

Examination of the Ryedale Plan- Local Plan Sites Document

Hearing Statement – Ryedale District Council

Statement 6 – Matter 6- Land for Retailing (Policy SD14)

Existing Retail Commitments (Policy SD14)

6.1 Is the approach set out in Policy SD14 of supporting existing commitments effective, justified and consistent with national policy?

The rationale for existing commitments is designed to reflect the fact that planning permissions for sites exist and aims to provide continued support in principle in the event that these expire. The approach is justified on the basis of the operation of the need to consider sequentially preferable sites for retail in accordance with Paragraphs 23 and 24 of the NPPF 2012. The evidence base supporting the Ryedale Plan (LPS and Helmsley Plan), identifies these sites as being edge of centre locations in retail development terms.

The identification of the Livestock Market Site (LMS) as a commitment reflects the extant planning permission and its sequentially preferable location adjacent to current Town Centre Commercial Limits. It also meets convenience (food) retailing needs as set out in the LPS. It should be noted that the Town Centre Commercial Limits are proposed in the LPSD to be extended to incorporate the site within the Town Centre, taking account of the sensitive and complicated planning history associated with the site and its location in relation to the town centre as it is currently defined.

The site known as the Former Dewhirst Site as now been identified as not being subject to an extant planning permission. Since the Publication of the LPSD, a planning application was submitted on the site for a Petrol Filing Station and forecourt shop (0.52ha of the site's 0.73ha). This applicant has been refused planning permission in August 2018, post Submission of the LPSD. The shop element was to provide convenience food retail and this would be contrary to the LPS in terms of convenience food retailing as the LMS is the sequentially preferable site, and meets need. Implications for the LPSD are that it is not possible to identify the Dewhirst site for undefined retail, as this has the potential to undermine the delivery of the LMS as the most sequentially preferable site for retail, based on its permission for food retail. Appended to this statement are two documents, the planning report for the application 17/01249/FUL at the Dewhirst Site, and the Court Judgement on the decision to grant permission for a food retailing scheme within the Northern Arc which was not the LMS.

On that basis the Council would ask that the inspector consider the Dewhirst Site is no longer identified as a retail commitment. The site remains a brownfield, edge of centre site. If it becomes available for non-food retail use, this can be considered within the context of Policy SP7 and national policy on that basis.

6.2 What is the justification for including existing commitments in Policy SD14 as opposed to allocating them? Against which criteria would a revised or alternative proposed development be considered?

The identification of the commitments, for all intents and purposes, is designed to operate as if the site is an allocation. The approach is supported by the evidence relating to the availability of alternative sites and by sustainability appraisal.

The LMS at Malton represents one of the very limited edge of centre locations/ opportunities to contribute to meeting food retail needs but also some non-food. It is the closest site to the town centre, and its suitability for the uses for which planning permission has been secured, has been accepted through the planning process.

The former Dewhirst site is a brownfield site in an edge-of-centre location (at Norton).

The Council is not aware of any other specific town centre or edge of centre sites at Malton and Norton which are available for retail uses.

The policy is therefore designed to provide comfort to the landowner that the retail use of the sites will be supported in principle if existing permissions are not implemented, and ensure that suitable and available edge of centre locations are identified.

6.3 What is the situation regarding existing commitments and any identified residual need?

- The LPS identifies residual need at Pickering, Helmsley and Kirkbymoorside is to be met though redevelopment of land and buildings within or on the edge of the town centre commercial limits or though expansion /intensification of existing retail uses. There are no allocations expected by the LPS.
- The requirement for additional non-food retailing space at Pickering has reduced by circa 325 square metres following the issue of a CLEUD (Certificate of Lawfulness of Existing Use or Development) at the Steam and Moorland Centre.
- Food (Convenience) retailing requirements at Malton are met by the planning permission which exists on the LMS, and this is in accordance with Policy SP7. The Council is not aware of an operator for the site.
- The Council has checked its records and it can confirm that no lawful commencement has been undertaken on the Dewhirst Site and that the planning permission has expired. In this respect the site can no longer be identified as a commitment which includes 1212 square metres of non-food retail floorspace. This would increase the residual shortfall in non-food retailing space to 2,112 square metres. The site is nevertheless a brownfield site on the edge of Norton Town Centre, and as such would be suitable, in accordance with SP7 for non-food retail. It should be noted that, with the operation of SP7 in place for close to 6 years, there has been very little interest in planning applications for non-food retail. Which is an indication of the current lack of demand within the retail sector.

