Neutral Citation Number: [2018] EWCA Civ 1571

Case No: C1/2017/3322

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT IN WALES
THE HON MR JUSTICE FRASER
[2017] EWHC 2922 (Admin)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 06/07/18

Before :

LORD JUSTICE DAVIS

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE SINGH

- -

Between :

WATERSTONE ESTATES LIMITED	**Appellant**
- and –	
THE WELSH MINISTERS	**Respondent**
- and –	
NEATH PORT TALBOT COUNTY BOROUGH COUNCIL	**Interested Party**

- -
- -

Gwion Lewis (instructed by **Berry Smith LLP**) for the **Appellant**
Tim Buley (instructed by **Government Legal Department**) for the **Respondent**
The Interested Party did not appear and was not represented

Hearing date: 21 June 2018

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Judgment Approved

Lord Justice Hickinbottom:

Introduction

1. Planning in Wales is a devolved function. This appeal gives rise to a potentially important issue as to whether, in relation to the approach to need in the consideration of a planning application for retail development outside settlement areas, the substance of national planning policy in Wales is substantively different from that in England. The Welsh Ministers contend that it is; the Appellant ("the Developer") that it is not. Whether it is or not depends upon the proper construction of the relevant Welsh policy as a matter of law.

2. The appeal concerns a site adjacent to the A465 at the Blaengwrach Roundabout, Glynneath ("the Site"), part of which is currently used as a petrol filling station and two fast-food restaurants, which the Developer wishes to develop as a roadside service area. The Site lies 45m outside the settlement limits of Glynneath.

3. On 12 February 2016, the Developer made applications for planning permission to the Interested Party local planning authority ("the Council") for two parts of the Site, namely (i) for full permission for a roadside service area comprising a petrol filling station and kiosk, a "drive-thru" coffee shop, car parking and associated works, and (ii) for outline permission for a pub/restaurant, car parking and associated works. Although pursued through two separate applications, the Developer always intended the development to comprise in substance a single roadside service area. Unless the context requires, in this judgment I shall treat the development as such.

4. The Council refused both applications on 25 August 2016. The Developer appealed under section 78 of the Town and Country Planning Act 1990 ("the 1990 Act"). The Welsh Ministers transferred authority to determine both appeals to Janine Townsley LLB (Hons) ("the Inspector"). Following a site visit and hearing, the Inspector refused the appeals in a decision letter dated 7 April 2017.

5. The Appellant applied to the High Court under section 288 of the 1990 Act to quash those decisions. On 16 November 2017, Fraser J refused that application. With permission from Lewison LJ, the Appellant now appeals against that refusal.

6. The appeal was heard by this court in Cardiff, where Gwion Lewis of Counsel appeared for the Appellant and Tim Buley of Counsel for the Welsh Ministers. Both also appeared below, although neither before the Inspector. At the outset, I thank them both for their helpful submissions.

The Relevant Law

7. The applicable law is uncontroversial and, for the purposes of this appeal, can be shortly put.

8. Section 70(2) of the 1990 Act provides that, in dealing with an application for planning permission, a decision-maker must have regard to the provisions of "the development plan", as well as "any other material consideration". "The development plan" sets out the local planning policy for an area, and is defined by section 38 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to include adopted

local plans. Section 38(6) of the 2004 Act (to which I shall refer as simply "section 38(6)") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Therefore, the development plan is not merely a material consideration for planning purposes: section 38(6) raises a presumption that planning decisions will be taken in accordance with the development plan, but that presumption is rebuttable by other material considerations. At all material times, the development plan for the Site has been the Council's Local Development Plan 2011-16 adopted January 2016 ("the Local Plan").

9. "Material considerations" in this context also include statements of central government policy which, for Wales, are largely set out in the Welsh Government's Planning Policy Wales, first published in 2002. The relevant and current edition is Version 9 (2016) ("PPW"). It was not suggested that reference to any earlier versions would assist with the issues raised in this appeal. Furthermore, although PPW is supported by a number of Technical Advice Notes ("TANs"), other than TAN 18: Transport to the limited extent referred below (paragraphs 29 and 44), it was not suggested that any of them assisted either.

10. The true interpretation of policy is a matter of law for the court to determine (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] PTSR 983 ("Tesco Stores v Dundee") at [17]-[22] per Lord Reed JSC). However, such broad statements of policy as are found in the Local Plan and PPW are not to be construed as if they were statutory provisions. Furthermore, the application of relevant policy (including the weight to be given to policies that are material considerations) often requires the exercise of planning judgment and, subject to a challenge on conventional public law grounds, is exclusively a matter for the decision-maker (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780F-G per Lord Hoffmann, Tesco Stores v Dundee at [19], and R (Bloor Homes East Midlands Limited) v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283 ("Bloor Homes") at [19(4)]) per Lindblom J as he then was).

11. Nor can an inspector's decision letter be subjected to the same exegesis that might be appropriate for a statute or a deed. The decision letter must be read as a whole, and must be construed in a practical, reasonably flexible and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and the arguments deployed at the inspector's inquiry, so that it is not necessary to rehearse every argument but only the "principal important controversial issues" (see Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26 at page 28 per Forbes J, and Bloor Homes at [19(1)]). The decision letter must give intelligible and adequate reasons as to why those issues were determined as they were (South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953 at [35]-[36] per Lord Brown of Eaton-under-Heywood, and Bloor Homes at [19(2)]).

12. Although an application under section 288 is a statutory procedure, it is determined on traditional judicial review grounds. It does not afford an opportunity to review the planning merits of an inspector's decision (Newsmith v Secretary of State for the Environment [2001] EWHC 74 (Admin) at [6] per Sullivan J, and Bloor Homes at [19(3)]).

Relevant Policy: PPW and the Local Plan

13. PPW sets out the national policy in respect of Retail and Commercial Development in Chapter 10, an essential part of which is a "sequential approach" to retail development, i.e. a hierarchy of decreasingly preferable locations for such development, with city/town centre sites at the top (in the form of a "town centres first" policy, that "consideration should always be given in the first instance to locating new retail and commercial development within an existing centre): see paragraph 10.1.4); then "edge-of-centre", "out-of-centre" and "out of settlement". Whilst it is said that A1 retail uses should underpin retailing and commercial centres, other retail and commercial centre uses such as A3 food and drink in such centres are also encouraged (paragraph 10.1.5).

