed in its own right"; need should be defined either for convenience or comparison goods. But later on it became acceptable to assess the need for DIY goods rather than the far broader comparison goods (see the B&Q Warehouse store Swindon decision 28/10/05).

Turning to qualitative need: the Secretary of State acknowledged in considering an out of centre B&Q Warehouse store proposal in Plymouth (27/7/00) "that the modern, large scale, "one stop" format proposed represents a qualitative improvement of benefit to . . .consumers". That application was refused, although the same words were used in a simultaneous decision to grant a rival application, also on an out of centre site, for bulky goods retail warehousing (Crownhill, Plymouth 27/7/00) but the acknowledgment that a large one stop format was "a good thing" did not survive for long. It reappeared in a glowing testimony for the B&Q Warehouse store format found in the inspector's report, with which the Secretary of State agreed in granting permission for an out of centre B&Q Warehouse on the Alcad site in Redditch (7/11/00): "The [B&Q] Warehouse concept represents a quantum increase in the scale and range of DIY goods available in a shop. The concept has been

devised to meet a need which, I think, arises from Britain's ageing housing stock, its increasingly confident, handy householders and the rapid evolution of DIY products. The commercial success of the concept is demonstrated by the increase and spread of B&Q Warehouses. To that extent B&Q satisfy a need, whilst creating it at the same time." However in March 2001 the Secretary of State did not attach significant weight to the qualitative benefit of improving DIY shopping facilities that a B&Q Warehouse store would bring to Bexley (8/3/01). By the time of the Dragonville (Durham) retail warehouse decisions (30/12/03) the Secretary of State felt it worth pointing out that "the decision of an individual retailer to display a wide range of products . . . does not constitute a retail need."

More effective competition between retailers (Asda being able to compete with Morrisons) was acknowledged by the Secretary of State, in agreement with his inspector, as an instance of qualitative need but only of "limited" weight: Asda Bishop Auckland (10/8/00). "Competitive prices" was considered to be an element of qualitative need in the decision to permit an edge of centre Asda superstore in Stevenage (23/11/00). In Tesco Alnwick (28/8/03) it was said that residents having a choice of retailers "should not carry any particular weight".

In the somewhat more liberal atmosphere after the issue of the new PPS6 in 2005, the operational difficulties of an existing store were considered to amount to a qualitative need for a new store in the Tesco Hanley (Stoke-on-Trent) decision (19/5/05) just as the overcrowding and overtrading of an existing B&Q store founded a similar conclusion in the Swindon B&Q Warehouse store decision (28/10/05). Overtrading was concluded to be an instance of qualitative (not quantitative) need in the 2nd Sainsbury Kidlington decision (13/10/05). These decisions were in contrast with the approach taken earlier in the Tesco Andover case (21/9/01) where "operational" and "commercial" needs were said not to constitute need under the Caborn Statement.

Reducing cross-town travel to other retail parks was categorised as a qualitative need in the Secretary of State's decision to permit an out of centre retail warehouse park in Middlesbrough (9/11/00).

Uniquely, a survey of local residents (in which some 60 per cent had indicated that they would use the proposed shops if provided) was regarded by the Secretary of State as "an indication of the qualitative need for the proposals" which comprised a local neighbourhood centre in Mansfield (8/7/04).

#### **Has the interpretation and application of the need test been consistent and predictable?**

Over most of the 10 years that I have reviewed it is fair to say that no-one can have been left in any doubt that the demonstration of need was seen by the Secretary of State as a fundamental pre-requisite to the grant of a planning permission. Like the lone inspector who was ahead of his time and pointed out in 2002 the inherent problems of the test, one might not agree that the test is a sensible hurdle to erect—why should retailers have to prove need when in the main most other forms of development are not required to do so?—but retailers knew how much significance the Secretary of State attached to the issue. That the test was seen as fundamental does however mean that it can only have been right to expect a consistent interpretation and application of it at the highest level of decision making by the author of the very test in question. Unfortunately this is where the decisions see-sawed over time, with a lack of clarity about what constituted quantitative and what constituted qualitative need. Perhaps the best example of inconsistency is the treatment of the potential benefits of particular forms—or formats—of retailing. So my verdict on the test of need is that following the Caborn Statement we all knew it was there but the Secretary of State was far from consistent and predictable in its interpretation and application.

### How about the sequential test?

The survey period got off to a liberal start in the application of the sequential test, with the Secretary of State agreeing with his inspector's approach of examining whether sequentially preferable sites would be likely to become available "in the short term": Hereford (19/10/98).

However, less than an month later, in the Arbury Camp decision (South Cambridgeshire, 12/11/98) in refusing permission for a large "edge of town" retail development, the Secretary of State concluded that "there might be potential" in the city centre and that it would be "inappropriate to grant permission . . . prior to fully examining the options in the city centre".

A few days later (23/11/98), the Secretary of State reminded readers in agreement with his inspector that there was "no commitment of positive support for an out of centre site even if there are none in or on the edge of a town centre" (Macclesfield).

Shortly afterwards, in refusing an application for an out of centre Tesco superstore in Hull (15/12/98) the Secretary of State agreed with his inspector that a period of up to five years was "reasonable" for more central sites to become available. (The idea that a sequentially preferable site should be given an opportunity to be progressed fed into the decision to refuse an out of centre retail warehouse development in Maidstone: 3/8/01.)