6.4 What is the current planning status of the sites?

The LMS has planning permission and a lawful commencement has been made. It is not known to the Council whether an operator has been found for the planning permission granted, and it is therefore unclear whether it will be developed in accordance with the permission granted. That being said, it is the most sequentially preferable site for retail uses and is available, is suitable, justified, and sustainable as demonstrated through the planning application process. The lack of an operator, does not mean that the site is not developable, deliverable and viable. Given its sequentially preferable status, this is the main reason why the Council has chosen to include the site within the Town Centre Commercial Limits.

The status of the Dewhirst Site is outlined above. The site has recently been the subject of a planning application for a petrol filling station and forecourt shop. This application was refused, and the report is attached for context, because the food retail element was in conflict with the food provision at the sequentially preferable site at the LMS.

The current planning status of the sites is a reflection of their aligned complicated planning history associated with the identification of retail space at Malton and Norton. There is a lack of sequentially suitable, and available, sites for non-food (comparison) retail development. This does raise implications for ability to address non-food requirements in the LPSD. However, the wider economic environment of the retail sector has been challenging in the time since the LPS was adopted. The strategic policy framework has been in place for nearly six years, and there has been very limited interest in operators who are in the non-food sector. Where businesses have set up, in purpose built accommodation in the DIY bulky goods retail sector, they have located to business parks in Malton. There has also been some churn of existing buildings and premises within the town centre.

6.5 Are the sites suitable, available, justified, sustainable, developable, deliverable and viable?

The LMS in Malton, with its sequentially preferable location is a strategic site in terms of its impact on the consideration of other sites. The LPS acknowledges it as meeting quantitative food retailing floor space. The LMS is adjacent to the existing Town Centre Commercial Limits and is proposed through the LPSD to be included within those Town Centre Commercial Limits. The site submitter (representor 1075 (SD14) is supportive of the inclusion of the site, and has not alerted the Council to any difficulties regarding the site which has an extant planning permission. As such it is available and developable although the Council is not aware of an identified operator.

The Dewhirst site is not a sequentially preferable site for food retail (in the context of the LMS which has an extant permission and is identified as being available). As such, the Council considers that any allocation would have to be for non-food retail. This is not the current aspiration of landowner, and therefore being able to demonstrate deliverability for non-food retailing is questionable. In view of LMS permission, and the proposal to locate LMS in the Town Centre, the allocation of the Dewhirst site is considered to be unlikely to be effective/deliverable. The Dewhirst site remains a Brownfield site on edge of Norton Town Centre. Any future proposals will be considered through application of Policy SP7 of the LPS, and the LPSD in the decision making process. This will also be within the context of the operation of the sequential test in respect of flood risk in national policy.

6.6 What is the background to the identification of the broad location of the Northern Arc? Is the approach of identifying a broad location as opposed to detailed site boundaries effective, justified and consistent with national policy?

The Northern Arc is an indicative broad location which is set out in the LPS as a broad area with scope for redevelopment potential, based on unanticipated sources, and for town centre uses (as opposed to being solely retail-driven). It was identified to recognise that whilst Malton is a Mediaeval Market Town, there were opportunities to consider town centre uses in an area of land which was adjacent to the established Town Centre Commercial Limits. The broad location of the Northern Arc includes the LMS, various 20th century buildings and a substantial Council-owned car park, Wentworth Street Car Park, which is subject to a quashed decision to approve a retail store. The judgement is attached.

