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Case No: C1/2013/1839

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
(MR JUSTICE TURNER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 2 April 2014

B E F O R E:

LORD JUSTICE SULLIVAN
LORD JUSTICE KITCHIN
LORD JUSTICE FLOYD

(1)BOROUGH OF TELFORD & WREKIN (2) ST MODWEN DEVELOPMENTS

Claimant

-v-

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL
GOVERNMENT

Respondent

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Dove QC & Mr S Choongh (instructed by Wragge & Co) appeared on behalf of the
Claimant Council

Mr Kingston QC (instructed by Wragge & Co) appeared on behalf of the Claimant St
Modwen

Mr J Moffett (instructed by Treasury Solicitors) appeared on behalf of the Respondent

Mr D Kolinsky (instructed by Richard Max & Co) appeared on behalf of the Interested Party

J U D G M E N T
(As approved by the court)

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LORD JUSTICE SULLIVAN:

Introduction.

1. This is an appeal against an order dated 14 June 2013 of Turner J dismissing the appellant's application under section 288 of the Town and Country Planning Act 1990 to quash the decision of the Inspector appointed by the respondent allowing the interested party's appeal against the first appellant's failure to determine the interested party's application for planning permission for the demolition of existing buildings and structures and erection of a new food store on land at Audley Avenue, Newport ("Audley Avenue"). The legal, factual and policy background to the appeal is set out in some detail in Turner J's judgment [2013] EWHC 1638 (Admin).

The Inspector's Decision.

2. The Inspector's decision is dated 2 August 2012. By the time of the inquiry in May 2012 the first appellant ("the Council") had resolved that if it had been in a position to do so it would have refused planning permission for Audley Avenue because there was a sequentially preferable site for a new food store in Newport. That sequentially preferable site was a greenfield site on the western side of Station Road owned by the Council ("Station Road").
3. The second appellant ("St Modwen") is involved in the promotion of Station Road. By the time of the inquiry the Council had resolved to grant planning permission for a new food store at Station Road and a decision was awaited from the Secretary of State as to whether he would call in the application for planning permission.
4. The Inspector noted in her decision that on 15 June 2012, following the close of the inquiry, the Secretary of State had decided to call in the Station Road application. That application remains undetermined by the Secretary of State.
5. The Inspector said in paragraph 17 of her decision that the National Planning Policy Framework ("the Framework"):

"Endorses a clear town centre first approach and emphasises that proposals for retail uses elsewhere should be considered in terms of the sequential test and an impact assessment."
6. In paragraph 18 the Inspector said:

"From the evidence I am satisfied that there are no suitable available or viable alternative sites within the town centre or on its edge that would accommodate a superstore of the type proposed."
7. Two sites close to the town centre had been referred to by objectors at the inquiry but the Inspector concluded that neither of those sites would be suitable, so she turned to consider the out of centre sites, saying in paragraph 19:

"The Framework says that when considering out of centre proposals preference should be given to accessible sites that are well connected to the town centre. This is also the advice in the PG..."

8. The Inspector had previously noted that while Planning Policy Statement 4 had been revoked the Practice Guidance ("PG") was still at that time in force. We were told that it has recently been replaced.

9. In paragraph 20 the Inspector referred again to the PG and to the advice in paragraph 24 of the framework:

"When considering edge of centre and out of centre proposals, preference should be given to accessible sites that are well connected to the town centre."

10. She summarised the test that she proposed to apply in the final sentence of paragraph 20 of her decision:

"There would thus be a sequential advantage if one out of centre site could achieve better town centre linkages than the other."

11. Between paragraphs 21 to 27 the Inspector considered the viability, availability and suitability of Station Road. There was no issue as to its viability. As far as availability was concerned, the Inspector noted that the site was subject to a village green application and that a footpath would have to be diverted and that the Secretary of State would be determining the planning application. Drawing those threads together, she said in the final sentence of paragraph 22:

"As matters stand, these factors impact negatively on the confidence that can be ascribed to the availability of the Station Road site."

12. When dealing with the suitability of Station Road, the Inspector noted the objective in the core strategy to prioritise the use of previously developed land and said in paragraph 23 that:

"The greenfield nature of the Station Road land counts against it in the face of an alternative brownfield opportunity at the appeal site."

13. Local Plan Policy OL6 states that:

"Throughout the district, the Council will protect from development locally important incidental open land within or adjacent to built up areas where that land contributes to the character and amenity of the area, has value as a recreational space or importance as a natural habitat."