The Secretary of State's approach became stricter still when in refusing an application for an out of centre Tesco superstore at Stratford-upon-Avon (24/5/99) he reminded applicants that the "onus falls upon the proponents" to thoroughly assess sequentially preferable sites; he concluded against the proponents because—note the formulation—"the unavailability of a suitable and viable site within a reasonable timescale has not been conclusively shown". (Subsequently the Court of Appeal held in *Michael Shanly Group Ltd v SSETR* [2000] P.L.C.R. 136 that the "possibility" of a sequentially preferable site would suffice otherwise the overall objective of the policy would be stultified.) Much later on, after the new PPS6 was issued in 2005, the Secretary of State approached such matters quite differently in permitting an out of centre Tesco in Hanley (Stoke-on-Trent) where although he concluded that the sequential approach had not been particularly rigorous—note the very different formulation from the Stratford-upon-Avon case—"there is no clear evidence to show that there are any other more suitable, and viable, sites that are available or likely to become available" (19/5/05).

Perhaps the harshest application of the sequential test in the survey period came in the Secretary of State's decision to refuse an out of centre Factory Outlet Centre adjacent to Bolton FC (8/1/01). He agreed with his inspector that the sequential assessment was flawed because it had been "undertaken for the purposes of the inquiry, not the application"; it had not been applied in the selection of the application site.

It is arguably logical in some cases to make a link between need and the sequential test on the basis that the sequential test should (so the argument runs) be applied with the scale of the identified need in mind. This approach was followed by the Secretary of State in deciding to permit an out of centre Tesco Superstore in Redruth (3/12/98) in which he concluded that there was no sequentially preferable site "capable of accommodating a store of sufficient size to meet the identified . . . need" which in that case was "for a foodstore . . . of a sufficient size to function as a counter-attraction, drawing trade back to the Redruth area." However, the increasing emphasis during the survey period on flexibility and disaggregation negated this line of argument in a large number of cases. (The High Court endorsed the separate consideration of need and the sequential approach in *Tesco v SSETR* CO/2297/2000.) It resurfaced seven years later when the Secretary of State permitted

a mixed use scheme which included a Tesco superstore on an edge of centre site in Hemsworth (Wakefield:1/3/05) where it was accepted that a smaller store would not attract back trade.

**The rise and fall of the theory of disaggregation in the application of the sequential test and the tale of the infrangible retailer**

Many of the decisions during the 10 years discussed the Secretary of State's expectation that in applying the sequential test retailers were expected to be flexible concerning the scale, format and design of proposals so as to ensure that more central locations were not dismissed too readily, and should consider disaggregating their proposals.

Early examples of this approach are: the Secretary of State's decision to refuse a retail warehouse park at Northbrook College in Worthing (23/11/98) pointing out that "flexibility . . . means that . . . retailers should consider whether their proposed development could be accommodated in a town centre, in whole or in part, by altering the format, design and scale of their scheme", and the Secretary of State's decision to refuse an out of centre retail warehouse park (including a B&Q) at Trafford Park (16/12/98) on the basis that the required degree of flexibility had not been shown in considering "disaggregated or more modest schemes". The Secretary of State also responded to an argument that more centrally located sites had higher land prices by concluding that he did "not consider land valuation to be a material consideration". Put in that sweeping way, rather than as a material consideration to which he decided to give little weight, the proposition must surely be wrong. A similar point re-emerged but in a more correct formulation some six years later when the Secretary of State concluded that "little weight can be given to the applicant's contention that, as bulky goods retailing cannot command high rents, it would be unacceptable to town centre developers." (Tunbridge Wells: 12/5/04).

As we will see, the demands of flexibility and disaggregation grew ever greater until towards the end of the survey period. (The class of goods approach and the requirement to pursue disaggregation were upheld as being consistent with the Secretary of State's written policies in a pair of High Court cases in 2002: *JJ Gallagher Ltd v SSSLGR* [2002] EWHC 1812 (Admin.); *B&Q Plc v SSSLGR* [2002] EWHC 551 (Admin))

Having said that, there was a brief interlude of an "off-message" decision by the Secretary of State to permit an out of centre B&Q Warehouse store in Birmingham (3/6/99) in which he agreed with a passage in his inspector's report where she had concluded that: "I do not consider it necessary for the appellants to abandon a retailing format which is clearly proving successful and shoe horn a smaller development onto a smaller site . . ." (An out centre Asda superstore which the Secretary of State permitted in Bradford (16/6/99) benefited from an implicitly similar approach where it was concluded that there were no sequentially preferable sites "which are . . . practical to develop for this scale of development".)

However it wasn't long before a more rigorous approach to disaggregation began to emerge. In refusing permission for an out of centre proposal comprising an extension to a Tesco superstore and five retail warehouse units in Portsmouth (10/12/99) the Secretary of State pointed out that the sequential assessment should consider whether there are more central sites which could accommodate the separate elements of the proposal rather than the development in its entirety; he concluded—note the formulation—that "there is some evidence that there are town centre sites which might accommodate at least some of the convenience floor space proposed."

