Neutral Citation Number: [2022] EWHC 2827 (Admin)

Case No: CO/2003/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN MANCHESTER

Tuesday 8th November 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of TESCO STORES LIMITED)	**Claimant**
- and -	
ALLERDALE BOROUGH COUNCIL	**Defendant**
- and -	
(1) AIP (DERWENT RIVERSIDE) LIMITED	**Interested Parties**
(2) LIDL GREAT BRITAIN LIMITED	

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Richard Turney and **Nick Grant** (instructed by Bryan Cave Leighton Paisner LLP) for the **Claimant**
Nicola Allan (instructed by Allerdale BC) for the **Defendant**
The **First Interested Party** did not appear and was not represented
Sasha White KC and **Isabella Buono** (instructed by Gateley Legal) for the **Second Interested Party**

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Hearing date: 25.10.22

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. By this claim for judicial review, the Claimant ("Tesco") impugns the decision of the Defendant ("Allerdale") taken by a Development Panel (the "Committee"). The Committee's decision was to grant the Interested Party ("Lidl")'s application for planning permission for a discount food store development at a site in New Bridge Road, Workington. The decision was reached at a meeting on 29 March 2022 ("the Meeting"). The Committee adopted the recommendation in the Planning Officer's Report published on 21 March 2022 (the "OR"). The Planning Officer addressed members at the meeting, as did a representative for Lidl. Tesco had made representations in writing, including in a letter dated 24 March 2022 to which Committee Members were referred and which the Planning Officer at their invitation addressed.

2. Permission for judicial review was granted on a single ground. As framed in the Agreed List of Issues, the essential question is this: Whether the OR contained any material misdirection to Committee Members in respect of the interpretation and effect of (a) Policy SA49 in the Allerdale Local Plan Part 1 2014 ("LP1") and/or (b) Policy S30 in the Allerdale Local Plan Part 2 2020 ("LP2"). As the Agreed List of Issues also recognises, the route to determining that essential question involves addressing arguments about the proper interpretation of Policy SA49 and Policy S30. A final issue is this: whether, if there was a material misdirection, judicial review should nevertheless fail because the Court assesses it highly likely that the outcome for the Claimant would nevertheless not have been substantially different, but for that misdirection. Those are the issues. LP1 and LP2 are published online. Also available online (by searching reference "FUL/2019/0210") are key planning documents including the OR. Sometimes, in this judgment, I will give paragraph or page numbers. These are extraneous to understanding the substance of the judgment. But they will be a navigational aid for the parties and anyone who wants to follow the greater detail by accessing the publicly available sources.

3. Lidl had applied for planning permission for the development in August 2019. Planning permission was granted in December 2019 but quashed by consent in March 2020 (in earlier judicial review proceedings). The site of Lidl's proposed food store falls within the specified "Lower Derwent Valley" area, north of Workington. Policy SA49 is a "specific policy" for the Lower Derwent Valley area, as the Planning Officer told Members at the Meeting. This specified area has the River Derwent arching above it to the north. Included within the specified area are the following. From west to east: there is Derwent Park (the home of Workington Town Rugby League Club and Workington Comets Speedway Team); then there is Tesco's own superstore; then you cross the A597 near a roundabout with a Travelodge, Costa café and drive-through takeaway (OR §4.6). Having crossed the A597 going eastwards there is Borough Park (the home of Workington Reds Football Club). To the south of Borough Park there are offices of Allerdale. To east of those offices is a section of the land known as "The Cloffocks" (OR §11.32). It comprises a public car park and public green space. The specified area ends, just before Workington leisure centre. Lidl's proposed site is in the specified Lower Derwent Valley area. The site is just to the north of Tesco's superstore. It is described as "undeveloped scrubland" (OR §3.1) and classed as "out of town" (the

Cloffocks is classed as "edge of town"). One feature of the specified area is that there was an undetermined planning application for a development ("the Stadium Development") at Borough Park and The Cloffocks which would demolish the existing Borough Park stadium and "provide a sports stadium (use class D2) that would incorporate a hospitality /conference suite (class D1/D2), community facility (class D1), Café (class A3) and office space (class B1a) and an outdoor sports pitch (class D2) with access, parking and landscaping" (OR §4.5). I was told that this application has now been withdrawn.

4. LP1 and LP2 are accompanied by a Policy Map. The Map shows the Lower Derwent Valley area (SA49). It shows other policy-relevant areas. These include: Housing Allocations (SA8-29), Employment Allocations (SA36-45), Gypsy and Traveller Site (SA31), Retail Allocations (SA47-48) and Green Infrastructure (SA52). The Map also shows: areas of Housing Commitment, Mixed Use Commitment, the Primary Shopping Centre, the Town Centre Boundary, the Settlement Limit, and the Conservation Areas. LP1 contains "Strategic Policies" (to "deliver the long-term spatial vision" for the local planning authority area) and "Development Management Policies" (setting out more detailed implementation). The Planning Officer identified these LP1 Strategic and Development Management Policies as relevant (OR §8.1):

> ***S1 (Presumption in favour of sustainable development); S2 (Sustainable development principles); S3 (Spatial Strategy and Growth); S4 (Design principles); S5 (Development Principles); S6a (Workington); S16 (Town centres and retail); S21 (Developer Contributions); S29 (Flood Risk and Surface water drainage); S30 (Reuse of land); S32 (Safeguarding amenity); S33 (Landscaping); S35 (Protecting and Enhancing Biodiversity and Geodiversity); DM7 (Town Centre development); DM8 (Protecting Town Centre Vitality and Viability); DM9 (Town centre frontages); DM14 (Standards of good design); DM16 (Sequential test for previously developed land); DM17 (Trees, hedgerows and woodland).***

LP2, entitled "Site Allocations", "identifies land for housing, employment, retail, gypsy and travellers and open space" and "an area suitable for wind energy development". Among its "Site Allocation Policies" are to be found "Site Specific Allocations" ("allocations of sites for specific or mixed uses or development" which "identify any specific requirements for individual purposes"). The Planning Officer (OR §8.2) identified these LP2 Site Allocation Policies as directly or indirectly relevant:

> ***Directly relevant: SA2 (Settlement Limits); SA49 (Lower Derwent Valley); SA52 (Protecting and Creating Green infrastructure). Indirectly relevant: SA46 (Retail and Town centres); SA47 (Central Car Park Workington); SA48 Royal British Legion.***

There is a "monitoring framework" which involves each LP2 policy having a stated "target/objective" (LP2 Appendix 2). LP1 and LP2 are "development plan documents". They form part of the Defendant's "development plan policies", viewed "as a whole". Each "policy" is identifiable within a shaded box and is "accompanied by explanatory text to aid understanding and implementation of the policy approach" (Introduction to LP2 at §15).

Law

5. There are three key legal topics which it will be helpful to address at the outset. First, there is the s.38(6) duty and the "development plan as a whole". In making the determination whether to grant planning permission: (i) the Committee needed to have

regard to the development plan; and (ii) the determination was required to be made in accordance with the development plan unless material considerations indicated otherwise: see Planning and Compulsory Purchase Act 2004 s.38(6). This duty was accurately encapsulated for Members (OR §10.1) in a passage which went on to describe the LP1 and LP2 policies as having "primacy". The section 38(6) duty is a duty to make a decision by giving the development plan priority, but weighing all other material considerations (including the National Planning Policy Framework: "NPPF") in the balance; the decision-maker "must understand the relevant provisions of the plan"; and must establish whether or not the proposal "accords with the development plan as a whole": BDW Trading Ltd v Secretary of State for Communities and Local Government [2016] EWCA Civ 493 [2017] PTSR 1337 at §21. It can be necessary, in asking whether there was an "error" in relation to "one part of a policy", and in considering a question as to "conformity" or "incompatibility" with any "policy criteria", to "understand the nature and extent of the departure" from the plan: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 [2012] PTSR 983 at §22; BDW §23.