14. In paragraph 25 of the decision the Inspector said that there was considerable debate at the inquiry as to whether Station Road was "locally important incidental open land" falling within policy OL6. Having referred to the definition of "open space" in the Framework, she said that the distinction between open space and open land was rather an academic one in the context of the cases before her and added:

"Paragraph 74 of the framework indicates that such land should not be built upon unless inter alia an assessment has been undertaken which has

clearly shown them to be surplus to requirements. The only assessment was that undertaken in 2008 and this identified the shortfall referred to above [in paragraph 24 of the decision]."

15. In paragraph 26 the Inspector referred to the evidence of local people that Station Road was greatly valued as an informal recreational resource. In paragraph 27 the Inspector's conclusion as to the suitability of Station Road was as follows:

"Whilst policy CS6 envisages growth to meet the local needs of the town there is no up to date spacial plan which shows how the competing land uses, including open space, are to be accommodated. The land to the south of the settlement was not one of the sites referred to by the core strategy inspectors as potential greenfield land releases. On the other hand saved policy OL6 seems directly applicable. In the circumstances it seems to me that there is doubt about the suitability of the Station Road site for a food store development in terms of the development plan policy..."

16. Having dealt with the availability and suitability of Station Road the Inspector said in the first sentence of paragraph 28 of her decision:

17. "I turn now to consider the issue of town centre linkages."

18. Having considered the two access routes to the Primary Shopping Frontage ("PSO"), the extent of claw back, the walking distances for shoppers and the availability of car parking in Newport the Inspector concluded in paragraph 30:

"It is much more likely that the shopper would drive from the store to the town centre either as part of the same outing or on another occasion. I therefore consider that in this case the proclivity for linked walking trips from either site would not be significant."

19. The Inspector considered that the two offers in respect of bus services would be broadly similar (paragraph 31), and that linked trips by bicycle would not be an attractive offer for most shoppers (paragraph 32). She therefore concluded in paragraph 32:

"In the circumstances I do not believe that Station Road offers any material advantage in terms of the potential to generate non-car based linked trips with the town centre."

20. In paragraphs 33 to 36 the Inspector dealt with another site considered at the inquiry, Mere Park Garden Centre, an out of centre location that was slightly closer to the PSF than the appeal site and benefited from a regular bus service to the town centre. However, the Inspector concluded in paragraph 36:

"On the basis of the available information I do not consider that Mere Park Garden Centre would be suitable to accommodate the proposed development."

21. In paragraph 37 the Inspector considered "other sites". She rejected one on the basis that there was no evidence that it was available and two others on the basis that there was:

"No evidence that they would be available, suitable or viable for a food store development."

22. The Inspector dealt with retail impact, both sole and cumulative, and noted in paragraph 46 that:

"The Council's retail expert made clear that if planning permission were to be granted for the appeal scheme his advice to be Council would be that it should no longer support a food store at Station Road... the Council has said in terms that only one planning permission for a food store can be granted..."

23. Under the heading "accessibility" the Inspector said in paragraphs 47 and 48:

"47. The Council's second putative reason for refusal relates to accessibility. It was argued by the Council and St Modwen that the Station Road site was more accessible and therefore to be preferred. It was also argued that in any event the appeal site performed so poorly in this respect that even if there were no sequentially favourable site the proposal should fall on this ground alone. It is the case that the appeal site is in a less prominent location than Station Road, which is on one of the main thoroughfares into the town. Due to the bus gate car drivers cannot drive into the town along Audley Avenue but have to travel round the by pass and in along Station Road. It was estimated that this would add about 1.5 minutes on to the journey in comparison with Station Road. However Newport is only a small town and the route is not complicated. The strategy in the RS and CS is to make Newport more self sufficient and meet the local needs of the town and its hinterland. The food store is thus not seeking to draw customers from far afield and it is a reasonable assumption that local people will know the geography of their town. In the circumstances I do not believe that the location of the appeal site is likely to put people off combining a trip to the food store with a visit to the town centre by car.

48. A large proportion of the turnover of the new food store would be supported by expenditure currently flowing out of the catchment. This would mean that people would be able to undertake their convenience shopping locally and so it is expected that journey distance savings would ensue resulting in a reduction in CO2 emissions. There is no dispute that such savings would be considerable which ever location was chosen. However this sort of calculation is inevitably a broad brush exercise and is based on a number of assumptions, including where customers come from and the routes they will take. The evidence suggests that the Station Road proposal would result in greater journey distance savings

due to its location relative to where people live and its closer proximity to the town centre for linked trips by car. It would also probably have an advantage due to its greater turnover and thus its ability to attract more trips."