6.7 How is it envisaged that the sites will be brought forward within the Northern Arc?

It is acknowledged that part of the Northern Arc is proposed to be within the Town Centre Commercial Limits, and includes the LMS. It is identified to provide scope for redevelopment through unanticipated sources, for town centre uses and not just retail. It has led to reconfiguration of existing buildings, including the unanticipated scheme at the former Kings Head Pub. The Wentworth Street Car Park area is to site a Public Sector Hub and car park where the District Council and other public service providers will move to, with town centre car parking retained.

6.8 Overall, does the LPSD provide sufficient land to meet the identified quantitative and qualitative need for retail in the broad locations identified in Policy SP7 of the LPS?

In terms of food retail needs, the LPSD provides the site to meet quantitative food retail needs, until the LMS is developed. There remains a degree of uncertainty around whether qualitative needs will be improved. There is a shortfall in respect of comparison retail, and this has been increased due to the Dewhirst site not being capable as being identified as an available site for non-food retail because of the landowner's intentions.

There is also a wider context to retail capacity which is in part a reflection of the work of the Fitzwilliam Malton Estate in their promotion of Malton as being a Yorkshire Food Capital. There has been an increase in independents and 'high-end' food offer in Malton within the last 4 years with bakery/cafes that allow purchases to be eaten off-premises, and delicatessens. There has been an increase in small, independent shops.

The Council considers that the undersupply of non-food (comparison) retail land in the LPSD cannot be divorced from the national picture. The retailing industry is undergoing a period of significant restructure and re-invention, and being forced to take on the challenges of the increasing dominance of internet shopping. As such national/chain operators are not making significant investment decisions. Demand is low, which is one of the reasons why there has been a limited source of land provided to consider retail provision. It is the operators who look for sites and buildings, and when there is interest, the landowner is able respond to this.

6.9 If not, what are the implications of not meeting the quantitative and qualitative need for retail?

The implications are that there will continue to be leakage of expenditure out of the District to Scarborough, Thirsk and in particular, York. Acknowledging also that the District's retail base also must compete with internet shopping. The Council nevertheless consider that the proposed approach in the LPSD, is pragmatic. The LPSD places the LMS within the Town Centre Commercial Limits, and it is sequentially the best performing site and has landowner

commitment. There is currently uncertainty around the operator of the site, but it is a clear policy response to support the site's re-development. Aligned to this, to not allocate any further, less sequentially preferable retail sites, allows the market to respond to the site which is available. The Local Plan Strategy's identification of the Northern Arc continues to help by identifying an area of opportunity to increase the choice and range of town centre uses, as the market demands.



Neutral Citation Number: [2015] EWHC 1948 (Admin)

Case No: CO/4915/2014

IN THE HIGH COURT OF JUSTICE
PLANNING COURT (LEEDS DISTRICT REGISTRY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2015

Before :

MR JUSTICE DOVE

Between :

The Queen

Claimant

- on the application of -

**MILTON (PETERBOROUGH) ESTATES
COMPANY TRADING AS FITZWILLIAM
(MALTON) ESTATE**

- and -

RYEDALE DISTRICT COUNCIL

Defendant

- and -

GMI HOLBECK LAND (MALTON) LIMITED

Interested Party

**Peter Village QC & James Strachan QC (instructed by Pinsent Masons LLP) for the
Claimant**

**David Manley QC (instructed by Ryedale District Council) for the Defendant
Paul Tucker QC and Michael Rudd (instructed by LB & Co Limited) for the Interested
Party**

Hearing dates: 10th – 11th June 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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MR JUSTICE DOVE :