6. Secondly, there is the "interpretation", and the "application", of planning policy. It is for the Court to identify the proper interpretation of a planning policy statement, interpreted objectively in accordance with the language used, read in its proper context and not as if it were a statute; remembering that "interpretation" is "logically prior" to "application"; but also remembering that policy provisions may be framed in language calling not for "interpretation", but rather for "application" to a given set of facts as an exercise of planning judgment: Tesco at §§18-19, 21. The Court's interpretation of a planning policy should be "straightforward, without undue or elaborate exposition": Mansell v Tonbridge & Malling BC [2017] EWCA Civ 1314 [2019] PTSR 1452 at §41. The explanatory text accompanying a policy is relevant to interpretation but is not itself policy (R (Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567 [2014] 2 EGLR 98 at §16); and it is policy which has primacy over other content (2004 Act s.17(5)).

7. Thirdly, there is the idea of members being "materially misled" by a planning officer's advice. When judicial review is based on criticism of a planning officer's OR, the question for the Court is this. On a fair reading of the report – read as a whole, without undue rigour, and with reasonable benevolence – has the planning officer "materially misled the members on a matter bearing upon their decision", which error has gone uncorrected before the decision was made? The officer's advice must be "significantly or seriously misleading" – "misleading in a material way" – viewed in the context and circumstances in which the advice was given, and its possible consequences: Mansell at §42(2)(3). Whether a planning officer's advice had materially misled the committee, involves looking both at the OR and at the planning officer's advice to members given orally at the meeting: R v Selby District Council, ex p Oxton Farms (18.4.17) [2017] PTSR 1103 at 1110G, 1111B-C; Mansell at §42(1).

Policies about retail and town centres

8. There are a set of policies within LP1 and LP2 which are concerned with "retail" and the "town centre". I start with some definitions from the LP1 and LP2 Glossary. Here is the definition of "main town centre use":

> ***Retail development (including warehouse clubs and factory outlet centres); leisure, entertainment facilities the more intensive sport and recreation uses (including cinemas, restaurants, drive-through restaurants, bars and pubs, night-clubs, casinos, health and fitness centres, indoor bowling centres, and bingo halls); offices; and arts, culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities). Also includes medical centres and clinics.***

Here is the definition of "ancillary use":

> ***A subsidiary or secondary use … connected to the main use of a building or piece of land.***

These definitions, when combined, produce the concept of an "ancillary main town centre use". As will be seen below, that concept is found in the first paragraph of SA49. To understand the policy lexicon, some practical examples will help. A supermarket would be a "retail" proposal, constituting a "main town centre use". A casino would be a non-retail proposal, but would constitute a "main town centre use". A housing project would not be retail, and nor would it be a "main town centre use". A new club shop at and connected to the rugby league stadium at Derwent Park would be retail and an "ancillary main town centre use". In the Stadium Development, the "hospitality/conference suite (class D1/D2)" may also exemplify an "ancillary main town centre use". Everyone agrees that Lidl's application was a "proposal"; that it is for "retail"; that it is a "main town centre use"; that it is not an "ancillary use"; and therefore that it is not an "ancillary main town centre use".

9. I turn to the policies themselves. Strategic policy S16 (Town Centres and Retail) says the Council "will support retail development in accordance with [a] hierarchy of centres" which has Workington as the "Principal Centre". It says that "proposals for main town centre uses will be expected to be located within the existing centres"; that "applications for main town centre uses outside of these defined centres will be refused where the applicant has not demonstrated compliance with the sequential approach to site selection, or where there is clear evidence that the proposal would have a significant adverse impact on the vitality and viability of a nearby centre". Allocation policy SA46 (Retail and Town Centres) states that allocated sites SA47 and SA48 "will be safeguarded" for "main town centre uses", which will be "supported subject to compliance with Policies S16, DM7, DM8 and DM9 and other relevant local plan policies". Development management policy DM8 (Protecting Town Centre Vitality and Viability) includes three points of particular note. First, there is in DM8 an identified "sequential approach" (seen in S16) by which "proposals for main town centre uses will be approved within the town centre boundaries" but "outside of the defined centres will be refused where the applicant has not demonstrated compliance with the sequential approach to site selection as set out in national policy". Relevant "national policy" includes NPPF §§87-88 of which state:

> ***87. Local planning authorities should apply a sequential test to planning applications for main town centre uses which are neither in an existing centre nor in accordance with an up-to-date plan. Main town centre uses should be located in town centres, then in edge of centre locations; and only if suitable sites are not available (or expected to become available within a reasonable period) should out of centre sites be considered. 88. When considering edge of centre and out of centre proposals, preference should be given to accessible sites which are well connected to the town centre. Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale, so that opportunities to utilise suitable town centre or edge of centre sites are fully explored.***

That approach is also reflected in the explanatory text to DM8 at §§361-362. Secondly, there is in DM8 an identified "Impact Assessment" which "may be required for certain proposals outside of a defined town centre to assess the full extent of potential adverse impacts upon the existing town centre", and where "proposals for retail, leisure and office development up to and including the … threshold[]" of 500sqm for Workington "will generally be regarded as being of a scale that would not result in significant adverse impacts". Thirdly, there are in DM8 "Out of Centre Exceptions". One exception is that proposals for "specialist forms of retail development" may be acceptable where "it can be clearly demonstrated that the nature of the business requires an out-of-centre location" and "the proposal uses the most sequentially preferable site available (the explanatory text to DM8 at §366 gives "DIY, furniture, carpets and domestic appliances" as examples). Another exception is that proposals for "small scale specialist retail services" will be "permitted outside of town centres only where it can be demonstrated that the proposal is to perform a wholly ancillary role to an existing or planned use. The maximum size of the unit permitted will not exceed 50sqm" (the explanatory text to DM8 at §367 gives as examples "a chandler at a harbour, or a small food vendor on a fully established employment site").

Policy SA49: the Lower Derwent Valley

10. I now set out Policy SA49, including its layout, but adding paragraph numbers in square brackets for ease of later exposition:

> ***Policy SA49 Lower Derwent Valley.***
>
> ***[1] Proposals for new or replacement sport or leisure facilities and ancillary main town centre uses will be supported in the Lower Derwent Valley area, as defined on the Policies Map.***
>
> ***[2] Proposals will be expected to:***
>
> ***• [a] Deliver high quality design solutions that reflect and enhances its location at the northern gateway to the town;***
>
> ***• [b] Improve access and connections, especially pedestrian and cycling, within the Lower Derwent Valley itself and to the town centre;***
>
> ***• [c] Contribute to the enhancement and protection of existing, open space and green infrastructure, especially along the River Derwent corridor***
>
> ***• [d] Deliver a measurable biodiversity net gain; and***
>
> ***• [e] Be compliant with Policy S29 of Local Plan (Part 1) and supported by a [Flood Risk Assessment] that demonstrates how the development will be safe from, or mitigate against, the impacts of flooding and not increase flood risk elsewhere.***
>
> ***[3] Proposals for main town centre uses will be expected to comply with relevant sequential and impact tests set out in Policies S16 and DM8.***
>
> ***[4] Opportunities along the River Derwent corridor to protect and enhance its ecological value and flood storage capacity and improve informal recreational use, including pedestrian and cycle links to the town centre will be supported.***

11. The stated "Target/Objective" of SA49 (LP2 Appendix 2) is:

To protect the natural features of the Lower Derwent Valley whilst building on the potential links to the town centre and its cultural and sporting heritage.

12. The explanatory text to SA49 says this:

Lower Derwent Valley

104. The Lower Derwent Valley forms an important gateway to the north of Workington. It has the potential to link the adjacent town centre, with the existing sport and leisure facilities, the river corridor and surrounding housing. In order to fulfil this potential a policy framework is required to ensure a holistic approach which enhances and protects it natural features, builds on its cultural and sporting heritage and delivers a high quality entrance to the town.