14. In the Local Plan, "retail centres" are defined as "identified town, district and local centres" (paragraph 5.2.49, quoted at paragraph 24 below). Glynneath is a "district centre" (paragraph 5.2.46 and table 5.4).

15. In PPW, under the heading "Principles of retail and commercial planning", and the sub-heading, "Retail and commercial strategies and support for existing centres", paragraph 10.2.2 states:

> "If a need (see 10.2.9 - 10.2.12) for retail development has been established, the strategy will need to consider the most appropriate form and scale of provision which best matches the retail needs of the community. Planning applications, including out-of-centre developments, which do not accord with this approach should demonstrate why they have departed from it. Out-of-centre developments refer to developments outside designated retail and commercial centres and beyond edge-of-centre developments; they can be located both within and outside settlement limits."

It was common ground before us that, here, "the strategy" is a reference to the local planning strategy as set out in the local development plan; and that the second sentence of paragraph 10.2.2 simply reflected the requirements of section 38(6) in the context of the policy-mandated sequential approach.

16. In connection with "need for retail development", paragraph 10.2.2 refers to paragraphs 10.2.9 - 10.2.12. So far as relevant to this appeal, those deal with "Tests for retail need", as follows:

> "10.2.9 In deciding whether to identify sites for comparison, convenience or other forms of retail uses in development plans or approving planning applications for such uses, local planning authorities should in the first instance consider

> whether there is a need for additional retail provision. Such need may be quantitative so as to address a quantifiable unmet demand for the provision concerned or qualitative. Qualitative considerations refer to issues such as the standard of existing retail provision in terms of the latest formats, range and mix of goods, distribution of retail provision and accessibility. Precedence should be given to establishing quantitative need before qualitative need is considered for both convenience and comparison floorspace, particularly as a basis for development plan allocations.
>
> 10.2.10 Where the current provision appears to be adequate in quantity, the need for further applications or developments as a result of an identified qualitative need must be fully justified.…
>
> …
>
> 10.2.12 If there is no need for further development for retail and commercial centre uses, there will be no need to identify additional sites. There is no requirement to demonstrate the need for developments within defined retail and commercial centre boundaries. This approach reinforces the role of centres as the best location for most retail/leisure/commercial activities. It is not the role of the planning system to restrict competition between retailers within centres."

17. Paragraphs 10.2.13 - 10.2.16 turn to the "Sequential test", i.e. the sequential approach to be applied by planning authorities when selecting sites for retail and commercial development in local plans and in determining planning applications.

> "10.2.13 The sequential approach to development applies to all retail and other uses that are complementary to retail and commercial centres. Local planning authorities should adopt a sequential approach to the selection of new sites in their development plan and when determining planning applications. The sequential approach supports the principle that retail and commercial centres are in the most readily accessible location, and promotes combined trips for shopping, business, leisure and services. The approach reinforces the vibrancy, viability and attractiveness of retail and commercial centres.
>
> 10.2.14 Adopting a sequential approach requires the application of a sequential test whereby first preference should be for a site allocation or development proposal located in a retail and commercial centre defined in the development plan hierarchy of centres. The proposed use (see 10.1.4 above) is likely to determine what type of centre (i.e. higher or lower order centre) is most appropriate as a starting point for the process. The extent of any sequential test should be agreed by pre-application discussion between the local planning authority and the developer at the outset of the development management

> process. This should indicate which retail and commercial centres should be examined for potential sites or buildings. If a suitable site or building is not available within a retail and commercial centre or centres, then consideration should be given to edge of centre sites and if no such sites are suitable or available, only then should out-of-centre sites in locations that are accessible by a choice of travel modes be considered….
>
> 10.2.15 When preparing development plans local planning authorities should take a positive approach, in partnership with the private sector, in identifying sites which accord with the sequential approach and are in line with a development plan's retail strategy in terms of size, scale and format of new developments needed…. Proposals for development may come forward after the development plan has been adopted irrespective of whether the plan provides allocations. These development proposals should be determined in accordance with the criteria based policies in the development plan or in relation to other material considerations.
>
> 10.2.16 Some types of retailing, such as stores selling bulky goods and requiring large showrooms, may not be able to find suitable sites or buildings within existing retail and commercial centres. Where this is the case such stores should in the first instance be located on the edge of retail and commercial centres, where specific sites are defined in the development plan for such uses. Where such sites are not available or suitable, other sites at the edge of retail and commercial centres, followed by out-of-centre locations may be considered, subject to application of the needs and impact tests. Edge-of-centre or out-of-centre sites should be accessible by a choice of public and private modes of travel. New out-of-centre retail developments or extensions to existing out-of-centre developments should not be of a scale, type or location likely to undermine the vitality, attractiveness and viability of those retail and commercial centres that would otherwise serve the community well, and should not be allowed if they would be likely to put development plan retail strategy at risk."

18. Section 10.3 deals with plan-making, i.e. "Development plans and retail and commercial centres":

> "10.3.1 Development plans should:
>
> …
>
> - allocate sites for retail and commercial centre uses where there is assessed to be a quantitative or qualitative need and where size and scale are in accord with retail strategy. Sites should be identified using the sequential approach and, where appropriate, assessed for their impact on other centres;

> - include a criteria based policy against which proposals coming forward on unallocated sites can be judged;…"

19. Section 10.4 then deals with decision-taking in the context of specific applications, i.e. "Development management and retail and commercial centres":

> "10.4.1 When determining a planning application for retail, commercial, leisure or other uses complementary to a retail and commercial centre, including redevelopment, extensions or the variation of conditions, local planning authorities should take into account:
>
> - compatibility with the development plan;
>
> - quantitative and qualitative need for the development/extension, unless the proposal is for a site within a defined centre or one allocated in an up-to-date development plan;
>
> - the sequential approach to site selection;
>
> - impact on existing centres;….
>
> …
>
> 10.4.5 The three tests of retail need, sequential test and retail impact assessments may apply to new retail developments. Proposals which are in accordance with an up-to-date development plan will not require the application of a test as this will have been undertaken when the plan was prepared."

