

Case Name: *Lidl Great Britain Ltd v East Lindsey District Council* [2024] EWHC 1641 (Admin) (02 July 2024)

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Commentary: This was a successful challenge by Lidl Great Britain Limited (the “Claimant”) of the decision by East Lindsey District Council (the “Defendant”) to grant planning permission to Aldi Stores Limited (the “Interested Party”) for development of a new retail foodstore and associated development at Boston Road, Horncastle (the “Site”) on 4 November 2022 (the “Decision”).

The case considered the issue of cumulative impact as a material consideration in the determination of planning applications.

Facts

The Claimant and the Interested Party are both supermarket operators trading in a discounter style who each applied for planning permission for a new supermarket on parcels of land outside of the town centre but within the settlement of Horncastle. The Defendant’s planning officers indicated an intention to consider both applications together.

As required by both national and local policy due to the size of both proposed schemes, the Defendant appointed specialist retail consultants to review the retail analyses submitted by the Claimant and the Interested Party as part of their planning applications. The Interested Party’s proposed scheme was considered to have a greater adverse impact on town centre trading than the Claimant’s proposed scheme, however it was not considered that this impact would be significant adverse, and so the impact test would be passed. When considered cumulatively, however, a significant adverse impact was anticipated if both proposed schemes were to come forward.

An addendum to the retail analysis was requested by the Defendant’s planning officer comparing the Claimant’s reduced scheme against the Interested Party’s proposed scheme. Despite the Defendant’s indication that the applications would be considered together, the Defendant’s planning officer did not have the addendum in time to finalise the report to committee and only the Interested Party’s application was considered at the Defendant’s Planning Committee meeting of 3 November 2022. Planning permission was granted the following day.

Submissions

The Claimant submitted that the two proposed schemes amounted to competing proposals for what was in effect one planning permission for new convenience retail floorspace in Horncastle and that the comparative merits of the schemes became an

obviously material consideration in their determination. The officer's addendum report accepted that alternative schemes needed to be considered together in the case of rival sites for the same need and the Defendant therefore failed to have regard to an obviously material consideration when making the Decision.

The Defendant, however, submitted that there was no obligation to take account of alternatives and that the Decision had been made because the Interested Party's proposed scheme did not cause planning harm. Cumulative harm had been considered, but was given little weight by the Defendant's planning officers, a decision which the Defendant was entitled to make. The Defendant was unable to undertake a comparison of the two schemes as the Claimant's application was not ready to be considered by the Defendant.

The Interested Party submitted that there was no special category of cases concerning rivals, and further that the part of retail policy which was concerned with alternatives was the sequential test. The finding that there were no sequentially better sites than the Interested Party's scheme was not challenged and therefore it was not appropriate to impose a requirement to consider alternatives.

Discussion

Dan Kolinsky KC, sitting as a Deputy Judge of the High Court, considered that to conclude that there would be no planning harm caused by the Interested Party's scheme would not be a fair reading of the officer's reports which otherwise accepted the retail consultants' analysis that there would be some adverse, albeit not significant, impact.

The Deputy Judge also considered that the Defendant's approach of determining the applications separately and attributing little weight to the cumulative impact when making the Decision meant that the Interested Party's application would be considered on a more favourable basis, despite the Defendant having the information it required to carry out a comparison of the schemes, save for the additional retail impact analysis which would only provide a further refinement of information the Defendant already had.

Conclusion

The Deputy Judge concluded that this case did consider two applications competing for one planning permission, due to the fact that the addition of more than one store would cause significant harm to the town centre, and that there would be a disadvantage created by the Interested Party's proposed scheme.

The Defendant was required to consider the competing merits of the two schemes, but

failed to do so properly by considering the applications separately.

This amounted to a mandatory material consideration as the need for a comparison was “so obviously material” and the Defendant acted unlawfully by omitting such a comparison.

The claim therefore succeeded on its first ground and the Decision was quashed.

Case summary prepared by Sophie Bell