105. The Lower Derwent Valley already hosts a mixture of retail, sporting and recreation uses, the most significant being two sport stadia which accommodates Workington Rugby Football League Club and Workington Comets Speedway Team (Derwent Park), and Borough Park which is the home of Workington Reds Football Club. Building on this sporting role, the Council has delivered a multi-million pound leisure centre to the east of the football stadium, close to the town centre.

106. The River Derwent corridor, which runs along the northern boundary, is an important feature of this area in terms of biodiversity value, green infrastructure networks and informal pedestrian links to the town centre and surrounding area. The River Derwent is designated as a Special Area of Conservation (SAC) and as such is recognised of international importance for its biodiversity. The river corridor provides opportunities in terms of an important area of open space, a green corridor link for informal recreation, opportunities for ecological protection and enhancement, as well as providing cycle and pedestrian links in to the town centre. Part of the Lower Derwent Valley also forms part of the English Coast Path network.

107. The Lower Derwent Valley has the potential to provide a complementary role to the town centre focussing on its sporting and cultural heritage and building on existing leisure and retail uses. To deliver this, the Council would expect that development proposals are designed to a high standard reflecting it importance as a gateway to the town and ensure that the river corridor and green infrastructure networks are integral to any design solution. Development proposals should also seek to maximise the opportunities to provide pedestrian and cycle links to the town centre, English Coast Path network and surrounding area. Proposed town centre uses will need to satisfy the sequential and impact tests set out in Polices S16 and DM8.

108. The River Derwent corridor is an integral feature of this area of Workington. An Assessment of Likely Significant Effect should be carried out on any development with the potential for impacting directly or indirectly on the River Derwent and Bassenthwaite SAC. Appropriate Assessment will be required for any development with a likely significant effect on the Natura 2000 site. Where proposals have a significant adverse effect, that cannot be made acceptable through mitigation, they should not be allowed to go ahead. Where mitigation is proposed, measures should be clearly defined and where appropriate secured by planning obligations. In addition, the River Derwent tributary that runs through the Lower Derwent Valley is classified as a main river and, as such, the prescribed buffer zone would be required to be incorporated in any development proposal. Proposals that enhance and protect the River Derwent's ecological value and its role as part of a town wide green infrastructure network will be supported.

109. Areas of the Lower Derwent Valley are subject to flood risk. In order to ensure development proposals are compatible with the relevant flood zones and reduce the potential for increased flood risk elsewhere, proposals should accord with Policy S29 of Local Plan (Part 1) and be supported by a Flood Risk Assessment. Opportunities to increase flood storage in the Lower Derwent Valley will also be encouraged and supported.

> ***110. The southern bank of the River Derwent is actively eroding. Proposals should fully assess the impact of this and include appropriate mitigation.***
>
> ***111. Green infrastructure networks, defined on the Policies Map, should be incorporated, where possible in proposals, both for the opportunities to provide links to the town centre and surrounding area but also to be safeguarded where it provides valuable flood storage and contributes to local biodiversity.***
>
> ***112. To support the delivery of this policy the Council intends to publish a development brief for the Lower Derwent Valley.***

Interpretation of Policy SA49: Tesco's argument

13. For Tesco, Mr Turney (appearing with Mr Grant) submits – in essence, as I saw it – as follows. There is a legally correct interpretation of policy SA49 which is this. There are an "overarching" set of criteria within policy SA49, which are "binary" in their effect. The function of those overarching criteria is that they serve to answer – "yes" or "no" – the question whether a proposal is in "conformity" with, on in "conflict" with, policy SA49. This "conflict" can equally be described as being "contrary" to or in "breach" of SA49. The only proposals which are in "conformity" with policy SA49 are proposals which are "supported" under SA49. That means a proposal "for new or replacement sport or leisure facilities" or "for… ancillary main town centre uses" in paragraph [1], or a proposal whose overall nature is "supported" under paragraph [4] as a proposal constituting an "opportunity" in the River Derwent corridor "to protect and enhance its ecological value and flood storage capacity and improve informal recreational use, including pedestrian and cycle links to the town centre" (as to which see the final sentence of §108 of the explanatory text). Any other proposal is in "conflict" with policy SA49, is "contrary" to the policy and in "breach" of the policy. It does not follow that such a proposal must be refused planning permission. But, on the legally correct interpretation of SA49, the "conflict" needs to be recognised, and its implications evaluated as a matter of planning judgment. This interpretation recognises the "overarching" nature of what is described in paragraph [1] and [4] as a proposal "supported" by SA49. The binary concept at the heart of SA49 is that a proposal which is not "supported" is "unsupported". This straightforwardly achieves the discernible purpose of safeguarding and protecting this specified area by reference to overarching criteria, in this allocation policy. It is true that, in principle, a policy in a local plan may be "non-binary" but multi-layered, with: (i) some proposals positively supported, (ii) others not positively supported but conforming and not in breach, and (iii) others neither positively supported nor conforming but in breach. But that is not the nature of policy SA49, on its legally correct interpretation.

14. Paragraphs [2] and [3] are therefore subordinate and secondary. They contain distinct criteria which a proposal is "expected" to meet. But the overarching, binary point remains. Unless "supported" under paragraph [1] or [4], the proposal will "breach" policy SA49, even if it meets the criteria in paragraph [2][a]-[e]. So, a proposal such as a housing development does not become "compatible" with policy SA49, just because it meets those criteria. A proposal for a main town centre use which cannot be described as an ancillary main town centre use – such as a new supermarket – does not become "compatible" with policy SA49, just because it meets the criteria in paragraph [3], nor if it also meets the criteria in paragraph [2][a]-[e]. The word "proposals" in paragraph [2] means "such proposals", referring back to the overarching paragraph [1]. The phrase

"proposals for main town centre uses" in paragraph [3] means "such proposals for ancillary main town centre uses", referring back to the overarching paragraph [1]. But even if that is wrong – even if "proposals" in paragraphs [2] and [3] means "all proposals", and even if "main town centre uses" in paragraph [3] has its Glossary definition unqualified by "ancillary" – none of that makes any difference. Although an applicant can point to meeting the criteria in paragraphs [2][a]-[e] and (for a non-ancillary main town centre use) [3], that assists – and assists only – in the assessment of the "nature and extent of the departure" (Tesco at §22) to properly inform a planning judgment. There is still a "breach". The purpose of paragraph [3] can be seen from NPPF §87. Paragraph [3] makes clear that "ancillary main town centre uses" are not taken, by virtue of SA49 paragraph [1], to be "in accordance with an up-to-date plan" (NPPF §87) so as to escape the rigour of the "sequential and impact tests set out in policies S16 and DM8". Paragraph [3] is needed to retain those tests. They apply to ancillary main town centre uses. True, there is the "exception" in DM8 for some main town centre uses which are "ancillary". But that is a narrow subset of "small-scale specialist retail services" (such as the chandler at the harbour or the small food vendor on the fully established employment site). The practical example of the conference centre within the Stadium Development shows the significance of paragraph [3]. But it is impossible to invoke paragraph [3] to bring non-ancillary main town centre uses within the scope of proposals which are "supported" by, and "compatible" with, policy SA49. They are not. They are a "breach".