In refusing permission for an Asda superstore on an out of centre site in Plymouth (9/2/00) the Secretary of State indicated that although some flexibility had been demonstrated in setting a

2,500sq m (gross) threshold for the sequential assessment (the proposed store was 6,950sq m gross) he was concerned that this “could still be too high a threshold” as he considered that it would be more appropriate to make provision in district and local centres. (The Secretary of State explained immediately before this conclusion that he was not persuaded that the need “can only be remedied by the provision of a single large superstore.”) Later that year Tesco were told by the Secretary of State to look for “far smaller sites” for a smaller store than it proposed, or even to look for more than one site, and that sites in the hands of another retailer were “not necessarily excluded”: Quinton (Birmingham: 25/5/00). In permitting an out of centre (18,850sq m gross) retail warehouse development at Giants Field, Trafford Park (19/12/01) the Secretary of State commented that an analysis of sites which could accommodate 5% (0.3 hectare) of the size of the proposal was a “reasonably flexible approach”.

An out of centre furniture retail warehouse in Stoke-on-Trent was refused (13/4/00) with the Secretary of State agreeing with his inspector’s conclusion that there was “. . .no substantive evidence that the new retail floor space proposed needs to be in the format of a retail warehouse”. Although just a few weeks later (18/5/00) the Secretary of State permitted an out of centre retail warehouse development in Mansfield, agreeing with his inspector that a town centre site was not a genuine alternative as it would be more likely to prove attractive to non bulky goods retailers. In similar vein, in permitting an out of centre retail warehouse park in Middlesbrough, the Secretary of State (9/11/00) agreed with his inspector who had concluded that it was reasonable to use a site size to reflect “a minimum immutable critical mass for a retail warehouse development to be viable.”

These approaches dropped out of favour later on. Thus by way of example, an out of centre two-unit retail warehouse development in Blackpool was refused (6/3/02) on the basis the units should be disaggregated and that there were sequentially preferable sites for each unit on its own.

In considering an extension to Tesco Edmonton (Enfield 14/4/00) the Secretary of State commented that he did “not accept that it is illogical and impractical to consider building the proposed extension other than alongside the existing store”. An attempt by Tesco to argue that it would be unreasonable to expect a retailer to look for a site for a proposed extension divorced from the store that it wished to extend, so that the sequential assessment should look for a site for the store and extension together rather than just for the extension, fell on deaf ears when the Secretary of State refused permission in Oldham (24/10/02). (Similarly in 2004 the Secretary of State pointed out that where an applicant proposes to redevelop an existing retail warehouse park, the sequential approach applies to the whole new scheme and not just to the net increase in floor space proposed: Tunbridge Wells 12/5/04).

A year later (30/9/03) Tesco obtained permission for an extension to an out of centre store in Bexhill on Sea; on this occasion Tesco disaggregated the (1578sq m) extension into three units for the purpose of their sequential assessment, namely a food hall, a non-food variety store and a clothes shop, with a range of sizes from 543–869sq m. However, even this drew an observation from the inspector, with which the Secretary of State agreed, that this had failed to consider whether provision could be made in even smaller existing vacant units and that there was no good reason why the proposal could not be even further disaggregated.

An out of centre “bulky goods” scheme was chastised for a lack of flexibility in seeking to pray in aid that a town centre site had been identified for a department store: Bell Green (Lewisham: 29/10/03).

An out of centre Factory Outlet Centre adjacent to Bolton FC was refused (8/1/01) amongst other grounds on the basis that the applicant had not demonstrated flexibility by disaggregating the FOC from the associated leisure proposals in a mixed use scheme. Another out of centre Factory Outlet

Centre was permitted in Morecambe (20/2/02) but the Secretary of State pointed out that he disagreed with his inspector that a FOC represents a particular and specific form of retailing which would not lend itself to disaggregation. A similar comment was made, this time in refusing an out of centre Factory Outlet Centre in Grantham (28/2/02). Arguments that a Factory Outlet Centre could not operate in a disaggregated form and that the format was beneficial were dismissed as being insufficiently flexible in the Kendal decision (17/9/03). A proposed extension to an out of centre Factory Outlet Centre in Fleetwood (Wyre) was sent packing with the Secretary of State agreeing with his inspector that the proposal could be disaggregated and provided for in individual units in existing vacant and underused town centre shops (18/9/03).

The lack of consistency in the decisions is illustrated by contrasting the approach taken in the Bolton case with that adopted in granting permission for an out of centre four-unit retail warehouse park in Tunbridge Wells (21/9/01) in which the Secretary of State agreed with his inspector that disaggregation of the units would be “impractical” because of critical mass arguments and on the basis that none of the committed retailers (PC World, Currys, DFS and B&Q Warehouse) would be interested in any of the sequentially preferable sites; there would be “no planning advantage or justification for any part or parts of the proposed development to be implemented in the town centre or its edge”.

The approach which the Secretary of State took in decisions concerning the B&Q Warehouse store format provides a good case study of the generally ever stricter application of the requirements of flexibility and disaggregation as time went by, until a less rigorous approach came back into fashion towards the end of the ten year period.