20. Turning to the Local Plan, policy SC1 ("Settlement limits") provides:

> "Development within settlement limits that is proportionate in scale and form to the role and function of the settlement as set out in the Settlement Hierarchy will be acceptable in principle.
>
> Outside settlement limits, development will only be permitted under the following circumstances:
>
> …..
>
> 9. It is associated with the provision of public utilities, infrastructure and waste management facilities that cannot reasonably be located elsewhere;…".

21. This, as a matter of policy, in effect proscribes all retail development outside settlement limits, except where it falls within one of the identified criteria. The policy identifies twelve sets of circumstances in which development outside settlement limits may be allowed; but only criterion 9 is relevant to this appeal. For the purposes of that criterion, the Local Plan glossary defines "infrastructure" as follows:

> "In planning terms the physical structures that are required for a community to operate and be sustainable in the long term. Infrastructure typically refers to matters such as roads, water supply, sewers, electricity and other social elements such as education, recreation and health facilities."

22. Paragraph 3.0.16 of the explanatory text to policy SC1 states:

> "Whether specific development proposals are appropriate or suitable outside settlement limits will be assessed with reference to the relevant topic policies within this Plan and national policy".

23. Policy R1 allocates sites for retail development, including (as R1/4) Park Avenue, Glynneath. This is described in paragraph 5.2.42 as a mixed-use development, of which "the retail element [of a modest new size foodstore to serve the local catchment] will be expected to be as close as possible to the existing district centre which would enable linked trips".

24. The rest of that section of the Local Plan deals with the relevant retail topic policies. Policy R2 concerns "Proposals within Retail Centres", in respect of which there is no reference to "need". Policy R3 deals with "Out of Centre Retail Proposals", providing (so far as relevant):

> "Proposals for new retail development or additional retail floorspace within settlement limits but outside the defined retail centres or retail allocations will only be permitted where:
>
> 1. It is demonstrated that there is a need for the development; and
>
> 2. The development cannot be accommodated within a defined retail centre and is located in line with the sequential approach;…".

Therefore, for proposals for new retail development within settlement limits but outside defined centres, there is a discrete requirement in the Local Plan to show that there is a need for the proposed development. Possible sequentially preferable sites come into play only if that need is established. If that need is not established, or it is established but there is a sequentially preferable site that will satisfy that need, then the proposed development will be contrary to the retail policies of the Local Plan and will likely be regarded as contrary to the development plan taken as a whole.

25. Paragraph 5.2.49 of the explanatory notes states:

> "Retail centres are defined as the identified town, district and local centres, not including any existing retail park. Proposals for retail development outside of the defined retail centres will be strictly controlled in accordance with national policy, in order to ensure that the retail centres are supported and enhanced as far as possible."

26. There is no policy in the Local Plan that expressly applies to sites that are outside (and, therefore, hierarchically below) "out-of-centre". However, although there were arguments to the contrary below, by the time the matter reached us, it was common ground that in those circumstances the default position in policy SC1 applied, i.e. unless one of the identified exceptions (such as criterion 9) applied, proposed retail development outside settlement boundaries as such is contrary to the development plan and therefore proscribed as being harmful in planning terms subject to other material considerations outweighing that harm.

The Inspector's Decision, the Section 288 Application and the Grounds of Appeal

27. In her decision letter, the Inspector recorded that it was common ground that the Site lies outside the settlement boundary of Glynneath (paragraph 9).

28. She identified the main issues before her as (i) whether the proposed development complied with local and national policies relating to new retail development and those designed to restrict new development outside defined settlement limits, and (ii) to the extent that they did not comply, whether there were any material considerations that would outweigh any harm identified (paragraph 7).

29. In respect of the permissive scope of policy SC1, the Developer submitted that the development was "infrastructure" within criterion 9. The Inspector dealt with that contention in paragraph 12:

> "… The [developer] has pointed to a reference to roadside service areas within Technical Advice Note 18 (TAN 18), however, there is nothing within the TAN to suggest that this would amount to an infrastructure proposal. Similarly, at the hearing I was referred to the LDP glossary which defines infrastructure as including social elements such as education, recreation and health facilities. These considerations do not persuade me that a roadside service area is infrastructure for the purposes of the Plan. For this reason, I conclude that criterion 9 of policy SC1 does not apply in this case."

Thus, the Inspector found that the development – in each of its two parts formally the subject of the separate applications and appeals – was contrary to policy SC1.

30. In the section 288 application, Fraser J held that the definition of "infrastructure" as set out in the Local Plan glossary was a matter of law not planning judgment; and a roadside services area fell outside it (see [50]). That conclusion is not now challenged in this appeal.

31. However, at the hearing of the application, Mr Lewis advanced a further ground namely that, even if the development was not itself "infrastructure", the A465 clearly is; and the development therefore fell within criterion 9 because it is "*associated with* the provision of… infrastructure…". Fraser J was not prepared to consider that new ground, on the basis that what was "associated with infrastructure" was an issue involving planning judgment, and it was an issue that had not been raised before the Inspector. Therefore, although he said that it was difficult to see how the proposed development could fall within the exception as being "associated with infrastructure"

(see [58]), he held, in effect, that it was too late to raise it as an issue before him (see [57] and [59]), saying that it would be "wholly perverse" to quash an inspector's decision on the basis of an error said to have occurred in an argument not ventilated before her (see [59]).

32. As his first ground of appeal before us (which I shall call Ground A), Mr Lewis submits that the judge erred in not dealing with the substance of the submission that the development fell within criterion 9 because the proposed development was "associated with infrastructure". The error was material because, if the judge had considered the point, he would have been bound to have concluded that the proposed development *was* associated with infrastructure (namely the adjacent road); and therefore did fall within criterion 9 and would thus have complied with policy SC1.

33. The Inspector considered the issue of retail impact in paragraphs 14-20 of her decision letter. Having, at paragraph 14, described the retail element in each of the two appeals before her, the Inspector continued:

> "15. Policy R3: *Out of Centre Retail Proposals* sets out criteria for retail developments outside designated town centres. However, its permissive effect does not extend beyond the defined limits of settlements. The amplification to the policy explains that the intention of the policy is to apply strict controls over retail proposals to ensure retail centres are supported and enhanced as far as possible. In the absence of any other retail supportive retail policy it follows that the scheme is in conflict with the [Local Plan's] retail policies.
>
> 16. PPW advises [at paragraph 10.2.2] that if need for retail development has been established, the form and scale of provision should be that which best meets the needs of the community."

