

Case Name: *Asda Stores Ltd, R (On the Application Of) v Leeds City Council & Anor* [2021] EWCA Civ 32 (20 January 2021)

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Commentary:

Sir Keith Lindblom, Senior President of Tribunals, along with Lord Justice Coulson and Lord Justice Males dismissed an appeal by Asda Stores Limited ("Asda") against the order of Lieven J by which she dismissed its claim for judicial review challenging the decision of the first respondent, Leeds City Council, to grant planning permission on an application made by the second respondent, Commercial Development Projects Ltd, for the redevelopment of a site of some six hectares at the former Benyon Centre on the Middleton Ring Road in Leeds. The proposal was to construct "a mixed use retail-led development comprising retail (use classes A1, A2, A3 and A5), leisure (use class D2), non-residential institutions (use class D1) and book makers (sui generis) with associated access, parking and landscaping". Asda owns and operates a large retail store on land next to the application site, to the south, and it objected to the proposal.

The central question in the appeal was whether Leeds City Council had erred in law when granting planning permission for the large "mixed-use retail-led" development, because it misinterpreted and misapplied the Government's policy for retail development in paragraph 90 of the NPPF.

Under the heading "Ensuring the vitality of town centres" in chapter 7 of the NPPF, paragraphs 89 and 90 state:

"89. When assessing applications for retail and leisure development outside town centres, which are not in accordance with an up-to-date plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floorspace threshold (if there is no locally set threshold, the default threshold is 2,500m² of gross floorspace). This should include assessment of:

- a) ...
- b) the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and the wider retail catchment (as applicable to the scale and nature of the scheme).

90. Where an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the considerations in paragraph 89, it should be refused."

During meetings of the South and West Plans Panel ("the Panel") on this application and included in the officer's report was the acknowledgement that the application would have "a significant adverse impact on Middleton Town Centre. Therefore in accordance with para 89 of the NPPF and P8 of the Core Strategy, it is recommended that the application should be refused on retail impact grounds. It is not considered the benefits of the scheme in terms of

economic investment outweighs the harm". However, the Panel eventually resolved to approve the application, based on the benefits of the scheme.

Lieven J rejected Asda's JR claim and emphasised that the NPPF must be "read as a whole". Paul Tucker QC submitted, on behalf of Asda in this appeal, that the judge's interpretation of paragraph 90 of the NPPF was wrong, as a matter of law. He stated that in circumstances where it was accepted that the proposed development would have a "significant adverse impact" on the vitality and viability of the town centre, the clear wording of paragraph 90 – "should be refused" – creates a policy presumption or expectation that planning permission will be refused.

It was held that it is plain from the officer's reports and the minutes of the meetings at which the Panel considered the application that the members made their decision conscious of the terms of paragraph 90 and aware that the decision was contrary to national planning policy in that paragraph. Indeed, this conflict with the paragraph 90 policy was at the heart of the Panel's discussion of the planning merits. The decision was one of balance. No policies in the NPPF or development plan were misinterpreted nor unlawfully applied. The Leeds City Council's South and West Plans Panel reached an entirely lawful decision on the proposal before it, and therefore this appeal was dismissed.

Case summary prepared by Amy Fender