The early signs were quite promising for the format, with the Secretary of State agreeing with his inspector in deciding to grant permission for an out of centre DIY Warehouse store in Bamber Bridge, South Ribble (10/2/00) that: “In assessing the suitability of the site some compromises may be made with the retail operator’s ideal requirement, but the essential characteristics of the proposal should remain unchanged”.

However by March 2001, in the Bexley B&Q Warehouse store decision the Secretary of State went out of his way to explain his “views on the . . . concept” that the benefits of a one stop shop did not outweigh the need to demonstrate flexibility and disaggregation in applying the sequential approach. (The store was permitted for other reasons concerning regeneration.) A B&Q Warehouse store had failed for lack of flexibility a month before in the Burton-Upon-Trent decision (8/2/01).

In October 2001 (4/10/01) a B&Q Warehouse store proposal at Charlton (Greenwich LBC) was refused by the Secretary of State who distanced himself from previous B&Q Warehouse decisions by saying that “each case is decided on its own facts and merits” (with which I would agree but add that similar cases should be decided following a consistent approach especially where it is the self same policy which is being applied throughout) and concluded that the concept was “format driven” and failed to demonstrate sufficient flexibility, for example by failing to disaggregate “truly bulky goods . . . from the very many unequivocally non-bulky goods which B&Q Warehouses normally sell”.

This approach was cemented in the Secretary of State’s decision to refuse a non-food retail park at the Metro Centre in Gateshead (22/11/01) on the basis that the sequential assessment had been “inappropriately governed” by format considerations; the Secretary of State explained that: “The Government’s policy is to follow the ‘class of goods’, rather than the ‘format driven’ approach to the application of the sequential approach, where the key question is whether there is any reason why

such goods cannot be sold from town centres". (This decision was quashed by the High Court<sup>3</sup> but the ground of challenge to this particular "class of goods" point failed.) A similar line was taken in refusing an out of centre DIY retail warehouse in Liverpool (30/5/02) with the Secretary of State concluding that the "majority of goods . . . can and should be sold from town, district [and] local centres".

But then, in another example of sending out a mixed message, in permitting an edge of centre Sainsbury and five "bulky goods" retail warehouses in Wolverhampton (12/11/02) the Secretary of State found that although the sequential approach had been departed from as the scheme was capable of disaggregation and there were sequentially preferable sites, this departure was outweighed by the "weighty material consideration" that these sites were better suited to retailing non-bulky goods. Less than a year later, the Secretary of State was back on message when he stated in his decision to permit an edge of centre retail warehouse park in Aylesbury (8/9/03) that he did "not accept that there is a category of goods that can be regarded as 'town centre comparison goods'." (Although this is an odd decision as the scheme involved 16 units and yet disaggregation was not pressed upon the applicant, the Secretary of State concluding that there were no sequentially preferable sites "which could accommodate this particular proposal".) In refusing an out of centre non-food retail warehouse development in Tamworth (11/12/03) the Secretary of State criticised the site search for concentrating on sites for bulky goods retailing rather than the type of goods, namely comparison goods.

In re-determining and permitting a B&Q Warehouse store proposal at Barton Power Station, Trafford Park (19/12/01) the Secretary of State commented that B&Q whose sequential analysis sought sites down to three hectares ("less than half of the size of the appeal site") "could have made further efforts to scale down the proposal" but he took into account the assessment carried out for another scheme heard at the same inquiry which had examined sites down to 0.3 hectare. By the time of the decision to permit an out of centre B&Q Warehouse store in Croydon (23/8/02) looking for sites as small as 0.2 hectare was described as indicating "some flexibility towards site selection" (bear in mind that the proposed store, minus its garden centre and builders yard, was 9,710sq m gross). An indication of what might satisfy the Secretary of State came in the Dragonville (Durham) decisions (30/12/03) in which no fewer than four retail warehouse permissions were granted; the schemes ranged in size from some 6,039sq m gross to 16,717sq m gross; sites as small as 0.1 hectare had been examined and the inspector concluded that there were no better sites "whatever degree of flexibility or disaggregation is applied"; the Secretary of State agreed.

However, the next month (30/9/02) in refusing an out of centre B&Q Warehouse store in Colchester the Secretary of State ticked the retailer off for being insufficiently rigorous in terms of flexibility and made the point that the format was not innovative as (by then) there were some 77 Warehouse stores. A similar point had been made the year before in the Sunbury case where the Secretary of State had commented that the Warehouse format was not innovative because by then it was "tried and tested" (13/6/01). (Later on, in 2004, however the Secretary of State was satisfied that looking at site sizes "about two thirds of the application area" was sufficient when he granted permission for an out of centre retail warehouse development in Weston-Super-Mare: 5/8/04.)