24. In her overall conclusions the Inspector said in paragraph 63:

"The appeal proposal would be of sufficient size... but it is in an out of centre location. There are no suitable sites for such a food store either in the town centre or on its edge. Whilst Mere Park Garden Centre has an unlimited retail use this is by virtue of a LDC. It is not considered that it is a realistic sequential alternative. Nevertheless there is a potential opportunity in Station Road where a planning application has been made for a Sainsbury's superstore. Whilst this is some 500 metres closer to the town centre it is out of centre and for all the reasons given I have concluded that is not sequentially superior."

25. It should also be noted that in paragraph 66 the Inspector said that it should be recognised:

"That car travel is likely to be the predominant mode of choice for those using an out of centre superstore either at Audley Avenue or at Station Road for their main food shop."

26. There was agreement as to what local highway improvements would be required if the appeal proposal was to be permitted, but the Highway Authority had requested a contribution to strategic highway works which the Inspector considered in paragraph 60 of the decision:

"The Highways Contribution relates to off site strategic highways works. These include improvements to the capacity of the A41 in accordance with a scheme that has been commissioned by the Council and costed on the basis of pooled contributions from a number of major development schemes potentially coming forward. The problem is that it is not known whether these schemes will all be approved or in what timescale. It is appreciated that there is a 10-year period after which the contribution would have to be paid back with interest. However there is little certainty that these works will be carried out expeditiously or that the contribution would be proportionate if all of the anticipated developments do not come on stream. Indeed the projects include both the appeal proposal and the Station Road scheme and for the reasons already given it seems very unlikely that both would come forward. In the circumstances I cannot conclude that the contribution is CIL [Community Infrastructure Levy] compliant and it cannot therefore constitute a reason for granting planning permission."

The Judgment Below.

27. Before the Judge the Inspector's decision was challenged on a number of grounds: she had failed properly to apply the sequential test; had failed properly to consider the issue of accessibility; had not given sufficient reasons for concluding that the strategic highways contribution was CIL compliant; had wrongly had regard to the core strategy's preference for the development of previously developed land over greenfield land and had misinterpreted core strategy CS7 and local planning policy OL6. The Judge considered and rejected all of those criticisms of the decision in a thorough and careful judgment.
28. Although there are no less than ten grounds of appeal against the judge's approach to the Inspector conclusions in respect of the sequential test, I do not consider that it would be helpful to analyse the judgment in any detail. The criticisms of the judgment in the appellant's written skeleton argument were somewhat repetitious, and I did not find it altogether easy to disentangle from the many criticisms of the judge's reasoning just what legal errors it was being said on behalf of the appellants that the Inspector had made in her decision. It must be remembered that the appellant's appeal is against the Judge's order declining to quash the Inspector's decision. The question for us, therefore, in this appeal is what was the error of law in the Inspector's decision.

The Appellant's Challenge to the Inspector's Decision.

29. Mr Kingston QC who appeared on behalf of St Modwen (whose submissions on the sequential test were adopted by Mr Dove QC on behalf of the Council) hopefully grouped the grounds of appeal under the following heads. He submitted that the Inspector had erred in law in the following respects. One, she had taken her conclusion as to the suitability and availability of Station Road into account in reaching her conclusion in paragraph 63 of the decision that it was not sequentially superior to Audley Avenue. Two, her conclusions as to the availability and suitability of Station Road were erroneous in a number of detailed respects. Three, in any event, the Inspector had erred in concluding that Station Road was not sequentially superior because (a) whilst she had taken into account the potential to generate non-car based trips to the town centre she had failed to take into account the potential for linked trips by car to the town centre when considering the sequential test, and (b) even if she did consider the potential for linked trips by car to the town centre she had failed to apply the proper test and considered whether the location of Audley Avenue would put people off combining a trip to the food store with a visit to the town centre by car rather than answering the question at which of the two sites, Station Road or Audley Avenue, was there a "higher likelihood of forming links with the town centre" in accordance with the guidance contained in paragraph 6.8 of the PG.
30. Mr Dove submitted that there were two grounds on which the Inspector's approach to the contribution to strategic off site highway improvements was challenged, one substantive and one procedural. At the heart of the substantive challenge was the proposition that it was common ground at the inquiry that the appeal proposal at Audley Avenue was unacceptable in the absence of a contribution to strategic highway improvements. Thus, even if the Inspector was entitled to conclude that the suggested contribution could not be imposed because it was not CIL compliant, she should have refused planning permission. If she had concluded that the appeal proposal was

acceptable without any contribution to strategic highway improvements, then she should have said so and given intelligible reasons for her conclusion to that effect.