15. Tesco's interpretation fits within the Local Plan as a whole and is supported by the explanatory text. It is supported by policy SA1 (identified sites), which policy states; "Sites allocated on the Policies Map for development and redevelopment shall be protected and delivered for their specified use in accordance with site specific policies and other relevant policies in the Local Plan". Nothing turns on whether or not SA49 is a "site-specific allocation" as opposed to an area-based allocation. What SA49 is doing (from July 2020) is safeguarding – or ringfencing – the Lower Derwent Valley area for new or replacement sport or leisure facilities, and for main town centre uses ancillary to existing buildings or land in the Lower Derwent Valley, unless there are good reasons to grant planning permission notwithstanding the breach of SA49. All of this is consistent with the retail and town centre policies. They beg, of other policies, the question which SA49 answers. True, policy SA46 speaks of proposals for main town centre uses "outside the allocated sites" and "subject to compliance with other relevant local plan policies". Lots of locations – including in the town centre – are outside the two "allocated sites": SA47 (the central car park) and SA48 (the Royal British Legion). SA49 is the relevant local plan policy, and there is not the "compliance" with it which SA46 would need. And there are plenty of other places on the Policy Map, including outside the town centre, where there would be no problem of "compliance". The interpretation is supported by the explanatory text to policy SA49. In particular in terms of §104, this is the holistic approach which enhances and protects the natural features, building on the cultural and sporting heritage and delivering the high quality entrance to the town. In terms of §107, this is the "complementary role to the town centre" which is one "focusing on [the] sporting and cultural heritage" of the Lower Derwent Valley, "building on existing leisure and retail uses" (as described in §105), of which are also expected the high standard design, reflection of the gateway importance and green infrastructure networks, and the maximisation of opportunities for pedestrian and cycle

links, and within which rubric the proposed town centre uses need to satisfy the sequential and impact tests. That, then, is Tesco's argument.

Interpretation of Policy SA49: Allerdale and Lidl's arguments

16. Miss Allan for Allerdale, and Mr White KC (appearing with Ms Buono) for Lidl, each say that that Tesco's interpretation argument is incorrect as a matter of law. They each emphasise that the four paragraphs of policy SA49 are "freestanding" paragraphs. They each emphasise questions of classic planning judgment arising under policy SA49, viewed on its own terms, but also viewed in the context of an evaluation against the development plan overall. They each reject Tesco's contention that policy SA49 involves "overarching" criteria, with a "binary" consequence for "conformity" or "breach", based on whether a proposal is "supported". They each submit: that SA49 paragraph [3] is applicable to any proposal for a "main town centre use"; that it it is not restricted to "ancillary" main town centre use; and that a proposal for a non-ancillary main town centre use can be in "conformity" with, "compatible" with, and not in "breach" of, policy SA49 by meeting relevant criteria in policy SA49 paragraphs [2] and/or [3], albeit that it is not "supported" under paragraph [1] or [4].

17. Beyond that harmonious united front, there are some divergences between Miss Allan and Mr White KC. A first divergence was this. Miss Allan supports this position: that paragraph [2] goes with paragraph [1] and identifies additional criteria to be met by proposals described in paragraph [1]; whereas paragraph [3] is a wholly freestanding paragraph containing the sole criteria for main town centre uses. That means ancillary main town centre uses need to meet the criteria in paragraph [2] and [3]; but non-ancillary main town centre uses need to meet only the criteria in paragraph [3] and not those in [2]. It means that a housing proposal could not be put forward as compatible with SA49, even if it would meet the criteria in paragraph [2][a]-[e], since those criteria apply to proposals falling within paragraph [1]. Mr White KC disagrees. He submits that all four paragraphs [1]-[4] are fully self-standing. He submits that a non-ancillary main town centre use would need to comply not only with paragraph [3] (as a "main town centre use") but also with paragraph [2] (as a "proposal") in order to be compatible with policy SA49. He submits that a housing proposal could in principle be put forward as compatible with SA49 because it could meet the criteria in paragraph [2][a]-[e].

18. A second divergence was this. Miss Allan relied on paragraph 194 of the explanatory text to policy S16 ("suitable sites will be identified on the edge of centre's as part of the Site Allocations process") and the language of SA46 ("Proposals for main town centre uses, outside the allocated sites, will be supported subject to compliance with policies S16, DM7, DM8 and DM9 and other relevant Local Plan policies"). She then advanced this submission: unless policy SA49 paragraph [3] were interpreted as allowing proposals for non-ancillary main town centre uses at Lower Derwent Valley compatibly with SA49, there would be no other out-of-centre location on the Policy Map where a non-ancillary main town centre use could be proposed without conflict with the policies of the Local Plan. That submission was advanced as powerfully undermining Mr Turney's suggested interpretation of SA49 paragraph [3]. Mr White KC rejected that submission as wrong. He made a distinct point of his own. His point was that it made no sense for paragraph [3] to be directed at ancillary main town centre uses, since something ancillary to a building or land within SA49 would not sensibly attract the rigours of the sequential and impact tests in S16 and DM8, particularly in

light of the exception made in DM8 for small-scale specialist retail services performing a wholly ancillary role to an existing or planned use.

Interpretation of SA49: Discussion

19. I cannot accept that policy SA49 involves the "binary" and "breach" components which are necessarily at the heart of Tesco's argument. In my judgment, SA49 is much more nuanced. It raises a whole series of evaluative questions for classic planning judgment, as a matter of "application". The starting point is that Mr Turney recognises that SA49 does involve some nuanced questions of planning judgment. One example is this scenario. Take a proposal which is not a "supported" proposal under paragraphs [1] or [4], but where the criteria in paragraphs [2] and/or [3] can nevertheless be applied. Mr Turney embraces this, but says it serves the function of informing an assessment of the "nature and extent of the departure". Another example is this scenario. Take a proposal which has, within it, one component falling within the description of an "opportunity" as described in paragraph [4]. That would not be "supported" proposal. But it would be "supported" component. Both of those are examples where, even on Mr Turney's own interpretation, there are shades of grey: nuanced questions of judgment and degree in the application of policy SA49.

20. Next, Mr Turney accepts – rightly – that in principle, a policy in a local plan may be "non-binary" but multi-layered, with: (i) some proposals positively supported, (ii) others not positively supported but conforming and not in breach, and (iii) others neither positively supported, nor conforming, but instead in breach. In my judgment, interpreted straightforwardly, this is exactly what SA49 does, or at least allows. The critical point is that it does not follow, as a matter of legal "interpretation" that, just because a proposal cannot claim to be "supported" for the purposes of paragraph [1] or [4], it must be characterised as a "breach" or in "conflict" with or "contrary" to policy SA49.

21. Next, it would have been very easy for the drafters of policy SA49 to present paragraphs [2] and [3] as being secondary and subordinate additional expected criteria falling within the umbrella of the "overarching" paragraph [1]. This could have been done by drafting paragraphs [2] and [3] as being a proviso to paragraph [1]. Paragraph [1] could have ended with "subject to" or "provided that". It could have been done by making paragraphs [2] and [3] into bullet points for paragraph [1]. As it happens, these techniques can be seen in the very next policy SA50 which describes proposals as "supported" but "subject to" points then made in bullet points. It would also have been very easy for the drafters of policy SA49 to use the language in paragraph [2] of "such proposals" or "those proposals"; and to repeat the word "ancillary" in paragraph [3], having used the phrase "ancillary main town centre uses" within the same policy at paragraph [1]. The drafters did not do so.

22. Next, the phrase "main town centre uses" is the phrase used in SA49 paragraph [3]. That is a particular phrase, expressly defined within the Glossary. There is every reason to treat it as meaning what the Glossary says it means.

23. What this means is that there are types of proposal being identified in paragraph [1] as being, in principle, positively "supported" by SA49. This starts with "sport and leisure facilities" as described at the beginning of paragraph 104 of the explanatory text, the

"cultural and sporting heritage" described at the end of paragraph 104, and the "sporting and recreation uses" and "sporting role" all described in paragraph 105. Also "supported" are proposals for main town centre uses which are "ancillary". That will include the example of a supporters' shop at one of the stadiums; or in the Stadium Development. There is also the enhancement and protection of natural features (reflected in paragraph 104) together with the opportunities as an area of open space, a green corridor link for informal recreation, opportunities for ecological protection and enhancement, and cycle and pedestrian links to the town centre (paragraph 106), themselves seen in the "supported" proposals or "supported" elements of proposals through SA49 paragraph [4]. It follows that it would not be a legally correct reading of policy SA49 to describe a supermarket or casino or housing project as being a "supported" proposal in terms of SA49, even if it has supported elements under paragraph [4].