Introduction

1. This claim is a challenge by way of Judicial Review to the grant of planning permission by the defendant to the interested party for A1 retail units, offices, petrol filling station, car park and landscaping at a site known as Wentworth Street Car Park (“WSCP”) in Malton, North Yorkshire. The planning permission was granted on 12th September 2014. The claimants are landowners who own a significant part of Malton town centre and who also have the benefit of the grant of a planning permission on appeal on 29th October 2012 for another retail development in the town on what is known as the Livestock Market Site (“LMS”).
2. The claimant contends, in brief, that in granting planning permission the following errors of law occurred. Firstly, the members of the planning committee were seriously misled in relation to the conclusions that the Inspector had reached in the claimant’s appeal in relation to the LMS site when he granted permission as set out above. This was, in particular, in relation to the Inspector’s conclusions in respect of the sequential ranking of the LMS site and the WSCP site and his reasons for concluding that the former was preferable to the latter. They were further misled by the failure to allude at all to the Inspector’s conclusion that for the purposes of retail impact analysis the LMS site should be counted as part of the town centre.
3. Secondly, in disagreeing with the Inspector’s conclusions in particular in relation to the sequential test the officer’s report on which members relied to make their decision to grant planning permission, failed to provide adequate reasons for that disagreement.
4. Thirdly, it is contended that the council failed to have regard to the impact on planned investment which would occur in relation to the implementation of the LMS if planning permission were granted for the WSCP. It is contended that the officers failed to properly disentangle the intentions of the proposed operator of the LMS site, Booths, from the intentions of the claimant, the landowner. Finally, it is contended that consideration should have been given to rescreening the proposed development for EIA purposes in the light of circumstances having changed since it was originally screened.

History

5. On 10th May 2011 the claimant applied for planning permission for the retail development of the LMS site. The proposal sought to demolish all buildings on the site and construct four new retail units with a total gross external floor space of 4,092 square metres along with a three storey decked car park and new public area. The largest of the retail units was proposed for a high quality food store and had a gross external floor space of 2,360 square metres. The three smaller retail units were proposed for comparison goods retailing.
6. In August 2011 the interested party applied for outline planning permission for a new food store of 5,205 square metres gross together with other ancillary development as described above. Around the time of making the application the interested party sought the opinion of the defendant as to whether or not their proposed development

was Environmental Impact Assessment (“EIA”) development pursuant to the then relevant Regulations, namely the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulation 1999. This request for a screening opinion was made by way of a letter dated 22nd August 2011. Amongst a number of characteristics of the proposed development the letter addressed the question of cumulative effect. The information provided in the letter was as follows:

“4.2 The Subject Site lies adjacent to the existing Malton town centre commercial limits (Ryedale Local Plan adopted March 2002). The emerging Core Strategy includes a proposal for the town’s commercial limits to be extended to an area known as the Northern Arc, which is suitable for mixed use development including new convenience and comparison retail uses. The area of the Subject Site proposed for built development lies broadly within the Northern Arc and there is currently another application for planning permission submitted to RDC for retail uses with the Northern Arc and thus adjacent to the existing town centre commercial limits. However, the two sites are not contiguous and are separated by existing town centre uses and residential streets. No adverse environmental effects are anticipated were both sites to include built development such as would result in a requirement for an EIA.

4.3 A full statement has been prepared by Nathaniel Lichfield and Partners (“NLP”) pursuant to Planning Policy Statement 4, which covers retail impact and the strategic retail policy implications of the proposal. The work by NLP includes a conclusion that only one large new convenience store/foodstore can be accommodated in Malton or the District generally. This is consistent with work undertaken on behalf of RDC by Roger Tym and Partners (“RTP”). Additionally Arup has prepared an economic impact assessment of the proposal which takes other development into account, where such potential is identified. These documents have been submitted as part of the planning application.

4.4 It is submitted that there are no developments anticipated to be constructed or conducted in the area which would together give rise to significant environmental effects such as to warrant EIA of this scheme.”

7. On 14th October 2011 the defendant responded to the screening opinion and the covering letter made clear that the opinion had been “given strictly on the basis of the information provided in the submitted application”. The screening opinion concluded that the development, whilst within Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the applicable Regulations at the time of providing the opinion), it was a development which was not likely to give rise to significant effects on the environment and therefore did not qualify as EIA development.