An 11,306sq m B&Q Warehouse store was permitted at Cribbs Causeway (9/3/04) despite the retailer having "failed to address the scope for locating constituent parts of the development, such as

<sup>3</sup> *JJ Gallagher—v- SSSLGR* [2002] EWHC 1812 (Admin).

the garden centre, on more central sites”; the Secretary of State concluded, in an apparent softening of the importance of the sequential approach, that the proven need and lack of significant impact meant that “the shortcomings in the sequential test are not determinative of the overall conclusion”. In the following month (28/4/04) there was more good news for B&Q when permission was granted for an out of centre (14,808sq m gross) Warehouse store in Southend-on-Sea; the Secretary of State concluded that “theoretically it would be possible to just about meet the floorspace requirements through disaggregation, but [he] also agrees . . . that disaggregation would be unrealistic in the particular circumstances of this case.” The particular circumstances were explained in a passage in the inspector’s report that the Secretary of State drew attention to, which explained that disaggregation would require “the use of virtually all the available town centre sites and a significant proportion of the vacant premises . . . such an outcome would be unrealistic in that not all these sites or units are likely to be devoted to meeting the type of DIY offer proposed. . . . As to the vacant premises, most have less than 200 sm. gross floorspace, which would require substantial and, . . . unrealistic disaggregation amongst the vacant shops.”

This new dawn proved short-lived as just a few days later (17/5/04) the Secretary of State dismissed an out of centre appeal for a B&Q Warehouse store at Kettering stating that although he accepted that the benefits of the Warehouse format were “unlikely to materialise if the store is broken up into smaller units” he considered that this was a point of “limited weight”. And in another decision issued on the same day, refusing an out of centre Warehouse store in Telford (17/5/04) B&Q’s approach to amending their format—so to produce a “more efficient design and layout for the proposed store”—was described as “infrangible”. (I must admit I had to look that one up: difficult or impossible to break or separate into parts.)

Later on, in the IKEA Stockport decision (2/8/04) the Secretary of State dismissed an application for an out of centre store although he did accept that disaggregation of the main elements of the (28,000 sm. gross) scheme was “not necessarily appropriate”. And a little later on still, an out of centre retail warehouse development in Shirley was permitted (18/10/04) even though a town centre site could accommodate one of the proposed units; the conclusion reached was that the town centre unit would be better used for a supermarket. Contrast some of the previous decisions.

An out of centre B&Q Warehouse store was permitted in Oldbury (24/11/04) on the basis that disaggregation of it, and the remainder of the proposed retail warehouse park, was not practical because comprehensive development was required in order to secure the reclamation of decontaminated land. But in July 2005 an out of centre retail warehouse scheme in Wallsend was refused as the sequential assessment had been format driven. Disaggregation continued to be raised as an issue, an out of centre Asda in Taunton was permitted because the retailer had searched on the basis of disaggregating its convenience goods from its comparison goods (3/8/05). In a more liberal turn, an out of centre B&Q Warehouse store (15,300sq m gross) was permitted in Swindon (28/10/05) where 1.5 acres was considered to be an acceptable minimum size for the search “as this is the size required to house the smallest element of the proposal” and an out of centre retail warehouse park at Haden Way in Birmingham was permitted as there were no sequentially preferable sites for the proposal as a whole “or when disaggregated into a number of constituent units” (14/2/06); flexibility was still said to be “a fundamental element of the sequential approach”.

But in permitting an out of centre DIY warehouse development in Tamworth (31/3/06) the Secretary of State said that he “agrees . . . that the individual retail elements of these proposals are not capable of meaningful disaggregation” accepting his inspector’s advice that “they . . . could not be broken down into finite retail sectors such as household, gardening, building materials etc in a town

centre location". And in permitting a Lidl in Merton (10/5/06) the Secretary of State said that there had been a "robust analysis of alternative sites" in circumstances in which the retailer had set out a requirement for a minimum store sales area of 1,063sq m net and a single storey retail operation with no disaggregation.

The change in atmosphere as the 10 year period drew near its end is illustrated well by the Secretary of State's decisions to permit an out of centre B&Q Warehouse store and a Wickes in Basingstoke (15/5/06) where she acknowledged that: "The scale and format of both 'business models' can be justified on commercial and planning policy grounds" and that both retailers had shown flexibility by providing "significantly less car parking places . . . than the maximum allowed by PPG13" (B&Q were 30 per cent below, Wickes, 35 per cent). It is hard not to put an exclamation mark after these conclusions in view of many of the earlier cases, although by this time the new (2005) PPS6 was in place.

Perhaps the high point of B&Q's fortunes came with the recognition in the Rochester decision (25/9/06) that "to develop many of the [sequential] sites would require the arbitrary sub-division of the applicant's proposed model. . . such sub-division would severely and . . . fatally dilute the qualitative benefits of the Warehouse model. . ." But it wasn't quite clear yet as in the following month the Secretary of State explained that she "considers that reliance on the 'Homebase Model' as not being appropriate for disaggregation is not in accordance with PPS6" (Sydenham, Lewisham, 19/10/06).

A few months later (14/3/07) however an out of centre retail warehouse park in Bromsgrove was permitted with an acknowledgment that "there are no separate elements which could easily be disaggregated . . . without compromising the principle of the scheme." A similar line was adopted in permitting an out of centre DIY retail warehouse in Bodmin (15/3/07) on the basis that "there is no scope for disaggregation. There are no elements of the proposal which could be successfully operated from separate sites." There was a momentary throwback to earlier strictures when the Secretary of State explained that she "does not accept that the format of such stores being well established or the floor area being typical are sufficient reasons to avoid a proper consideration of flexibility" however she permitted an out of centre Focus DIY store in Castle Morpeth (10/10/07) agreeing with her inspector that: "While some disaggregation would be possible, such as separating the garden centre, PPS6 does not expect unrealistic divisions."