34. Pausing there, as Mr Lewis indicated, the two applications for planning permission were in effect for a single development in the form of a roadside services area with some associated retail use. In her decision-letter, the Inspector did not anywhere make an express finding as to whether there was need for a roadside services use; but, paragraph 23 ("Even if I was satisfied that there was a need for roadside services in the area…") is premised on the basis that there was no such need. Reading the decision-letter as a whole, it is clear that the Inspector considered that there was no need for such a use.

35. Returning to the Inspector's consideration of retail impact, her decision-letter continued:

> 17. It is common ground between the parties that there is an identified additional retail need for Glynneath. This is addressed in the [Local Plan] by the allocated regeneration site at Park Avenue. The proposed developments would therefore offer retail provision over and above the need identified in the [Local Plan]."

36. The Inspector then considered the impact the proposed development would have on Glynneath district centre, concluding that "there would be some trade diversion, as acknowledged by the [Developer] in their retail statement" (paragraph 18). She continued:

> "19. The Council identified a retail need and that need has been addressed in the development plan for the area. I acknowledge the [Developer's] arguments that the allocated site at Park Avenue is not readily deliverable, however, the Council's position is that the [Local Plan] is relatively newly adopted and there is no reason to suggest that the site would not be deliverable within the plan period. I note also that the allocated site is within the settlement limits and is promoted by the Council as having good connectivity to the district centre. For these reasons, the identified retail need can be met by a sequentially preferable site in accordance with the approach set out within PPW.
>
> 20. For the above mentioned reasons, the appeal proposals fail to accord with policy R3 of the [Local Plan] and the advice set out within PPW in relation to the location for new retail development and would be harmful to the vitality and viability of Glynneath district centre."

37. In its section 288 applications, relying upon English and Scottish authorities on the meaning of and approach to the "sequentially preferable" test (notably Tesco Stores v Dundee, Warners Retail (Moreton) Limited v Cotswold District Council [2016] EWCA Civ 606 ("Warners") and Aldergate Properties Limited v Mansfield District Council [2016] EWHC 1670 (Admin) ("Aldergate")), the Developer submitted that the Inspector came to the irrational conclusion that the Park Avenue site was sequentially preferable in retail terms even though it would not – indeed, could not – serve the same roadside service function. Alternatively, it was said that the Inspector failed to consider the specialist function of the proposals before concluding that the Park Avenue site was sequentially preferable.

38. Fraser J dismissed the section 288 applications on this ground, for essentially two reasons.

39. First, he emphasised that the particular sentence in paragraph 19 of the Inspector's decision upon which Mr Lewis relied ("For these reasons, the identified retail need can be met by a sequentially preferable site in accordance with the approach set out within PPW") could not be taken out of context. From the first sentence in that paragraph ("The Council has identified a retail need and that need has been addressed in the development plan for the area"), the judge considered that it was clear that the Inspector was not saying that there is a sequentially preferable site for the proposed development, namely a roadside services area. She was merely saying that there was a need for retail development in the area, and that need could be met by the Park Avenue site (see [38]).

40. Second, the judge considered that reliance on the English and Scottish authorities was "misconceived" because they concerned policy in England and Scotland which

requires consideration of whether there is a "sequentially preferable" site for any development proposal. This case concerns Welsh planning policy which requires a different approach, namely whether there is a "sequentially preferable" site for "meeting… the identified retail need" which, before any consideration of sequentially preferable sites, requires a retail need to have been established. In referring to "sequentially preferable", the judge concluded, the Inspector here was not applying the test considered in the authorities, but merely saying that the Park Avenue site was in planning terms better placed to meet the identified retail need (see [41]).

41. As his second ground of appeal (which I will call Ground B), Mr Lewis submits that, the judge erred in his approach to "need" and "sequentially preferable" by, in effect, making satisfaction of the needs test a pre-condition of the Council's obligation to consider sequential preferences; and, by so doing, he wrongly proceeded on the basis that the policy approach in Wales was significantly different from that in England and Scotland so that the authorities from those jurisdictions as to "sequentially preferable" were not relevant in this case.

42. On 5 January 2018, Lewison LJ gave permission to appeal on both Ground A and Ground B, with which I will deal in turn. None of the other earlier grounds of challenge to the Inspector's decision remains alive.

Ground A: Local Plan Policy SC1 Criterion 9: "Associated with Infrastructure"

43. The Inspector rejected the only argument made on behalf of the Developer that the proposed development fell within Local Plan policy SC1, namely that it fell within criterion 9 in that it was itself "infrastructure". That conclusion was challenged in the section 288 applications, but was dismissed. It is no longer pursued.

44. However, in a late-running submission before Fraser J, Mr Lewis also contended that the development fell within criterion 9 because it was "associated with the provision of…. infrastructure" namely the A465 road. That road is uncontroversially "infrastructure": indeed, TAN 18 gives advice on assessing need for "motorway and roadside areas" under the heading "Planning for Transport Infrastructure" and, in the Local Plan glossary, roads are referred to as typical infrastructure. Furthermore, the proposed development is unarguably "associated" with the road which it would serve.

45. Mr Lewis submitted that the Inspector was required to make her decision in accordance with the Local Plan; and, even though the matter was not raised as an issue before her, she erred in law in not taking into account this part of the development plan properly construed. For that proposition, he relied upon R (St James Homes Limited) v Secretary of State for the Environment [2001] EWHC 30 (Admin); [2001] PLCR 27, in which Ouseley J said (at [47]):

> "The nature of the decision-maker's duty under section 54A [now section 38(6) of the 2004 Act] and 70 of the 1990 Act requires him to consider the relevant development plan policies even when they are not specifically drawn to his attention. Those sections impose duties which are not discharged simply by considering what, in the case of an appeal, the parties may decide to rely on; the duties are cast on the decision-maker,

> who must fulfil them, whatever assistance he may have had or lacked from the applicant or others."