31. Even if the Inspector had been entitled to conclude that planning permission should be granted without any contribution to the strategic off site highway improvements, Mr Dove submitted that she should as a matter of procedural fairness first given the Council an opportunity to respond to her concern that the contribution could not properly be based upon the impact of all of the major development schemes in the pipeline and asked the Council if it wished to contend for a contribution to strategic off site highway improvements on any different basis, for example on the basis that only some but not all of the major developments would come forward within a reasonable time. I will deal with these criticisms of the Inspector's decision in turn.
32. The Sequential Test.
33. In support of his submission that the Inspector had considered the availability and suitability of Station Road when reaching her conclusion that it was not sequentially superior to Audley Avenue, Mr Kingston relied on the fact that the Inspector had said in the final sentence of paragraph 63 of the decision that she had reached her conclusion that it was not sequentially superior "for all of the reasons given." He submitted that on a straightforward reading of the decision those reasons must have included the reasons given earlier in paragraphs 22 to 27 as to availability and suitability. He drew our attention to the fact that those paragraphs appear in the decision under the sub-heading "Land at Station Road", which is one of three sub-headings under a major heading "The Sequential Test." The other two sub-headings within that major heading are "The Mere Park Garden centre" and "Other Sites".
34. I do not accept this submission. Mr Kingston's reliance on the words "for all of the reasons given" in paragraph 63 of the decision plucks those words out of context and takes insufficient account of the need to read the decision as a whole. If that is done it is plain, in my judgment, that "all of the reasons given" is a reference to the reasons the Inspector has given in respect of sequential advantage and is not a reference to the reasons that she has given in respect of other matters, including the availability and suitability of Station Road. The appellant's submission, based upon the headings and sub-headings in the decision, elevates form over substance.
35. The Inspector began her analysis of the sequential test with the conclusion that there were no suitable, available and viable town centre or edge of centre sites. She therefore considered what the Framework and the PG had to say about out of centre proposals and concluded in paragraph 20 that there would be a sequential advantage if one out of centre site could achieve better out of centre linkages than the other.
36. Having dealt with the viability (as to which there was no issue) availability and suitability of Station Road the Inspector then turned in paragraph 28 to consider the issue of town centre linkages. Since she had previously defined sequential advantage in terms of whether one of the two out of centre sites could achieve better town centre linkages it would not be a fair reading of the decision to conclude that she then

proceeded to ignore her own definition and incorporate questions of availability and suitability into her assessment of sequential advantage.

37. It is to be noted that when the Inspector did conclude that an alternative site was not available or not suitable, she said so in express terms and did not, because she had no need to, consider whether that site was sequentially superior. Thus, in respect of the two town centre sites to which reference was made at the inquiry, she said:

"It was difficult to see how either site would be suitable in terms of its configuration and size." See paragraph 18 of the decision.

38. In paragraph 36 of the decision she rejected Mere Park Garden Centre on the basis that it was not suitable and in paragraph 37 she said that in respect of the two other sites that were mentioned, that there was no evidence that they were available, suitable or viable.
39. In this context there can be little doubt that if the Inspector had considered that Station Road was not available or was not suitable she would have said so. The position becomes even more plain if paragraph 63 is read as a whole. Having repeated her conclusion that there were no suitable sites, either in the town centre or on its edge, the Inspector considered Mere Park Garden Centre and expressly rejected it as "a realistic sequential alternative." This contrasts with her approach to Station Road. Because it was a "potential opportunity"(ie it was potentially both available and suitable, unlike the other sites mentioned earlier in the paragraph), the Inspector had to consider whether it was sequentially superior. There is no reason to believe that when deciding whether Station Road was sequentially superior the Inspector cast aside her earlier definition of sequential advantage, in terms of better town centre linkages, and substituted some other definition incorporating availability and suitability.
40. Mr Kingston submitted that if the Inspector had not taken availability and suitability into account in reaching her conclusion that Station Road was not sequentially superior, then she could simply have stated her conclusion that it was not sequentially superior and it would have been unnecessary for her to have considered the issues of viability, availability and suitability in respect of Station Road. If that site was not sequentially superior, then those factors would have been irrelevant.
41. As a strict legal analysis, with the benefit of hindsight as to what the Inspector's eventual conclusions on all of the issues were raised at the inquiry, that is true. But it fails to reflect the reality of writing a decision after a ten day inquiry at which the rival merits of Station Road and Audley Avenue were hotly contested. Once she had reached the conclusion that Station Road was not sequentially superior the Inspector could have said that the lengthy discussion at the inquiry of its suitability and availability was irrelevant, but it is not in the least surprising, and it certainly does not amount to any error of law on her part, that having heard all of the evidence and submissions on those matters the Inspector should have set out in the decision her response to them.