The Costco Warehouse Club format appears to have received a consistently more benevolent approach: in permitting an out of centre proposal in Chingford (Waltham Forest: 15/3/01) the Secretary of State explained that he "accepts . . . that the particular nature of your client's business operation requires a store of the size proposed." The particular points concerned economies of scale, that the aisles should be wide enough for forklift trucks and that there would be a comprehensive range available, in bulk, under one roof, in a single trip. The same approach was adopted the following day in permitting an out of centre Costco in Oldham (16/3/01) and a few months later in granting permission at Shinfield (26/7/01). It survived to resurface in a decision to permit an out of centre Costco in Chester five years later (6/4/06) where it was concluded that "to provide low prices economies of scale are necessary" and that "the sequential approach has to be applied having regard to the requirement to accommodate a building of at least the size proposed" (sic 12,612sq m). It is hard, surely impossible, to square these decisions and especially the economies of scale/low prices point with many of the other decisions over the survey period, particularly some of the B&Q Warehouse store cases in which an almost evangelical approach to disaggregation was adopted.

**Scale—is my store too big for your town?**

The Secretary of State has taken the approach that where the scale of a proposal would lead to a centre elevating its status in the retail hierarchy this should be plan-led: see the Bracknell town centre decision (8/5/01). In the Tesco Hartcliffe (Bristol) decision (28/6/01) the Secretary of State expressed concern about “the problems associated with large superstores ‘piggybacking’ on local centres”, but the scheme was allowed for other (regeneration) reasons. However in the Tesco Lambeth decision (11/12/01) although the Secretary of State considered the proposed store to be out of scale with the neighbourhood/local centre in which it was located, he did not consider it to be “so out of proportion” as to justify refusing permission.

A year later (12/12/02) a 21,708sq m edge of centre Factory Outlet Centre was refused permission on the basis that it was not appropriate to the scale function and catchment of the adjacent Burntwood (Lichfield) centre which was considered to be a “smaller town centre and urban district centre”. In similar vein, an edge of centre Asda superstore was dismissed (24/9/03) on the basis of a “compelling objection” that its scale would not be appropriate to a town centre of the size and nature of Elland; the store, it was pointed out, would be six times larger than any other individual shop and would have added some 3,252sq m net retail floor space to a centre of some 4,136sq m. An out of centre proposal for a B&Q Warehouse in Kettering was dismissed (17/5/04) on the basis that it would be out of scale with Kettering and its catchment; increasing Kettering’s retail floorspace by around 10 per cent was said to be “a very significant increase”.

The main reason given by the Secretary of State for refusing an out of centre IKEA store in Stockport (2/8/04) was that at 28,000sq m gross its scale would have been too large for the sub-regional role of Stockport, it would have been better located in a regional centre such as South Manchester. A challenge to this decision failed; the High Court held in *IKEA Properties v First Secretary of State* [2005] EWHC 208 (Admin) that “the relevant catchment is that which the development would serve . . . It is that catchment which defines the area within which the sequential analysis must be applied.”

A short while later, the Secretary of State permitted an out of centre B&Q Warehouse store in Oldbury (24/11/04) as “proportionate” in scale to the town “despite the fact that the development would lead to an increase of 160 per cent in the existing floor area in Oldbury town centre.” An extension to Tesco Burnham-on-Sea was refused for being out of scale with the local centre (31/8/06). A Tesco superstore was found to be an inappropriate scale in relation to the adjacent neighbourhood centre but justified nonetheless on the basis of quantitative and qualitative need (Highams Park, Waltham Forest (11/6/07) the proposal was refused on design grounds).

**Has the interpretation and application of the sequential test been consistent and predictable?**

As with the need test, over the 10 years that I have reviewed it is fair to say that no-one can have been left in any doubt that the sequential test was seen by the Secretary of State as an important part of retail planning policy—retailers knew how much significance the Secretary of State attached to the issue. However, once again, the significance of the test surely means that those who were affected by it were entitled to expect a consistent interpretation and application by its author. The decisions do show a general trend, until towards the end of the period in question, of increasingly onerous demands concerning flexibility. This is particularly evident in the decisions which discussed disaggregation. However it was never really clear quite how far a retailer had to go in pursuing this theory—the decisions lurched around with various new sub-sets of the theory appearing and disappearing over time. So my verdict on the sequential test is similar to the view I expressed earlier

concerning the need test—we all knew it was there but the Secretary of State was far from consistent and predictable in its interpretation and application.

**Retail impact—the appearance and disappearance of a sustain and enhance test**

Factory Outlet Centres got off to a bad start with the Corby decision (27/1/98) in which an out of centre proposal was refused on the basis of absence of proven need, breach of the sequential test and unacceptable impact by virtue of failing to positively sustain and enhance the town centre. In other words, it was not sufficient that the proposal would not harm the vitality and viability of the town centre—it had to boost the centre as well—a difficult test for an out of centre proposal to meet.

The Secretary of State followed this approach in deciding to refuse permission for an out of centre retail warehouse development in Macclesfield (23/11/98) explaining that “the proposals do not accord with the clear thrust of PPG6 . . . that town centres should be enhanced”.