24. What this means is that there are also general "expectations" that any proposal within the Lower Derwent Valley will meet the criteria in paragraph [2]. That is simply to give the language of paragraph [2] its ordinary and natural meaning – "proposals" in the Lower Derwent Valley area – without 'reading in' any restrictive words. The five general criteria [2][a]-[e] reflect important expectations as to a high standard of design and the importance of maximising opportunities for pedestrian and cycle links (emphasised in paragraph 107 of the explanatory text), the enhancement and protection of open space and green infrastructure together with biodiversity (emphasised in paragraphs 106, 108 and 111) and compliance with flood risk policy S29 (emphasised in paragraph 109). These criteria stand as important general expectations for any proposal within SA49. They fit with the stated "Target/Objective" of SA49 (LP2 Appendix 2): "To protect the natural features of the Lower Derwent Valley whilst building on the potential links to the town centre". Whether each, and whether all, of these are satisfied is a matter for classic planning judgment.

25. What this also means is that there are "expectations" that any proposal for a "main town centre use" in the Lower Derwent Valley area will comply with the sequential test and impact test in policy S16 and policy DM8. That involves giving the word "proposals" its ordinary and natural meaning. In involves giving the phrase "main town centre uses" its ordinary and natural meaning. It also involves giving that phrase the meaning which it has in the definition in the Glossary. Again, there is no 'reading in' of a restriction. This makes explicit that no proposal for a main town centre use, meeting the expectations of paragraph [2], avoids the sequential test by being "in accordance with an up-to-date plan" (NPPF §87).

26. Nothing in the explanatory text to SA49 conflicts with any of this. It is recognised in the explanatory text that the Lower Derwent Valley "already hosts a mixture of retail, sporting and recreation uses" (paragraph 105), and the word "retail" is significant. Also significant is "retail" in the description (paragraph 107) of the potential of the Lower Derwent Valley "to provide a complementary role to the town centre focusing on its sporting and cultural heritage and building on existing leisure and retail uses", the criteria reflected in paragraph [2] serving to "deliver this". It is conspicuous that paragraph 107 ends with the sentence: "Proposed town centre uses will need to satisfy the sequential and impact tests set out in policies S16 and DM8". This follows after a description which included "retail uses". The existing retail uses include the Tesco superstore. There was no reference here to "ancillary".

27. What to make of the merits of a retail proposal – or for that matter a casino or a housing proposal – would all be a matter for planning judgment. Whether the five general criteria in paragraph [2][a]-[e] are met is a matter of judgment. The significance of those criteria, and the virtues of compliance with them, is reflective of a policy protection for the Lower Derwent Valley. Whether a proposal for a main town centre use complies with the sequential and impact tests in policies S16 and DM8 is also a matter for planning judgment. Whether an application, which is not of a "supported" type, but which involves elements which are "supported" opportunities in terms of paragraph [4], is also a question of planning judgment. What to make of a proposal which is in principle "supported" (paragraph [1]), but which does not meet – or fully meet – the expectations of the paragraph [2] criteria, is a matter for evaluative judgment. All of this is in the realms of "application" of the policy, after the hard-edged questions have been answered by the law. Above all, the critical point is that, just because a proposal is not of a type which is "supported", it does not follow – as a matter of legal interpretation of policy SA49 – that the proposal for that reason is a "breach" of SA49 or "incompatible" with it or in "conflict" with it.

28. This is a "straightforward" interpretation. It simply gives the words used their ordinary and natural meaning. It recognises that the structure of policy SA49 is to set out four paragraphs. It recognises a difference between "supported" and "expected".

29. I deal with the loose ends. I agree with Mr White KC that paragraph [2] would apply to a proposal for a non-ancillary main town centre use, as falling within the word "proposals". I agree with Ms Allan that paragraph [2] are criteria applicable to the proposals described in paragraph [1] but I cannot agree with her that they apply only to those proposals. It follows that Mr Turney's example of a housing development could in principle be compatible with and in conformity with policy SA49, if it met the expectations of the criteria in paragraph [2]. The planning merits of such a housing development would be informed by a number of other policies. I agree with Mr Turney (and Mr White KC) that Ms Allan cannot sustain the submission that SA49 is the only location out of centre where a non-ancillary retail proposal could be in compliance with relevant local plan policies. I agree with Mr Turney that SA46 ("outside the allocated sites") in any event is not the same as outside the town centre. If it matters – and Mr Turney submitted that it does not – I agree with Miss Allan that policy SA49 is an "area based allocation" but not a "site-specific allocation". Finally, I do not agree with Mr White KC that it could not be sensible to apply paragraph [3] only to non-ancillary main town centre uses, but I would agree with the more modest submission that paragraph [3] makes best sense as being intended to apply to all – rather than only ancillary – main town centre uses.

<u>The Cloffocks discussion</u>

30. As part of the OR at §§11.32-11.34, there is an evaluation of the Lidl proposal by reference to the sequential test in S16 and DM8. Within that evaluation the following discussion appears:

> ***Sequential assessment – The Cloffocks (Lower Derwent Valley).***
>
> ***11.32 This 1.6ha site comprises a public car park and public green space and is classed as an edge of centre site i.e. within 300m of the edge of the designated town centre boundary. The site is allocated in Part 2 of the Local Plan for sports and recreational use, policy SA49 being***

> ***applicable. Part of the site is included in pending application (FUL/2019/0018) for the demolition of the existing stadium and redevelopment to provide a sports stadium including hospitality /conferences, community, café, office land uses and a sports pitch.***
>
> ***11.33 The remaining land could accommodate the proposal, but the allocation is for alternative recreational uses with complementary "ancillary" town centre uses, rather than retail. The proposal would be contrary to these allocations if pursued as a stand-alone retail development. It would also result in the loss of existing parking facilities serving the town centre which would need to be accommodated elsewhere. The loss of car parking may deter shoppers from using the town centre (including the elderly and disabled). The site also lacks road frontage and prominence. The site is therefore not considered suitable.***
>
> ***11.34 Notwithstanding the unsuitability, the Council. as landowner of this site, was contacted on its availability but no formal reply has been received to date. It is therefore considered unavailable.***

Understandably, Mr Turney emphasises the first two sentences of paragraph 11.33. He submits that they constituted a legally correct direction in law as to the true interpretation of policy SA49: the allocation under SA49 is for alternative recreational uses with complementary "ancillary" town centre uses rather than retail; the Lidl proposal as a stand-alone retail development would be "contrary" to these allocations. Tesco says this is correct and the very position it advanced in respect of the application site, itself recorded in the OR (§5.13(s)) as follows: "The proposal cannot be seen as ancillary and therefore it is contrary to its allocation under Policy SA49". This is a 'sauce for the goose' point: that "contrary" is the "binary" idea of "breach". Ms Allan and Mr White KC attempted, in my judgment unconvincingly, to suggest a different meaning of the opening sentences of §11.33. As they showed me, the description at the beginning of §11.33 is taken directly from Lidl's own "Planning and Retail Statement" (May 2021). The description at paragraph 11.33 is that it takes the positive "supported" proposals in SA49 paragraph [1] as being "the allocation". But the point ultimately goes nowhere. That approach was not taken to Lidl's application. The argument at §5.13(s) was rejected. I have been invited to approach the question of the interpretation of policy SA49, objectively, based on the policy and its context and permissible aids to interpretation. That is what I have done. By the time of the Meeting the question left open at §11.34 had been answered and the Cloffocks site was unavailable. There were also in any event other reasons ("It would also result") why Cloffocks was said, in the OR (and by Lidl) to be unsuitable. Cloffocks is water under the bridge.