8. On 12th April 2012 the defendant refused the claimant's application for planning permission for four reasons. The first and fourth reasons are of materiality to the matters in this case. So far as relevant the first reason for refusal was expressed as follows:

"Whilst the application site is on edge of centre as defined in National Planning Policy, and would function as an immediate and logical extension to the town centre, it is considered that the site is not currently available for the proposed development or suitable for the type/mix of retail development proposed by this application. Furthermore, the applicants have failed to demonstrate to the satisfaction of the Council that the proposed development would be viable, and therefore that the scheme would be deliverable.

It is considered that an alternative site, located to the east of Wentworth Street and currently in use as a car park, is sequentially preferable to the application's site on the basis that it is available suitable and viable.

The application is therefore judged to have failed to demonstrate compliance with the sequential approach required by National Planning Policy."

9. The fourth reason for refusal, again so far as relevant, provided as follows:

"The National Planning Policy Framework states that where a proposed development is likely to have a significant adverse impact on town centre vitality and viability planning permission should be refused..."

There is a resolution to approve an application for a foodstore with a gross floor space of 4,494 square metres (net floor space of 3,086 square metres) as part of a scheme at Wentworth Street, Malton taking the impacts of the proposed development into account it is considered that in combination with this commitment the proposed development is likely to have a significant adverse impact on town centre vitality and viability, contrary to the provisions of the National Planning Policy Framework and Regional Spatial Strategy."

10. The claimants appealed and the appeal was heard by the public inquiry procedure. During the course of the inquiry the following material formed part of the evidence before the Inspector who made the decision on the appeal on behalf of the Secretary of State:

- a) Within the inquiry's Core Documents the Inspector was presented with reports from Roger Tym and Partners ("RTP") that had been commissioned to provide the evidence base for the defendant's emerging forward plan (which started as a Core Strategy and later developed into a Local Plan Strategy). The role of these reports was to provide the Council with evidence in relation to matters concerning retail planning both in terms of the retail needs that had to be planned for and also the potential candidate sites which might accommodate those needs. In the first report of May 2006 RTP noted that the LMS site had closer adjacency to the town centre and offered "good potential for retail uses" in particular for a small number of retail shops. They noted that the WSCP site was "approximately 160 metres to the north-east of the town centre" and edge of centre in terms of the then National Planning Policy on retail. They suggested that the WSCP had potential for retail warehousing. In the next report dated September 2008 they advised in relation to the LMS that it appeared "to offer excellent potential for retail uses because of its close adjacency to the town centre core". They noted that the site was already well connected to the retail core and "would form a natural extension to the town centre". In particular they considered that the site would be a suitable location for unit shops for comparison goods retailing. In respect of the WSCP they observed that this site was "more peripheral being separated from the town centre by existing residential development... and being located on a different lower level to town centre shops". They went on to say that whilst pedestrian linkages between the site and the town centre existed "the degree of separation by other non-retail uses means that the site is unlikely to form an "extension" to the existing town centre". RTP's most recent report was provided in July 2011 and in relation to the LMS site they noted that the site was "technically edge of centre" for the purposes of the sequential test but went on to provide as follows:

"However, the [LMS] site is well-connected to the retail core of Malton town centre, which can be easily accessed by pedestrians via The Shambles or Spittle Street / New Gate. Indeed the site lies just to the rear of the existing retail / service units at Market Place, which – in our professional judgment – is part of the primary shopping area of Malton (although we recognise that the Proposals Map does not formally define a primary shopping area). We therefore consider that the cattle market site, if developed for town centre uses, would form a natural extension of the town centre, and that it represents the most sequentially preferable opportunity in Malton."