The idea that a retail proposal could be refused on the basis of lack of positive impact had a brief shelf-life in retail planning as the High Court held in the Hambleton case that PPG6 did not require enhancement to be shown.

A rare example of an out of centre proposal being found to meet the “positively enhance” test is the Tesco Redruth decision (3/12/98) in which the Secretary of State concluded that the out of centre store would bring about a substantial clawback of expenditure, which would lead to an increase in linked trip expenditure to the town centre which in turn would be greater than the trade that would be drawn from the town centre to the new store, so that there would be “an overall beneficial effect” on the vitality and viability of the town centre. (A similar approach was adopted in the decision to permit an edge of centre non-food scheme in Denton: 27/09/01.)

Harmful impact has been a straightforward test.

There is nothing much of note in the decisions concerning the test of avoiding harmful impact on the vitality and viability of centres.

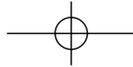
The use of company average (rather than predicted actual) turnovers in order to assess retail impact was considered to be “highly unusual” and wrong in the Chesterfield Asda decision (3/1/02).

Every now and again an approach crops up in a decision which is never repeated afterwards. Thus in deciding to permit an out of centre Asda superstore on the Old Kent Road in Southwark (20/9/00) the Secretary of State examined whether there would be harmful impact not only from trips to the new store but also from linked trips to nearby shops and services.

Deterring potential investment in centres constitutes harm.

In the Arbury Camp decision (South Cambridgeshire: 12/11/98) although it was concluded that there would not be material harm to the vitality and viability of the city centre, an unacceptable impact was found by virtue of the perceived effect that out of centre retail development would have on potential investment in the city centre.

The protective approach to guarding investment in centres manifested itself in the Secretary of State’s decision to refuse an application for an out of centre Tesco superstore in Hull (15/12/98) in which it was concluded against the proposal that the strategy for bringing forward a city centre site “could be delayed or put at risk” and the proposal “may delay or prejudice” it. It is interesting to note the formulation which did not involve a conclusion that prejudice would be likely but rather that it “could” or “may” be so.



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An out of centre Matalan in Corby (18/4/02) was refused permission with the Secretary of State agreeing with his inspector's comment that the proposal would "do nothing to improve retailers' and investors' confidence" in what was described as a "fragile" town centre. An out of centre Lidl in Newhaven was refused (22/3/05) as its approval "would constitute a major psychological blow to confidence in what is currently a fragile town centre".

**Has the interpretation and application of the retail impact test been consistent and predictable?**

I consider that the Secretary of State has been both consistent and predictable in the interpretation and application of the retail impact test over the 10 years in question. There is little of note in the decisions because this is a well understood area of retail planning—the test has been in place in some shape or form for decades. I suspect that things would have been different had an enhancement test been maintained.

**What is the role of regeneration benefits in retail planning?**

Arguments that a retail proposal would bring regeneration benefits have had mixed fortunes over the 10 years of my review. The argument has been successful in a good many cases but has failed to win the day in several others. There were attempts to argue that regeneration benefits could qualify as a category of retail need but eventually (in the April 2003 McNulty Statement) the Secretary of State made it clear that this is not so and that the proper analysis is that regeneration benefits constitute a material consideration which might add weight to the case for granting permission, and in some circumstances might outweigh concerns that otherwise would have pointed to a refusal.

A fairly early example of this "weighty consideration" approach was seen in the Secretary of State's decision (contrary to his inspector's recommendation) to grant permission for a mixed use scheme which included a Factory Outlet Centre on an out of centre site in Seaham (30/1/00) in which the regenerative benefits of the scheme were held to outweigh concerns about a possible adverse retail impact on the town centre. The Secretary of State explained that the primary considerations "are the exceptional economic and social characteristics of East Durham . . . and the extent to which the proposal is consistent with the government's commitment to regenerating the coalfields. . ." He continued that "in recognition of the unique history and circumstances of mining communities", "a more pragmatic approach to planning is required. . ."

On the other hand, later that year (8/5/00) the Secretary of State agreed with his inspector who had characterised the role of an out of centre retail development in securing an appropriate use for a complex of listed buildings in a mixed use scheme including the Fire Services National Museum in Daventry as a "real need".

In the Asda Old Kent Road (Southwark) decision (20/9/00) the Secretary of State concluded that shortcomings in the sequential assessment and his concerns about whether the scale of the proposed out of centre store was justified were outweighed by the "considerable regeneration benefits" in an area "badly in need of regeneration".

The "weighty consideration" approach surfaced again in the Secretary of State's decision to permit an out of centre mixed use scheme, including a B&Q Warehouse (and a mosque—a unique combination?) on the Alcad site in Redditch (7/11/00). He gave "much weight" to the "boon" of decontaminating a "daunting" site. A similar approach, in which the regeneration benefits of funding the high cost of decontaminating a site outweighed policy objections led the Secretary of



State to grant permission for an out of centre B&Q Warehouse store in Gloucester (7/10/03). Just as decontaminating an ex-gas works site had tipped the balance in favour of permission for an out of centre non-food scheme in Bell Green (Lewisham: 29/1/03). The Secretary of State was not wholly convinced by IKEA's sequential assessment in the Edmonton (Enfield 26/11/03) decision but concluded that this was outweighed by the remediation of a heavily contaminated site.