42. The fact that she did respond, for example to the "considerable debate at the inquiry as to whether policy OL6 applied to Station Road" does not mean that she took that issue into account when deciding whether Station Road was sequentially superior.
43. Save for Mr Kingston's point about the headings and sub-headings in the decision, the Inspector's reasoning consistently distinguishes between considerations of availability and suitability and the question of sequential advantage, which the Inspector had defined in terms of town centre linkages.
44. It is therefore strictly unnecessary for us to consider the appellant's criticisms of the Inspector's conclusions as to the availability and suitability of Station Road because in my judgment they played no part in her conclusion that it was not sequentially superior to Audley Avenue. However, for the sake of completeness and having heard the submissions I will briefly explain why I do not in any event accept that there was any error of law in the Inspector's conclusions in this respect. Before the Judge the Inspector's reasoning was criticised on the basis this her conclusions were unintelligible because she had failed to reach any clear conclusion as to whether Station Road was or was not available and suitable. It is true that the Inspector's conclusions in paragraphs 22 and 27 of the decision are expressed in tentative terms. But, as the Judge pointed out, the Inspector was not required to reach definitive conclusions as to Station Road's availability and suitability if she was not satisfied that it was a sequentially superior site. She was entitled to consider the question of sequential superiority on the basis that Station Road was a potential opportunity. Only if she had come to the conclusion that this potential opportunity was sequentially superior would she have had to reach firm conclusions as to the extent to which that potential was a reality in terms of the availability and suitability of Station Road.
45. In terms of availability the Inspector reached no clear conclusion as to whether Station Road would be available within a reasonable time, but the Inspector realised that the practice guidance referred to availability within a period of time. She accepted that while it was likely that all of the unresolved issues -- the village green application and the footpath diversion in the Secretary of State's decision -- would be resolved within the next year or two, she noted that the last two of those issues were outside the Council's control. In these circumstances her modest reservation as to the availability of the Station Road site -- that as matters stood, the three unresolved issues impacted negatively on the confidence that could be ascribed to its availability -- was one to which she was entitled to come as a matter of planning judgment.
46. Before the Judge it was further submitted that there was an error of law in the decision because the Inspector had failed to mention the fact that the Council had received advice from a QC that the village green application could be successfully resisted and that the Council's public rights of way officer had given evidence to the officer that he saw no difficulty with the footpath diversion. That submission was rejected by the Judge. It has been repeated before us. I have no reservation in rejecting it.
47. The Inspector was not bound to record in her decision every detail of the evidence that she was given over a ten day inquiry. There is nothing to suggest that she did not have regard to this evidence when reaching the conclusion that it seemed likely that all of the

outstanding issues would be resolved within a year or two. However eminent the QC giving the advice, and however experienced the public rights of way officer, the Inspector was entitled to reach her tentative conclusion, which was to the effect, not that a bird in the hand is worth two in the bush, but merely that one's confidence in the availability of a bird is somewhat less if the bird is in a bush than if the bird is safely in one's hand.