SA49: Application

31. Having dealt with the question of interpretation of policy SA49, I turn to the way in which SA49 was addressed in the OR, in the assessment of the Lidl proposal. The starting point is that nowhere in the OR is it said that the Lidl proposal was a "supported" type of proposal for the purposes of SA49. Had that been said, as Mr White KC expressly accepted, that would have been an error. The question would have been as to its materiality and whether it rendered the advice materially misleading in the context of a decision about compatibility with the development plan as a whole. Mr Turney's essential argument is twofold. He says that the OR was materially misleading "by omission", in failing to identify a "breach" of SA49. He also says that what was said by the planning officer at the Meeting was materially misleading "by commission", because it communicated "conformity" and "compatibility" with SA49, where the absence of paragraph [1] "support[]" meant that there was a "breach". For the reasons

already explained, I cannot accept the legal interpretation which is the premise for those arguments.

32. I will describe the key contents of the OR and what the Planning Officer told Members at the meeting. In the OR, under a heading "Principle of Development", the Planning Officer's assessment included this (OR §11.2):

> ***… The application site falls within the designated Lower Derwent Valley, policy SA49 being relevant. That policy supports the provision of new/ replacement sports facilities and ancillary town centre uses in this area subject to specific criteria (reflecting the existing established uses in this area). It recognises the site's value as an important gateway approach into the town seeking design solutions that enhance this entrance to the town whilst improving the green infrastructure / ecological habitat of the River Derwent corridor.***

Mr Turney fairly accepts that this passage is legally correct. It uses the word "supports" for "new/replacement sports facilities and ancillary town centre uses". It does not tell Members – nor did Planning Officers anywhere tell Members – that this included the Lidl proposal, as a "supported" type of development within the designated Lower Derwent Valley. The OR (§5.13(s)) then recorded the objection (which I have mentioned already) having been raised: "The proposal cannot be seen as ancillary and therefore it is contrary to its allocation under Policy SA49." The OR did not agree with that objection. Mr Turney's point is his "omission" – that the OR did not tell Members that, since it was a non-ancillary main town centre use, the Lidl proposal was "contrary" to Policy SA49 – but that was not an error in the proper interpretation of SA49, for the reasons I have explained.

33. The OR conclusions section was:

> ***12.0 Balance and Conclusions.***
>
> ***12.1 The proposal has been considered against the Development Plan policies as a whole. There are no material considerations which result in a decision not being made in accordance with the Development Plan. The Investment Plan and Towns Fund funding are a material consideration specific to the retail sequential assessment of alternative sites.***
>
> ***12.2 Rigorous assessment of the impact of the proposal on the viability and vitality of the town centre has been undertaken with the application of the sequential test and retail impact assessments. The impact is considered acceptable.***
>
> ***12.3 Overall, the proposal balances Economic, Environmental and Community objectives, and is thus sustainable development. And so, subject to conditions and planning obligations, this is a sustainable development, compliant with the development plan policies and which secures the redevelopment of an undeveloped site in poor condition, with associated biodiversity enhancement.***

Mr Turney accepts that this section, including §12.3, is dealing with compliance with the development plan 'as a whole'. I add this. Even if in §12.3 the phrase "compliant with the development plan policies" were read as communicating "compliance" with SA49, the fact that this was a non-ancillary main town centre use did not mean an absence of "compliance" – or "breach" – for reasons I have explained.

34. One obvious question is whether the Lidl proposal was treated as meeting the criteria in SA49 paragraph [2][a]-[e]. No point arises out of that question. It is no part of this claim for judicial review that the Planning Officer misinterpreted SA49, and materially

misled Members, by treating paragraph [2] as inapplicable. I add this. There are passages in the OR, and in what the Planning Officer told Members at the meeting, which were plainly addressing the substantive content of the criteria found in SA49 paragraph [2][a]-[e]. The Planning Officer told Members that these criteria applied only to a type of proposal "supported" in paragraph [1]. The fact that the proposal was assessed as meeting the criteria would explain why the Planning Officer said there was "a bit of an academic question" about it conforming to the policy. Lidl, for its part, treated the paragraph [2] criteria as needing to be met. Take paragraph [2][d] as an example: Lidl's representative told Members that it had acted "in accordance with Allerdale's planning policy to deliver a measurable biodiversity net gain"

35. At the Meeting, Members were told this by the Planning Officer:

> ***There is a specific, if I can move on to my next point, there is a site where there is a specific policy, SA49, which talks about what the site can be used for. And different people have come to a different view on that policy, so it's important that you are aware of that policy. The policy firstly talks about the site being suitable for uses related to leisure and sport, and ancillary retail, but it then goes on… it branches on to say… that for full scale retail, it has to meet the tests of the sequential test and the test of retail impact. So, if you like, that policy has two parts to it. The first part says that if you're going for sporting or leisure use with ancillary retail, here are the criteria you've got to use. But the second part of the policy says that if you're going for a town centre type retail use, you've got to do the sequential test and you've got to check the viability. So, we are very much looking at the second half of Policy SA49.***
>
> ***It is the view of officers that it meets the requirements of that policy. Going down the key points of planning concern …***

The Planning Officer was asked to deal with the points raised in Tesco's letter of objection (dated 24 March 2022), which had stated this as a third objection:

> ***Conflict with Policy SA49. The officer identifies that the application site falls within the Policy SA49 allocation, finding that the "…policy supports the provision of new/replacement sports facilities and ancillary town centre uses in this area subject to specific criteria…". The Glossary to the Local Plan defines an ancillary use as "a subsidiary or secondary use or operation connected to the main use of a building or piece of land." … Whilst development that is not "ancillary" will be at odds with the approach in Policy SA49, such non-compliant proposals are, as the policy confirms, required (as a site that is "not in accordance with an up-to-date plan" (NPPF paragraph 87)) to meet the sequential and impact tests. Satisfying those requirements does not remove the overarching failure against Policy SA49 …***

Asked to address that objection, the Planning Officer told the Meeting:

> ***The third point is the view of the objector that there's a conflict with the site's allocation. The allocation in our Local Plan, in terms of Policy SA49. Now, this is one of the points I tried to specifically cover in my presentation. For those of you who got a copy of the plan in front of you, you may wish to refer to it. It's on page 117 of the Local Plan, Policy SA49. It's a … policy covering the Lower Derwent Valley. The surrounding text, the explanation of the policy, talks about the Lower Derwent Valley forming a gateway into the town, and it talks about the surrounding housing, sports and leisure facilities etc. Now, when it moves from the explanation to the policy, it starts of by saying "proposals for new development for replacement sports or leisure facilities, and ancillary main town centre uses will be supported in the Lower Derwent Valley area as defined in the policy maps." So, if this proposal being brought forward by Lidl, was a sports or leisure facility, with some ancillary retail, that would fit in the first part of the policy. But it's fairly obvious that they're not bringing forward a sport and leisure facility, and the retail is not ancillary to a sports and leisure facility. So, that***

> ***takes you on to the second part of the policy where it says, "proposals for main town centre uses will be expected to comply with relevant sequential and impact tests, set out in policies S16 and DM8". So, in other words, having crossed that first hurdle that it's not ancillary to a sports or leisure facility, you then go on to the second leg of the policy, which says have you done the sequential test? Which they have, tick. Have you looked at the impact on the town centre and consider it reasonable? Again, that has been done. So those two criteria in the policy have been met, in that second part. So, it's a bit of an academic question about whether it conforms to the policy. It conforms to the bit of the policy relevant to that type of development.***

36. Mr Turney argues that at the Meeting the Planning Officer was adopting a legally erroneous approach to SA49, which Miss Allan has sought to support. I can put it as a flowchart ('route to verdict'):