Providing a new college building was held to counter-balance an acknowledged lack of capacity for the convenience element of an edge of centre Asda superstore in Stevenage (23/11/00). (Regeneration was considered to be a need "of another sort".) In a similar fashion, an edge of centre Asda superstore was permitted in Bishop Auckland (12/2/02) despite a "modest element" of need because of the "major factor" that a site which was considered to be "a major blight upon the image of the town" would be regenerated.

The regeneration of Springfield Gardens (Spalding 12/2/01) as a tourist facility and as a centre for promoting the British bulb and cut flower industry was considered to be a "compelling need" such as to justify an out of centre Factory Outlet Centre which would provide cross-subsidy funds.

An out of centre retail warehouse park was permitted in Stoke on Trent (8/3/04) despite a failure to fully consider disaggregation with the Secretary of State deciding that this was outweighed by the regeneration benefits of bringing about an "environmental uplift in an important gateway location" which was a rundown "red light" area. (A unique balancing exercise in these decisions!)

Lidl obtained permission for a store in Binley (Coventry 26/7/06) by securing the future of a local company despite their retail case being described as "weak", "unconvincing" and "seriously flawed".

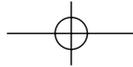
Perhaps the clearest example of regeneration considerations being decisive is the Tesco Warrington decision (19/12/01) in which an out of centre store that the Secretary of State said in terms "could not be justified and would have been refused" was permitted because it would cross-subsidise a new stadium for the Warrington Wolves Rugby League Club. Their continued Super League status depended upon the new stadium which was not otherwise financially viable. A similar approach won the day for an out of centre retail warehouse park in Salford that was permitted because of the regeneration benefits of providing a stadium for the Salford City Reds to retain their place in the Super League (2/11/06).

#### **Has the approach to regeneration benefits been consistent and predictable?**

By and large I would say that there has been a consistent approach in the decisions of regarding regeneration benefits as material considerations which might, depending on the circumstances of the case in hand, outweigh other considerations that point against permitting a proposal. As for predictability, the decisions which have had to grapple with regeneration issues are classic examples of planning judgments in which various competing considerations are weighed in the balance before an overall conclusion is reached. In other words, it isn't really possible to predict the outcome in any given case but that is inherent in an exercise of judgment involving weight and balance.

#### **What is the role of a "fallback" planning permission in retail planning?**

Every now and again a proposal is put forward on the basis that its effects would be better (usually in the sense of less harmful) than the implementation of an extant planning permission on the site. The argument usually runs that the applicant would be prepared to give up the fallback permission if a new permission is granted. Plainly, the existence of a fallback permission is a material consideration



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and the more likely it is to be implemented in the absence of the new permission which is being sought, the greater the weight that should be given to it.

In some cases, a fallback permission has proven to be decisive in tipping the scales in favour of a proposal that otherwise would not have been permitted.

Trading in a fallback permission (and closing an existing store) was decisive to overcome an absence of proven need for an out of centre Tesco superstore near Scunthorpe (5/3/01). An edge of centre Asda superstore in Leicester would have been refused for breach of the need, sequential and retail impact tests but for the fallback permission which the Secretary of State considered would have caused more harm (10/12/01). An out of centre non-food retail warehouse development in Chichester (30/5/02) would have been refused but trading in a fallback permission for a larger amount of floorspace was considered to “tip the balance”. A similar approach won the day for an out of centre B&Q Warehouse store in Stoke-on-Trent (20/1/05) where the fallback permission had “more relaxed” conditions which would have allowed town centre retailers such as Boots and WHSmiths to trade.

In some other cases, it has proven to be a useful rather than decisive element in the weighing scales in favour of granting the new permission. (For example, the Tesco extension in Ponders End permitted by the Secretary of State (22/8/00).

### **Has the approach to fallback permissions been consistent and predictable?**

The approach to fallback permissions has been consistent throughout, treating them as material considerations which might, depending on the circumstances of the case in hand, outweigh other considerations that point against permitting a proposal. Just as with weighing regeneration benefits in the balance, the weight given to a fallback permission must be a matter of planning judgment and so it should not be possible to predict the outcome in any given case. That said, in those cases where there has been a realistic fallback position which would cause more harm than the proposal, the Secretary of State has tended to give it decisive weight so as to justify granting permission for the (less harmful) proposal. This seems inherently sensible.

### **So has retail planning delivered the goods?**

My overall conclusion is that the Secretary of State’s decisions over the last 10 years in dealing with retail planning cases have been consistent, and as predictable as matters of planning judgment can be, by and large in dealing with the test of retail impact, regeneration benefits and “fallback” planning permissions but inconsistent and unpredictable in dealing with quite what comprises quantitative and qualitative need, and never clear and consistent about how far a retailer was expected to go in order to satisfy the theory of disaggregation.

My own personal view drawn from reading nearly two hundred decisions and accompanying inspectors’ reports issued over the last 10 years is that the lack of consistency and predictability in relation to aspects of the need test is due to the test being, to use the current Secretary of State’s word, “dysfunctional” in the first place. Perhaps the lack of clarity concerning the theory of disaggregation is due to a similar reason.