48. Then it was said that the Inspector erred in concluding in paragraph 23 that the greenfield nature of Station Road counted against it in the face of an alternative brownfield opportunity at Audley Avenue. This submission is somewhat surprising, because the Council in its closing submissions at the inquiry had accepted that the fact that Station Road was a greenfield site was relevant to the question of suitability but had argued that for various reasons only limited weight should be attributed to this factor. The weight to be attributed to this factor was, of course, a matter for the Inspector's planning judgment.
49. There is no dispute that one of the objectives in the core strategy was to prioritise the use of previously developed land. It was submitted on behalf of the Council at the inquiry that less weight should be given to this development plan policy because the Framework did not incorporate previous central government policy guidance to the effect that a sequential approach should be adopted when considering the rival merits of greenfield and brownfield sites. Instead the Framework in paragraph 17 says that one of the 12 core planning principles is:

"to encourage the effective use of land by reusing land that has been previously developed (brownfield land)..."
50. Mr Kingston submitted that in paragraph 23 of the decision letter the Inspector had wrongly applied a sequential approach. She was entitled to conclude that Audley Avenue's brownfield nature was an advantage but she was not entitled to conclude that the greenfield nature of Station Road counted against it.
51. In my judgment that submission constructs a legalistic Aunt Sally. If the Inspector had applied the sequential approach to the greenfield/brownfield issue she would have decided not simply that this was factor that counted against Station Road but that Station Road was unsuitable. Given that there were only two out of centre sites that were realistic alternatives, a factor that would be in favour of one of them would in practice tend to count against the other and vice-versa.
52. Lastly it was submitted that the Inspector had erred in concluding in paragraph 27 that policy OL6 was applicable, because the Inspector had not reached any conclusion as to whether Station Road was appropriately described as "incidental" open land. In the bundle of authorities we were provided with a dictionary definition of the word "incidental".
53. This submission is curious because the application for planning permission for the Station Road site was treated by the Council as a departure from the development plan and referred to the Secretary of State precisely because it was accepted in the planning

officer's report recommending that planning permission should be granted that policy OL6 was relevant and that the application was a departure from that policy. It seems that at some stage prior to the inquiry the Council changed its mind in this respect and contended, together with St Modwen, that policy OL6 did not apply to Station Road.

54. However, it is clear from the parties' closing submissions to the Inspector that the question of whether or not policy OL6 was applicable did not turn on the dictionary definition of the word "incidental" in policy OL6, rather it turned on the particular characteristics of the site, with the Council arguing that it was different in character from the other open land covered by policy OL6 because it was simply agricultural traversed by a footpath. The Inspector engaged with the issue as it had been presented to her at the inquiry and concluded that the land was greatly valued as an informal recreational resource. Having concluded that that was the function that was being performed by the land she was entitled to conclude that policy OL6 was applicable and that there was therefore a doubt about the suitability of Station Road in terms of development plan policy. That doubt simply echoed the Council's own reason for referring the application for Station Road to the Secretary of State as a departure from the development plan.
55. I turn, therefore, to the third respect in which the Inspector is said to have erred in law in her application of the sequential test. I do not accept the submission that in reaching her conclusion that Station Road was not sequentially superior the Inspector ignored the potential for car based linked trips to the town centre. It is true that the Inspector dealt separately with non-car based linked trips to the town centre in paragraphs 28 to 32 of the decision under the main heading "the sequential test", and with car based linked trips to the town centre in paragraphs 47 to 48 under the main heading "accessibility".
56. However, I do not accept that the Inspector would have made such an egregious error as to ignore the potential for car based linked trips to the town centre when considering whether Station Road was sequentially superior when she had defined sequential superiority in terms of better town centre linkages, had concluded that the proclivity for linked walking trips from either site would not be significant, and had recognised in paragraph 66 among other places in her decision that car travel was likely to be the predominant mode of choice for those using either Station Road or Audley Avenue for their main shop. Against this background the fact that the Inspector considered the potential for linked trips by car to the town centre under the heading of "accessibility" rather than "the sequential test" does not mean that she left this aspect of linkages with the town centre out of account when reaching her conclusion as to whether Station Road was sequentially superior, ie whether it had better linkages with the town centre.
57. The Inspector concluded in paragraph 47 of the decision that in the particular circumstances of Newport, a small town where the route to the town centre was not complicated and where the food store was not seeking to draw its customers from far afield, the additional journey time of 1.5 minutes to the town centre from Audley Avenue compared with Station Road would not be "likely to put people off combining a trip to the food store with a visit to the town centre by car." That was a planning judgment which the Inspector was entitled to reach.