> ***Q1. Does the proposal fall within SA49 paragraph [1]?***
>
> ***If the answer to Q1 is "yes", ask:***
> ***Q2a. Does the proposal meet the criteria of SA49 paragraph [2][a]-[e]?***
>
> ***If the answer to Q1 is "no", ask:***
> ***Q2b. Does the proposal fall, and meet the tests, within SA49 paragraph [3]?***

37. I agree with Mr Turney that the Planning Officer told Members this was the approach to SA49. For the reasons already given, I also agree with him (as does Mr White KC) that this approach involves a misunderstanding of SA49. However, for reasons I have explained, no issue arises in this claim for judicial review about the proposal failing to meet the criteria of paragraph [2][a]-[e] and bypassing Q2a. As has been seen (OR §12.2) the tests of SA49 paragraph [3] were met. Members were not told that the proposal was "supported" under SA49. Members were told that the proposal was one which "meets" the policy, and "conforms with the bit of the policy relevant to that type of development". Provided that Planning Officers sustainably concluded – and the contrary is not argued in this claim – that the criteria of paragraph [2][a]-[e] and the tests in paragraph [3] were met, there was no material error of law; the advice was not materially misleading. I have rejected Mr Turney's interpretation that, in law, a proposal not "supported" under SA49 cannot be seen to "meet" or "conform" with SA49, but must inevitably be seen to "breach" SA49.

Policy S30

38. I turn to the second part of the case. I explained at the outset that one of the LP1 strategic policies identified as relevant by the Planning Officer (OR §8.1) is S30 (Reuse of land). Policy S30 (again, with the insertion of paragraph numbers in square brackets for ease of cross-referencing) is as follows:

> ***S30 Reuse of Land.***
>
> ***Previously Developed Land (Brownfield).***
> ***[1] In line with local regeneration and sustainability objectives, the Council will encourage and where appropriate prioritise the effective reuse of previously developed and vacant sites within the Plan Area.***
>
> ***[2] Proposals for windfall development on greenfield sites may be required to carry out a sequential test to demonstrate that there are no available previously developed sites, which***

> ***are not of high environmental value, within the settlement that could suitably accommodate the scheme.***
>
> ***Contaminated and Unstable Land.***
> ***[3] For proposals for development of land where there is risk of potential onsite contamination or ground instability, an investigation into the quality of the land will be required. In circumstances where the proposal involves a site that is known to be contaminated or unstable, the Council will require an assessment to be submitted with the application. This must be carried out by a suitably qualified person to the current British Standards and in accordance with local guidance.***

39. The explanatory text to S30 says this:

> ***294. There is a history of vacant previously developed land throughout the Plan Area, but concentrated in the South West of the Plan Area, in and around Workington.***
>
> ***295. Policies encourage redevelopment of previously developed land and support schemes that involve the restoration and regeneration of these sites, provided these sites are not of high environmental value. Vacant land can provide an ideal habitat in which plant and animal wildlife can thrive, especially if left undeveloped and undisturbed. A sequential test may be required for windfall proposals on greenfield land to demonstrate that no suitable previously developed sites are available, the thresholds for which are set out in Policy DM16.***
>
> ***296. Given their former use, many previously developed sites are contaminated with chemicals, oils and other pollutants that can pose risk to human health and the natural environment. Consequently proposals involving the reuse of contaminated sites must be rigorously assessed to ensure that the extent and nature of the contamination is identified and a suitable scheme for remediation of the site can be achieved, while ensuring the development does not affect habitats, species and protected sites.***
>
> ***297. Where development is proposed on a site known to be contaminated or have the potential to be contaminated as a result of industrial activity (e.g. Gasworks, petrol stations, filled ground, steelworks, railway land), a preliminary risk assessment will be required. This must be carried out by a suitably qualified person to the current British Standards and in accordance with guidance set out in Development of Potentially Contaminated Land and Sensitive End Uses: An Essential Guide for Developers (Jan 2013) or any subsequent guidance.***
>
> ***298. A history of coal mining within the Borough has left a legacy on the land. Whilst most past mining activity is generally benign in nature, potential public safety and stability problems can be triggered and uncovered by development activities. Problems can include collapses of mine entries and shallow coal workings, emissions of mine gases, incidents of spontaneous combustion and the discharge of water from abandoned coal mines. Therefore it is important that proposals for new development delivered through the Local Plan recognise the problems and how they can be addressed. Where a proposal has been identified by the Council as being on land where there is a risk of ground instability, an appropriate investigation into the quality of the land will be required.***

40. I start with the interpretation of Policy S30. I could detect no material disagreement about what S30 means. None of what follows was in in dispute. I start with S30 paragraph [1]. This is applicable to a "site" which is "previously developed land", and so "brownfield". The phrase "effective reuse of previously developed and vacant sites" means "effective reuse of sites which are vacant previously developed land" (a phrase also found in explanatory text §294). It does not mean "effective reuse of previously developed sites and effective reuse of vacant sites". After all, "vacant sites" which are not also "previously developed" would not fall within the heading to paragraph [1]. Turning to S30 paragraph [2], this is applicable to a "site" which is "greenfield", and

so not "previously developed". If the proposal on the "greenfield" site is a "windfall development" (meaning that "planning consent (usually for housing)" would be being "granted despite that site not being allocated for development in the local plan"). Paragraph [2] says the Council "may" require the applicant to carry out the "sequential test" there being described. That sequential test would involve looking within the "settlement" (using the "settlement boundary" in the Policy Map), at other "previously developed sites" which are "available". It would involve excluding any such site of "high environmental value". Having looked at the relevant "available" sites, the question is whether any of those "could suitably accommodate the scheme". Turning to S30 paragraph [3], this is applicable to any site proposed for development where there is "risk of potential onside contamination" or a "risk of ground instability". In such cases, "investigation into the quality of the land will be required". Where the site is "known to be contaminated or unstable", the application for planning permission must be accompanied by a compliant assessment.

41. The OR included this (underlining added for later cross-referencing):

> ***11.0 Assessment***
>
> ***Principle of development***
>
> ***11.1 Workington is identified as the Principal Centre in the settlement hierarchy under Policy S3 of [LP1] (2014) and should therefore be the focus for major new development (the application site is located within the defined settlement limits under Policy SA2 of [LP2]). The Principal Centre and its vitality and viability are to be protected under Policies S2 and S6a. Subject to certain criteria, policy S5 indicates that new development will be concentrated within the physical limits of such centres, providing that the scale of the development proposed is commensurate to the size of the settlement and reflects its position within the hierarchy. Where available, and if appropriate, the Council will also encourage and prioritise the effective reuse of previously used land and buildings or vacant and underused land, as identified by Policy S30. However, under its criteria policy DM16, as the development exceeds 500sqm, a sequential test is also required.***
>
> …
>
> ***Retail Planning Considerations***
>
> …
>
> ***11.6… The site is undeveloped land, but its immediate setting and the nearby stadiums were developed in the 20th century, with the construction of the river bridge in the 21st century following earlier major floods. Policy S30 of [LP1] – undeveloped land therefore applies.***
>
> …
>
> ***Contamination***
>
> ***11.108 Policy S30 outlines the criteria for the reuse of land which includes addressing any contamination.***
>
> ***11.109 The application was supported by a ground investigation report including a range of mitigation measures. Neither [Allerdale]'s Environmental Health Officer nor the Environment Agency raise concerns on this issue, but the latter refers to the potential for any pollution transfer due to the tidal activity of the River Derwent to ecological designated sites upstream. As already detailed in the Ecology section of this report, measures including a***

> ***Construction Management Plan can address this matter appropriately. The proposal therefore complies with policy S30 of [LP1].***

The proposed planning permission conditions, adopted by Members, addressed minimising risk arising from any possible contamination.