46. Although the matter was not raised until the Developer's skeleton argument was served a week before the section 288 substantive hearing, Fraser J allowed the amendment. However, he refused the claim on that new ground on the basis that it was effectively too late, because whether a proposed development was "associated with infrastructure" required the exercise of planning judgment; and, the matter not having been argued before the Inspector, she had not made the factual findings or planning assessments required to determine this new issue. Although not determinative, relying upon Trustees of the Barker Mills Estates v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408 at [77] per Holgate J, the judge considered that that weighed strongly against the new point being argued, or at least being upheld (see [56]-[57]). Therefore, whilst expressing doubt as to the ultimate merits of the point, he refused to determine those merits (see [58]) and said that, even if he had considered the merits and found in the Developer's favour, he would in any event have refused relief (see [59]).

47. Before us, Mr Lewis maintained that the judge was wrong not to consider the merits of the point; and, had he done so, for the reasons Mr Lewis put forward below, the judge would have found that the proposed development was "associated with infrastructure"; and, therefore, it fell within criterion 9 of policy SC1 and did not contravene PPW.

48. However, although my analysis and approach may have been slightly different from those adopted by Fraser J, I am unpersuaded that he was wrong to deal with this new ground as he did. I agree with him: it was essentially too late.

49. It is well-established that generally an inspector is only required to deal with (and give his reasons for his conclusion in relation to) the "principal important controversial issues" (see paragraph 6(iv) above). Mr Lewis accepted that the issue as to whether the development fell within criterion 9 as being "associated with infrastructure" was not an argument that had been raised before the Inspector (or indeed even in the section 288 challenge until the service of his skeleton argument just before the substantive hearing before Fraser J). However, he pressed the argument that, even where a matter is not expressly put into issue, an inspector has an obligation to consider a "Robinson-obvious" point (see R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929 (QBD), especially at [39]). As I understood his submission, he accepted that the Inspector could not have had any obligation to raise the issue off her own bat unless it had been Robinson-obvious.

50. Mr Buley submitted that there was little room for the Robinson-obvious principle in the planning context – and neither Counsel referred us to any case in which it has been found that the Secretary of State or one of his inspectors erred in law in failing to take a point not taken by any party before him on the basis that it was Robinson-obvious. Be that as it may, I am in any event entirely unconvinced that the Inspector in this case erred in law by not of her own motion taking the point now taken by Mr Lewis.

51. The circumstances of Robinson were very different from those with which we are concerned here. It was an immigration case in which the issue of whether Colombo

was, at that time, a safe haven for those who supported the Tamil Tigers was not raised before the Immigration Appeal Tribunal which refused permission to appeal from the dismissal of the applicant's appeal by the Special Adjudicator. In dismissing the application for judicial review of the tribunal's determination, Lord Woolf MR (giving the judgment of this court which, having given permission to proceed with the judicial review, retained the substantive application) said this (at page 945G-946C):

> "Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the Tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention [i.e. the Geneva Convention relating to the Status of Refugees 1951] law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed to 'obvious'. Similarly, if when the Tribunal reads the special adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do…".

52. In my view, the point now taken was not "obvious" in that sense, such that the Inspector erred in not taking it of her own motion. Indeed, it fell some way short. Before the Inspector, the Developer was represented by a planning agent. The statement of facts and grounds for the section 288 application was drafted by Leading Counsel and Mr Lewis. At the hearing of the application for permission to proceed with that application before His Honour Judge Jarman QC, the Developer was represented by Mr Lewis. At no stage was this issue – now said to be "obvious" – raised, until the skeleton argument for the section 288 applications was served. In any event, for the reasons set out below, although Lewison LJ gave permission to appeal on the substantive point, I certainly do not regard it as more than arguable.

53. Therefore, whilst I would not adopt the terminology of Fraser J, who said that it would be "wholly perverse" to quash a planning decision on a ground not taken before the Inspector, it is my firm view that the Inspector did not err in not taking the point herself. As frequently emphasised by both the Planning Court and this court, it is important that the burdens placed on planning decision makers are not

inappropriately heavy. In my view, to impose on the Inspector the legal obligation of taking this point herself would quite unreasonably expect too much of her.

54. For those reasons, speaking for myself, I would have refused permission to amend to include the new ground, on the basis that it was not arguable that the Inspector erred in law in the manner asserted and so the proposed amendment would have been empty. In any event, in my view, having allowed the amendment, Fraser J did not err in law in refusing the claim in relation to the new ground on the basis he did.

55. However, even if I had not taken that view, I would have refused the appeal on its merits on the grounds set out in the Respondent's Notice.

56. So far as relevant to this ground of appeal, criterion 9 of policy SC1 (quoted at paragraph 20 above) states:

> "Outside settlement limits, development will only be permitted under the following circumstances:
>
> …..
>
> 9. It is associated with the provision of… infrastructure… that cannot reasonably be located elsewhere;…".

57. In the Respondent's Notice, Mr Buley submitted that, when read in context, the reference to "infrastructure" is to prospective development and does not include infrastructure already in existence. I agree.

58. In coming to that conclusion, I have particularly taken into account the following.

i) "It" at the beginning of criterion 9 is a reference to the earlier word "development". That much was rightly common ground.

ii) Mr Lewis submitted that the words "the provision of" and "that cannot reasonably be located elsewhere" are otiose, and can simply be read out; so criterion 9 could have read (and, properly construed, means) simply, "It is associated with… infrastructure…". However, Mr Buley submitted – and I accept – that those words cannot be ignored, and are in fact crucial to a correct understanding of the criterion.

iii) Criterion 9 states that the proposed development must be "associated with *the provision of* infrastructure". The natural inference from the use of the word "provision" is that it is something which is currently happening or in the future will happen, i.e. the provision of *new* infrastructure: it does not suggest existing infrastructure. That inference is strengthened by the use of the present tense ("It *is* associated with the provision of… (new) infrastructure…"), rather than the conditional ("It *would be* associated with… (pre-existing) infrastructure…").

iv) Furthermore, the phrase "that cannot reasonably be located elsewhere" clearly qualifies, not "it" (i.e. the proposed development), but "the infrastructure". During the course of argument, Mr Lewis frankly accepted as much. As Mr Buley submitted, it makes little if any sense to ask whether infrastructure can

be located elsewhere in a case where it is already in existence. Although it may be possible (although, in my view, not easy) to conceive of examples where existing infrastructure might reasonably be *re*located elsewhere, criterion 9 in any event refers only to "located" not "relocated". Mr Buley submitted that the concept of location of infrastructure only makes sense if one is concerned, not with existing infrastructure, but with the provision of new infrastructure. In my view, there is very considerable force in that submission.