58. In reaching that judgment did the Inspector err in law because she applied the wrong test? I have mentioned Mr Kingston's submission that the Inspector should not have been considering whether the location of Audley Avenue would put people off making linked trips by car to the town centre and that she should instead have decided at which of the two sites, Station Road or Audley Avenue, there would be a higher likelihood of car based linked trips with the town centre in accordance with the guidance in paragraph 6.8 of the PG.
59. The decision must be read in a common sense way. The Inspector was not required to use a particular form of words or formulation. Her decision is a response to the cases that were advanced by the parties at the inquiry. In concluding as she did in respect of non-car based linked trips and in concluding that the location of Audley Avenue would not "put people off" making car based linked trips to the town centre, the Inspector was in effect accepting the interested party's case at the inquiry: that although Audley Avenue was further away from the town centre than Station Road, whether one considered car based or non-car based linked trips, there was no practice no material difference between the two sites in terms of town centre linkages and hence Station Road was not sequentially superior. In some towns being 500 metres closer to the town centre might well make a material difference in terms of town centre linkages, but the Inspector concluded that in the particular circumstances of Newport it did not.
60. For these reasons I would reject the challenge to the Inspector's decision in respect of the sequential test.

The Community Infrastructure Levy Regulations.

61. I turn to consider the Inspector's conclusion in paragraph 60 of the decision in respect of the Community Infrastructure Levy ("CIL") Regulations ("the CIL Regulations"). When considering the contribution to strategic off site highway works the Inspector had to apply the test set out in regulation 122 of the CIL Regulations, which provides that a planning obligation may only constitute a reason for granting planning permission if the obligation is:
- "(a) necessary to make the development acceptable in planning terms.
 - (b) directly related to the development.
 - (c) fairly and reasonably related in scale and kind to the development."
62. The Inspector's witness statement explains how she investigated the compatibility of the contribution that was being sought by the Highway Authority in respect of strategic off site highway works with the provisions of the CIL Regulations. The notes of the pre-inquiry meeting on 18 April 2012 record:
- "The Inspector reminded the parties that information should be provided to rigorously justify the obligations in terms of the CIL Regulations. Miss Clover, junior counsel for the Council, said that the Council Highway Officer could be made available to deal with this issue and the Inspector welcomed this initiative."

63. At some stage during the inquiry the Inspector was provided with a statement of common ground which merely stated that "the principle of a contribution to off site highway improvements is acceptable." The Inspector understandably took the view that this bald statement did not provide the "rigorous justification" which she had required, so the issue of the contribution to strategic off site highway works was considered at a "round table" discussion on the third day of the inquiry. Mr Archer, the Council's Highways and Development Control Engineer, attended the meeting and answered questions from the Inspector. The Inspector requested a note from the Council setting out its justification for the proposed contribution and at some stage before the end of the inquiry Mr Archer provided the Inspector with a memorandum which the Inspector listed as her document 50:

"Council's justification for off site highway works prepared by Mr Archer."

64. At the conclusion of the round table discussion the Inspector said that she would consider whether the strategic highways contribution was compliant with the CIL Regulations and asked if any of the parties had anything further to say. They did not.
65. On the last day of the inquiry, 29 May 2012, the Inspector was provided with a copy of the completed section 106 planning obligation, which included in the First Schedule provisions for the contribution sought by the Highway Authority in respect of the strategic off site highway works. Clause 15 of the obligation provided:

"If any of the obligations in the first schedule to this deed are found by the Inspector appointed by the Secretary of State not to comply with Regulation 122 of the Community Infrastructure Levy Regulations 2012 (as amended) they shall be cancelled and be of no effect but such cancellation shall not effect the validity or enforceability of the remaining provisions of this deed."

66. In his submissions Mr Dove referred us to a number of authorities in which pooled contributions have been accepted by the Administrative Court as a legitimate approach to the provision of a requirement for strategic infrastructure. While I readily accept that there will be circumstances in which such an approach is capable of being compliant with the CIL Regulations, I have no doubt that the Inspector's conclusion that the contribution sought by the Highway Authority in respect of strategic off site highway works in this case was not CIL compliant was correct. As the Inspector said in paragraph 60 of the decision, the need for the works and the amount of the contribution sought was based on the Highway Authority's concern that potentially a number of major development schemes, housing developments and both Station Road and Audley Avenue, might be developed, and that if this did occur there would be an adverse impact on the wider highway network in Newport.
67. The problem with that approach, as the Inspector pointed out, was that it was not known whether all of those schemes would be approved or within what timescale they would be developed, even if they were approved. Indeed, it was most unlikely that both of the food store proposals would be approved. I have already referred to

paragraph 46 of the decision in which the Inspector had noted the Council's own evidence that on cumulative impact grounds only one planning permission for a food store could be granted in Newport.