42. Mr Turney submits in essence, as I saw it, as follows. The interpretation of S30 is clear and undisputed. But the Planning Officer misunderstood S30. The contents (underlined) of OR §§11.1 and 11.6, in particular when read together, demonstrate a misdirection rendering the OR materially misleading. At §11.1, the Planning Officer is telling Members that S30 involves positive encouragement and prioritisation of the effective reuse of some sites. That can only be a reference to paragraph [1] of S30. Just five paragraphs later, at §11.6, the OR tells Members that S30 "applies". The statement at §11.6, that S30 "applies", cannot be explained by reference to the need to address contamination from S30 paragraph [3]. That is addressed much later in the OR (§11.108). There is no reference at §11.6 to contamination, there is no reference such as: "see §11.108 below". No reasonable member could conclude that the applicability of S30 at §11.6 is because of contamination risk. The OR, rightly, recognises that this is "undeveloped" land. But the OR describes it as relevant that there was previous development of "the immediate setting" (§11.6). The test in S30 paragraph [1] is whether the "site", not the immediate vicinity, has previously been developed. The OR mistakenly also treats land which is "vacant and underused" as falling within S30 paragraph [1]. The mistake can be seen in the use of the "or" (at §11.1) in "or vacant or underused land". These are themselves errors. Overall, the message communicated by OR §§11.1 and 11.6 is that "effective reuse" of this site is "encourage[d] and prioritise[d]" by S30. That makes the OR materially misleading to Members when read as a whole and vitiates the decision overall.

43. I do not accept that these passages satisfy the legal threshold of being materially misleading, still less so as to vitiate the conclusion (seen at OR §§12.1-12.3) that the Lidl proposal was compliant with the development plan policies as a whole. I am going first to address contamination. There was a concern, by reference to S30, which would have been a 'negative'. It is recorded in OR §11.109. It links to concerns, which had been raised by the Environment Agency, and had been summarised earlier (OR §5.10). The applicability of S30 to that concern relates to S30 paragraph [3]. That is reflected in OR §11.108. Lidl's application had been "supported by a ground investigation report" (OR §11.109). Two planning conditions (8 and 9) were identified in the OR, each of which had express reasons which stated "compliance" with S30. The second of these conditions reflected the possibility of existing contamination (being found when carrying out the development). In this context, it was correct to say that S30 "applies". In this context, it is also relevant that there was the previous development in the nearby vicinity. The word "therefore" at OR §11.6 is not a reference back to §11.1; but rather a reference to the earlier part of §11.6 (the development of the vicinity). S30 paragraph [3] "applies" to "undeveloped land", where there are contamination issues. The OR made clear, throughout, that this site is "undeveloped" land. The OR has to be read as a whole. Had §11.6, after the words "therefore applies", said "(see §§11.108-109 below)" there could be no possible criticism. Viewed in the context of S30 paragraph [3] and §§11.108-109, the contents of §11.6 cannot be characterised as a misdirection. It was, and is, legally correct to say S30 "applies" to this as "undeveloped" land.

44. I now put contamination to one side. I would accept that it is appropriate to test Tesco's arguments by 'picking up the stick at the other end'. I start with OR §11.1. This is the first time that S30 is discussed, having been listed as a relevant policy at OR §8.1. There are really three concerns. First, why would an OR, in dealing with "Principle of development", tell Members about a policy to "encourage and prioritise" an "effective reuse", unless that was being treated as descriptive of the proposal under consideration? Secondly, it is a misreading of S30 to say that it encourages and prioritises "the effective reuse of previously used land and buildings" and that it encourages and prioritises "the effective reuse of … vacant and underused land". Thirdly, since the phrase "vacant and underused land" would apply to this site, the impression could be that S30 encourages and prioritises the proposal at this site. These are understandable points for which there is a proper basis. But they are quite insufficient, in my judgment, to make the OR "materially misleading". Nowhere does the OR tell Members that this Lidl proposal at this site is encouraged and prioritised by S30. It does not do so at §11.1 or at §11.6 or anywhere else. No point is made at §11.6 about this being vacant and underused land. Nothing then or later in the OR picks up on or reflects S30 encouragement and prioritisation, or reflects S30 encouragement and prioritisation on the basis of being vacant and underused land. S30 does not have any prominence elsewhere in the OR, or read as a whole (except as to the distinct question of contamination). S30 did not feature in the Planning Officer's oral presentation at the meeting. No claim was made by the Planning Officer, or by Lidl, that this was an encouraged or prioritised development for undeveloped land pursuant to S30. Anyone looking at S30 paragraph [1] – indeed the heading to that paragraph – would have known that it was not. And there is a helpful, contemporaneous cross-check about how the OR was being read, so far as relevant policies were concerned. The detailed letter of 24 March 2022 written by Tesco's representative – emphasised by Mr Turney as being a planning letter of criticism – identified a number of what were said to be material errors in the OR. But this was not said to be one of them. The writer of that letter had not taken from the OR that it was communicating S30 encouragement or prioritisation of this development, contrary to the clear meaning of S30. In my judgment, on no view was the OR materially misleading by what it said about S30 at §§11.1 and/or 11.6.

HL:NSD

45. It follows that – whether the two aspects are viewed individually or in combination – the claim must fail. There was a final issue. Allerdale and Lidl have argued that even if the OR were materially misleading, in relation to SA49 or S30 or both, it is "highly likely" that the outcome would have been the same ("not substantially different"), so that no remedy could be appropriate: Senior Courts Act 1981 s.31(2A). What is said is that the Court can be confident that the OR would still have advised Members that the planning permission should be granted, and Members would have acted in accordance with that advice. At a level of principle, I wonder whether that will not be an ambitious argument in a case, involving the exercise of planning judgment, where the Court has found the OR to be "materially" misleading. I was shown R (Advearse) v Dorset Council [2020] EWHC 807 (Admin), where the test of an officer's report having "significant misled councillors about one or more material matters" (§19) was satisfied by the claimant. The report had failed correctly to approach two aspects of the NPPF (§§224, 27-29). But the HL:NSD test was also satisfied by the defendant, and so the claim failed: that was because the public benefits, so clearly apparent, meant there could

only be one realistic outcome (§31). In the present case, for the HL:NSD test to be engaged, the premise would have to be as follows: that I had concluded that SA49 on its legally correct interpretation compelled a proposal which is not "supported" to be characterised as a "breach"; and/or that I concluded that the OR in this case communicated that this proposal was "supported" by SA49; and/or that I concluded that the OR communicated that this proposal was "encouraged" or "prioritised" by S30; and that I concluded that one or more of these was "materially" misleading to Members. In the circumstances of the present case, I would have found it quite impossible to have the high degree of confidence needed to dismiss this claim for judicial review by reference to the HL:NSD test, in the context of the exercise of planning judgment, with its "forbidden territory of assessing the merits", which precludes my acting as a primary decision-maker or 'second-guesser'. I am reminded that this was a 5-4 decision. And I have well in mind what was said in R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 [2020] PTSR 1446 at §273.

Conclusion

46. For the reasons which I have given, the claim for judicial review fails on its legal merits and will be dismissed. Having circulated this judgment as a confidential draft, I am able to deal with consequential matters. The costs position was communicated as being agreed. I will order that the Claimant pay the Defendant's costs in the agreed sum of £25,008.67 (exclusive of VAT). Mr Turney and Mr Grant applied for permission to appeal on two points, arguing in respect of each that there is a real prospect of the Court of Appeal reaching a different view. The first is the interpretation of SA49, arguing in essence that my judgment is wrong because a proposal not positively "supported" by SA49 must "conflict" with it "at least to that extent", which "partial conflict" is required to be identified by Tesco at §22 and policy SA1. The second is the reading of OR §§11.1 and 11.6, arguing in essence that my judgment is wrong because a reasonable committee member would have read those passages as communicating that S30 was "supportive" of the proposal. My view is that those points, and the submissions made in support of them, do not have a realistic prospect of success in the Court of Appeal, and so I refuse permission to appeal.