59. For each of those reasons – lateness and construction – in my view this ground of appeal fails.

Ground B: PPW: "Need" and "sequentially preferable"

60. Subject to Ground A (which I have found not to have been made good), Mr Lewis conceded that the proposed development did not comply with policy SC1, and was thus contrary to the Local Plan as a whole. Therefore, for the purposes of section 38(6) of the 2004 Act (see paragraph 8 above), he accepted that there was a presumption that the planning applications would be refused, unless other material considerations indicated otherwise. That was the approach taken by the Inspector.

61. However, in considering those other material considerations, she proceeded on the basis that, as well as not complying with the Local Plan, the proposed development would also not comply with Chapter 10 of PPW insofar as it did not satisfy the requirement for need as there prescribed. Mr Lewis submitted that the Inspector was wrong to proceed on that basis, because she erred in her approach to the PPW tests for need and sequential preference.

62. He submitted that the Inspector was wrong to construe PPW as imposing a discrete gateway test as a result of which, if need is not established, the planning decision-maker is not required to go on to consider the sequential preference test or any more general planning assessment balance. PPW, like its English and Scottish counterparts, requires the decision-maker to consider need; but it was his contention that, having done so, whether need is established is simply a material consideration for the purposes of the general planning assessment. If need is not established, that does not bring the enquiry demanded by PPW to an end. The next stage is to consider whether any other, sequentially preferable site is suitable for the broad type of development proposed, which is another material consideration in that assessment.

63. Mr Lewis submitted that the construction of the policy which he advocated is clear when PPW is looked at as a whole. He particularly relied upon the following provisions of PPW, which are quoted in full above (see paragraph 15 and following).

    i) Mr Lewis accepted that PPW requires development plans to allocate sites for retail and commercial uses in accordance with the sequential approach where (and only where) need has been established (see paragraph 10.3.1). However, he submitted that the position when decision-makers consider planning applications is different.

    ii) Various paragraphs of PPW within the section on "Sequential test" emphasise that the sequential test should be applied, not only when allocating sites for retail purposes in the development plan, but also when determining individual

planning applications (e.g. paragraphs 10.2.13 and 10.2.14). He submitted that, in the context of planning application decision-making, there is nothing in those paragraphs to suggest that the obligation to apply the sequential approach is supplanted where no need has been established.

iii) Paragraph 10.2.16 (which deals with types of retailing that may not be able to find sites within existing retail and commercial centres, such as stores selling bulky goods and requiring large showrooms) states that:

> "Where such sites are not available or suitable, other sites at the edge of retail and commercial centres, followed by out-of-centre locations may be considered, subject to application of the needs and impact tests."

This, he submitted, treats the needs test and the impact test as within the same category of considerations for the purposes of planning application decision-making. The retail impact of a proposed development is a matter which clearly has to be taken into account in the planning balance. This provision treats need in the same way, emphasising that, if need is not established, then there is still a requirement within the policy to proceed to consider that absence with other material considerations such as the retail impact and whether there are other suitable and sequentially preferable sites. Mr Lewis submitted that paragraph 10.2.16 cannot be read consistently with the construction preferred by the Inspector, on the basis of which, if need is not established, so far as PPW policy is concerned there is no obligation to consider any planning factors further; because the non-establishment of need is a knock-out blow.

iv) Mr Lewis submitted that that is made the clearer when paragraph 10.2.16 is read in the context of the paragraph 10.2.15, and in particularly the end of that paragraph, where there is reference to:

> "Proposals for development may come forward after the development plan has been adopted irrespective of whether the plan provides allocations. These development proposals should be determined in accordance with criteria based policies in the development plan or in relation to other material considerations."

It is said that this envisages that applications for planning permission for development at a site which has not been allocated to that particular use by the development plan are considered on the basis of any need established (or absence thereof) together with all other material considerations including alternative suitable sites that are sequentially preferable.

v) Mr Lewis submitted that that is reflected in paragraph 10.3.1 which, as well as making clear that development plans must allocate sites where there has been an assessment that there is a need for that retail and commercial centre use, requires plans to:

> "… include a criteria based policy against which proposals coming forward on unallocated sites can be judged".

vi) Paragraphs 10.4.1 and 10.4.5, Mr Lewis suggested, effectively put the matter beyond doubt. The former requires planning decision-makers, when determining a planning application for retail etc use, to take into account a number of material considerations, including (a) compatibility with the development plan, (b) need for the development (if the proposal is for a site outside the centres and has not been allocated for retail use on the plan), (c) the sequential approach and (iv) impact on existing centres. Need is treated there as simply one of several material planning considerations, not as a distinct requirement that, if not met, is fatal to a proposal. Similarly, paragraph 10.4.5 provides that:

> "The three tests of retail need, sequential test and retail impact assessments may apply to new retail developments. Proposals which are in accordance with an up-to-date development plan will not require the application of a test as this will have been undertaken when the plan was prepared."

64. Thus, Mr Lewis submitted, the Inspector was wrong to construe PPW as imposing a discrete requirement of "need". Whether there is need is no more than a material consideration to be taken into account with other material considerations in the general planning assessment.

65. He submitted that this led the Inspector into further error. Another material consideration is whether there is any suitable sequentially preferable site for the proposed development. In assessing whether the Park Avenue site was sequentially preferable to the Site, the Inspector considered its suitability for generic retail use, and concluded that "the identified retail need can be met by a sequentially preferable site [i.e. the Park Avenue site] in accordance with the approach set out within PPW" (see paragraph 19 of her decision letter). That was apparently taken into account by the Inspector as a factor that militated against the grant of permission. However, in line with Tesco Stores v Dundee, Warners and Aldergate (see paragraph 37 above), she ought to have asked herself a different question, namely whether the Park Avenue site was suitable, not for generic retail use, but for the broad type of retail development proposed (i.e. a roadside service area). Given that the Park Avenue site is not near the A465 or any main road, it was clearly not suitable for a development of the type proposed; and there was no identified sequentially preferable site to the Site.

66. Therefore, in summary, Mr Lewis submitted, in considering whether there were other material considerations that outweighed the planning harm to which the development would give rise (including the fact that it would not comply with the Local Plan), the Inspector erred in proceeding on the basis that the development would also be in breach of policy within PPW simply because need for the development had not been established, an error compounded by her wrongly concluding that there was a suitable sequentially preferable site at Park Avenue.