68. Mr Dove submitted that even if the Inspector's conclusion that the contribution was not CIL compliant was correct then the only conclusion reasonably open to her was that in the absence of a contribution planning permission should be refused because, he said, there was no evidence before the Inspector that the proposal was acceptable without at least some contribution to strategic off site highway works.
69. I accept Mr Moffett's submission on behalf of the Secretary of State (which was adopted by Mr Kolinsky on behalf of the interested party) that in effect Mr Dove's submission puts the boot on the wrong foot. It was for the Council as the local planning authority to justify any reason for refusing planning permission. There was no evidence before the Inspector that in the context of any realistic scenario as to the major development schemes that were likely to come forward within a reasonable time this appeal proposal would be unacceptable without a contribution to strategic off site highway works. It is clear from both the report to the Planning Committee in respect of the Audley Avenue application and the Inspector's document 50 that the need for strategic off site highway works, their extent, their costs and the amount of the contribution were all predicated on the combined traffic impact of all five major schemes coming forward. Once it was concluded that that was not a realistic scenario there was no proper evidential basis for rejecting the appeal proposal on the ground that it failed to make a contribution to strategic off site highway works. I do not therefore accept Mr Dove's substantive CIL challenge.
70. Turning to his procedural challenge, it is difficult to see what more the Inspector should have done. At the pre-inquiry meeting she had flagged up the need for a "rigorous justification" of the contribution in terms of the CIL Regulations. The Council, as a local planning authority, was well aware of the requirements of the regulations. While I acknowledge the importance of statements of common ground in modern inquiry procedure, it must have been obvious to all parties at the inquiry that the bald statement of common ground that the principle of such a contribution was acceptable was the antithesis of a rigorous justification of the need for the contribution, the way in which it was directly related to the appeal proposal, and the reasons as to why it was both fair and reasonable.
71. The Inspector explored these issues at the round table discussion. During that discussion she questioned Mr Archer about both the timescale of the major schemes and the acceptability of pooled contributions. At the conclusion of the round table discussion she made it clear that she would consider whether the proposed contribution was CIL compliant. In clause 15 of the section 106 obligation the parties expressly acknowledged the possibility that she might reach the conclusion that some of the obligations (including the contribution to strategic off site highway works) were not CIL compliant.
72. Mr Dove's answer to the question of what more should the Inspector have done was to say, in effect, that if the Inspector was not content with the basis on which the Council

as Highway Authority was seeking the contribution, as it had explained in document 50, then she should have raised the matter and invited further evidence from Mr Archer and/or further submissions. The Council would then have had the opportunity to seek to justify the need for a contribution to strategic off site highway works on a different basis, for example on the basis that only one food store would be permitted in Newport.

73. While the Inspector might have raised the matter again, I accept Mr Moffett's submission that she was not required to do so as a matter of procedural fairness. In support of that submission Mr Moffett referred us to the judgment in Castleford Holmes v the Secretary of State for the Environment, Transport and the Regions [2001] EWHC (Admin) 77 in which Ouseley J said in paragraph 65 that fairness did not require an Inspector to give a party an opportunity to deal with a point:

"Where the party ought reasonably to have been aware on the material and arguments presented at the inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed."

74. Whether a party to an inquiry has been given a "fair crack of the whip" in any particular case is fact-sensitive. I am satisfied that in this case, in the light of the Inspector's comments at both the pre-inquiry meeting and the round table discussion, the Council as a local planning authority familiar with the requirements of the CIL Regulations, ought reasonably to have been aware that the basis on which it was seeking a contribution to strategic off site highway works was fatally flawed, and that if the need for a contribution was to be raised as a potential reason for refusing planning permission in the absence of a contribution, then that need would have to be justified on a realistic basis.
75. I say that the Council ought reasonably to have been aware of the fatal flaw in its case on this issue because on its own evidence, whatever might have been said about the prospects of the three major residential schemes, there was no realistic prospect of planning permission being granted for two food stores in Newport. The Inspector's response to the flawed basis on which the contribution was sought would not have come as any surprise to a local planning authority which was familiar with the CIL Regulations.

Conclusion

76. For these reasons I would reject the appellant's challenge to the Inspector's decision in respect of the CIL Regulations and I would dismiss the appeal.
77. LORD JUSTICE KITCHIN: I agree.
78. LORD JUSTICE FLOYD: I also agree.