67. However, well as those submissions were made, I am unpersuaded by them for the following reasons.

68. Mr Lewis submitted that the construction favoured by Fraser J (and Mr Buley) led to the "extreme" result that, if, on a planning application for retail development use outside a centre, an applicant cannot establish need then it is fatal to the application. However, he made clear that it was not his case that that construction was legally perverse, in the sense that, whatever words had been used, the result could not have been intended. In that context, it is noteworthy that, as recorded by Lindblom LJ in Warners at [8], a predecessor of the relevant English policy now found in the National Planning Policy Framework, namely Planning Policy Statement 6: "Planning for Town Centres" (which was in place from March 2005), had a policy requiring new retail development outside a town centre to be justified by a demonstration of the need for the development. That policy was in place until December 2009, when it was replaced by a policy without such a discrete requirement (Planning Policy Statement 4: "Planning for Sustainable Economic Growth").

69. Furthermore, as Mr Lewis accepts:

    i) In PPW, for development plan purposes the allocation of sites for retail uses outside retail and commercial centres *is* dependent upon need for such uses. That is clear from paragraphs 10.2.2 and 10.3.1 of PPW (quoted at paragraphs 15 and 18 above). It is to be noted that the need required is for retail uses; and it is the establishment of that need which triggers the consequential enquiry into sequentially preferable sites that might meet that established need.

    ii) So far as an application for proposed retail development within settlement areas but outside retail centres is concerned, policy R3 of the Local Plan *does* impose a discrete requirement for need for the development as well as a requirement that it is established there is no suitable sequentially preferable site (see paragraph 24 above). The Local Plan prohibits retail development entirely outside settlement areas irrespective of need (again, see paragraph 24 above).

70. In any event, even if the proper construction of PPW is that for which Mr Buley contends, it is not true to say that if an applicant for planning permission for new retail development cannot establish need then that is fatal to the application. National planning policy is of course a material consideration; but a policy is only a policy. If a particular policy requirement is not met, it must be open to a decision-maker to grant planning permission if other material considerations outweigh identified planning harm including the harm that results from the failure to comply with that requirement. Even proposed development that is contrary to the local development plan, which has the entrenched importance given to it by section 38(6), may be granted permission if other material considerations outweigh that inconsistency.

71. In this case, the role of need in the planning application was – or, at least on the submissions as they evolved, now is – more subtle. It is common ground that the proposed development is not in accordance with the Local Plan, which does require need to be established for a development of this type in these circumstances. Therefore, by virtue section 38(6), there is a presumption that permission will be refused. That presumption is rebuttable by other material considerations. However,

in performing that assessment, the planning decision-maker must take into account, not only the planning harm caused by the failure of the proposal to comply with the Local Plan, but also the planning harm inherent in the proposal as a result of it being contrary to any other material policy, including of course any policy set out in PPW. Mr Buley contends that PPW requires the establishment of need for a proposal such as this. That was the view of the Inspector, who found there was no such need and therefore put the fact that the proposal was contrary to PPW in that respect into the balance against grant. The issue before this court is whether, as a matter of construction of the relevant parts of PPW, she was right to do so, as Fraser J found to be the case.

72. Whilst much of the debate before us involved a very detailed critique of the words and phrases in PPW which Mr Lewis and Mr Buley respectively considered assisted their submissions, the proper construction of PPW depends upon a fair and broad reading of the policy document as a whole.

73. Mr Buley submitted that the starting point should be on the paragraphs in PPW which focus on need for retail development. I agree: the true intention of the policy so far as need is concerned is most likely to be discerned from the paragraphs dedicated to that topic, i.e. paragraphs 10.2.9 - 10.2.12.

74. In my view, those paragraphs clearly indicate that, in the context of planning applications, there is a discrete requirement for need to be established which, if not satisfied, is a breach of PPW policy. In coming to that conclusion, I have particularly taken into account the following.

75. In my view, paragraph 10.2.2 sets the scene. As I have described (see paragraph 69(i) above), for plan-making purposes, need for the retail use has to be established first – and it is that which triggers an enquiry into whether there are sequentially preferable sites that might meet that need. Paragraph 10.2.2 makes clear that any planning application must "accord with this approach", or demonstrate why it departs from it.

76. Turning to the key paragraphs, paragraph 10.2.9 provides that: "In… approving planning applications for [retail] uses, local planning authorities should *in the first instance* consider whether there is need for additional retail provision" (emphasis added). As Mr Lewis frankly accepted, "in the first instance" is a temporal reference, and not simply an indication that need is a primary consideration in terms of importance and weight. If need were just a material planning consideration, there would be no purpose or sense in the policy requiring it to be considered first.

77. The policy requires need to be considered first because, as paragraph 10.2.12 states: "If there is no need for further development for retail and commercial centre uses, there will be no need to identify additional sites". Mr Lewis submitted that that was a reference to the process of plan-making only, and not the process of decision-making on planning applications; but I am not persuaded that that is the case. First, the paragraph is within a section that is not generally restricted to plan-making; indeed, paragraph 10.2.9 makes clear that it covers both plan-making and decision-taking. Second, Mr Lewis accepted that the following sentence in paragraph 10.2.13 ("There is no requirement to demonstrate the need for developments within defined retail and commercial centre boundaries") relates to both plan-making and decision-taking functions; and, indeed, the whole of the rest of that paragraph appears to apply to both

functions. It would be curious if just the first sentence did not. On a natural reading of the paragraph as a whole, in my view that sentence applies equally to both functions.

78. Paragraph 10.2.12 refers to there being "no need to identify additional sites" if no need for further retail use has been established. Mr Lewis relied upon the forensic point that, in paragraph 10.2.9, the concept of "identifying sites" appears to be restricted to the plan-making function because, grammatically, it has to be read as follows:

> "In [i] deciding whether to identify sites for comparison, convenience or other forms of retail uses in development plans or [ii] approving planning applications for such uses, local planning authorities should in the first instance consider whether there is a need for additional retail provision."

He submitted that "identify sites" in paragraph 10.2.12 should be read accordingly, and also restricted to plan-making. However, I consider that to be too fine a point. The policy document has to be read broadly; and, in my view, for the construction of the first sentence of paragraph 10.2.9, the fact that need has to be considered "first" is more telling than the exegetical point Mr Lewis made in reply. Looked at broadly and in its proper context, in my view paragraph 10.2.12 firmly indicates that, outside centres, need is a discrete requirement for planning applications; and, if it is not satisfied, then there is no requirement (or "need") to proceed to consider whether there is any sequentially preferable site.

79. Although I accept that other parts of Chapter 10 of PPW are less clear, or even ambivalent, in my view none fundamentally undermines the clear indication of paragraphs 10.2.9 – 10.2.12 which specifically deal with the test for retail need.

80. As I have described (see paragraph 63 above), Mr Lewis relied heavily upon the section of the chapter which deals with sequential preferences. For example, he submitted that there was nothing in those paragraphs that suggested there was no obligation to apply the sequential approach where no need had been established. However, subject to Mr Lewis's submissions with which I deal below, there is nothing in the paragraphs which positively indicates that need is not a discrete requirement, the establishment of which triggers consideration of sequentially preferable sites. At best, this point is neutral. That is not surprising: unlike paragraphs 10.2.9 – 10.2.12, these paragraphs are not focused on need.

81. Mr Lewis submitted that paragraphs 10.2.15 - 10.2.16 treat "the needs test" and "the impact test" as similar in nature. As the retail impact of a proposed development is merely a material consideration in the general planning balance, then (he submitted) it is implicit that need is to be treated in the same way. Paragraphs 10.4.1 – 10.4.5 similarly: indeed, the latter (quoted at paragraph 63(vi) above) groups the two tests and that for sequential preferences together, clearly indicating that PPW intends all three be merely material considerations.

82. I accept that these paragraphs – and especially paragraphs 10.4.1 and 10.4.5 – do not at first blush sit easily with the proposition that need is a discrete policy requirement of PPW. However:

i) Paragraph 10.4.5, which on the face of it might appear the most helpful to Mr Lewis's case, only states that the tests "*may*" apply to new retail developments: which is not inconsistent with the construction pressed by Mr Buley.

ii) The focus of that paragraph is, in my view, on the second sentence, to the effect that none of these tests will have to be applied in respect of a planning application if the proposal is in accordance with an up-to-date development plan, as they will have been considered when the plan was prepared.

iii) Whilst paragraph 10.4.1 sets out matters that should be taken into account in the determination of a planning application for retail etc use, it does not state that all are simply material considerations. Indeed, they are clearly not. For example, "compatibility with the development plan" is more than simply a material consideration because of the effect of section 38(6). The list also includes "the sequential approach to site selection". However, paragraph 10.2.14 indicates that that in itself can in certain circumstances involve a policy requirement, in the sense that a proposal for retail development on an out-of-centre site will not be considered if there is a suitable and available site in a centre or edge-of-centre. There is no reason to consider that, by including it in that list, it was the intention that "need" was to be simply a material consideration.

83. In the course of argument before us, there was some focus on the word "suitable" in paragraph 10.2.14. Mr Lewis criticised the Inspector for considering (in paragraph 19 of her decision letter) whether there was a sequentially preferable site in this case on the basis that the Park Avenue site was suitable for general retail use, although not for the broad type of retail development proposed (i.e. a roadside service area) as required by Tesco Stores v Dundee, Warners and Aldergate. She concluded that the Park Avenue site was sequentially preferable on this basis.

84. However, first, as Mr Buley powerfully submitted, "suitable" in paragraph 10.2.14 must mean suitable for general retail use because, in that paragraph, it is applied to plan-making as well as decision-taking on an application, and Mr Lewis accepts that, for in the context of plan-making, that is the accepted (and only sensible) meaning. It must have the same meaning in respect of each of those functions. That meaning is clearly not the same as that used in the three English and Scottish authorities relied upon by Mr Lewis. I do not consider that those cases assist on the issue of construction of PPW: they concern the construction of different national policies that apply in England and Scotland.

85. Second, paragraph 19 of the Inspector's decision letter has to be seen in context. As I have indicated (see paragraph 34 above), the Inspector proceeded on the basis that there was no need for roadside services. Given that the broad nature of the proposed development was as a roadside services area, so far as the PPW retail polices were concerned, it is at least strongly arguable that she could simply have stopped there. Need not having been established, there was no requirement to consider sequential preferable sites. However, she recognised that the Local Plan had identified a need for general retail use; and she therefore considered whether that identified need, which the proposal might go some way to satisfying, could or could not be met by a sequentially preferable site, concluding that it could (i.e. the Park Avenue site). That

ruled out any planning benefit to which the Site might be entitled on that score in the planning balance exercise she performed under section 38(6): no more, and no less. The Inspector clearly did not suggest that the Park Avenue site was sequentially preferable for use as a road services area: it was not adjacent to a major road, and in any event she considered preferable sites for that use at paragraph 23 of her decision letter, when she considered other material considerations. As Fraser J concluded, the Inspector did not err in law in the manner she dealt with sequential preference.

86. Finally, whilst I do not suggest that the Local Plan can assist in the interpretation of the national policy in PPW, it is of some comfort that the Local Policy chimes with the construction of the national policy I favour.

87. For those reasons, I do not consider that the Inspector erred in the manner in which she approached and dealt with need and sequential preference under PPW; nor, in my view, did Fraser J err in upholding her decision in that regard. Consequently, Ground B also fails.

Conclusion

88. Thus, despite the considerable efforts of Mr Lewis, I do not consider either ground of appeal has been made good. I would dismiss this appeal.

Postscript

89. As a result of the construction of the PPW which I consider to be true, it may well be that policy relevant to need on an application for planning permission for retail use in Wales is significantly different from that in England. That is not surprising, given the devolved nature of town and country planning. It is to be expected that, over time, planning policy and substantive law will increasingly diverge. The Planning (Wales) Act 2015, section 3 of which inserts a new section 60 into the 2004 Act requiring the Welsh Ministers to prepare and publish a National Development Framework for Wales, is only likely to increase the pace of change in Wales.

90. I emphasise that Mr Lewis, who is highly experienced in planning matters in Wales, did not for a moment suggest that there should be an assumption that planning policy in Wales is the same as in England. This case is a further reminder as to how dangerous such an assumption might be.

Lord Justice Singh:

91. I agree.

Lord Justice Davis:

92. I also agree.