RTP went on to reaffirm their view that the LMS site was well placed to provide comparison retail units albeit a foodstore could be acceptable as part of a mix of uses at the site they did not advocate a supermarket only scheme which would rule out the prospect of attracting comparison retailers. So far as the WSCP site was concerned they reiterated that it was approximately 160 metres to the

north-east of the town and they went on to conclude that the site was more suited to convenience rather than comparison retail development “because new high-street stores should be focused on the cattle market site as the first priority given its close proximity to the primary shopping area”.

- b) The Inspector received evidence from Mr Goddard on behalf of the claimant contending that the first reason for refusal set out above was misconceived and that the LMS site was sequentially preferable to the WSCP site. It appears from the closing submissions of the defendant that during the course of cross-examination their witness on retail planning issues, Mr Johnston, accepted that the LMS site was “sequentially the most preferable site in Malton”. The council were therefore no longer able by the end of the inquiry to sustain the first reason for refusal in particular as it was conceded that members had not been properly advised as to the policy content of the sequential test when they had reached their decisions both on the LMS but also on the WSCP which they had resolved to grant consent for at the same meeting that they refused the claimant’s application. Not only therefore was the council’s case at the close of the Inquiry that the LMS site was sequentially preferable to the WSCP site but also they conceded that it would be necessary for the members to reassess their resolution to grant planning permission “in the light of the concession that the nature and application of the sequential test was not properly spelled out in the LMS Committee Report”.
 - c) In order to address the fourth reason for refusal Mr Goddard undertook a cumulative impact on the town centre which included the impact of both the claimant’s and the WSCP proposed developments. In undertaking that analysis Mr Goddard incorporated the additional turnover from the claimant’s scheme within the overall figure for expenditure in the town centre. The effect of the analysis was to show that the claimant’s proposal would lead to an overall positive increase in the retail turnover in the town centre in the region of 24.7% leading to the conclusion that the claimant’s proposals would have a positive impact on the town centre. This approach was predicated on the RTP acknowledgement that the LMS site would form part of the functional town centre. This approach was disputed by the defendant.
11. The Inspector concluded that the claimant’s appeal should be allowed in a decision date 29th October 2012. The Inspector explained the backdrop provided for the application by the RTP studies and noted the claimant’s justification for the proposals on the basis that they would fulfil Malton’s convenience and comparison retail floor space needs up to 2021 and beyond. He then turned to consider the sequential approach. His conclusions are expressed as follows:

“21. I turn now to the sequential test, formerly set out in PPS4 and now carried forward into the Framework. Paragraph 24 of the Framework explains that local planning authorities should require applications for main town centre uses to be located in town centres, then in edge-of-centre locations and only if

suitable sites are not available should out-of-centre sites be considered. It further notes that when considering edge-of-centre and out-of-centre proposals, preference should be given to accessible sites that are well connected to the town centre, and goes on to say that applicants and local planning authorities should demonstrate flexibility on issues such as format and scale.

22. The RTP retail assessments referred to above have consistently taken the view that the LM site represents the most sequentially preferable opportunity in Malton. However, in the LM report to Committee, Officers adopted what the Council referred to at the inquiry as a “novel” application of the sequential test. As a result, the Planning Committee was advised that the WSCP site was preferable to the appeal site in PPS4 terms. A reading of the Committee Report reveals that this advice was based on the Officers’ view that the appeal site was not suitable for the development proposed; could not be considered as currently available for the proposed development; and that the development proposed had not been demonstrated to be viable.

23. However, at the inquiry the Council’s planning witness acknowledged that there had been significant flaws in the way this matter had been approached. Firstly, there is nothing within the Framework, nor was there anything within PPS4, which requires a developer to apply tests of availability, suitability and viability to the site being promoted for development. The sequential approach is intended to establish whether or not there are any more sequentially preferable sites for the development proposed, than the site in question. In this case there is no dispute between the parties that the LM site could accommodate the appeal proposal.

24. Moreover, an assessment of the site provided to the Council by RTP in the RRCIAU comments that a retail-led scheme would be viable at the site and could form a natural extension of the existing town centre. It considers that the site would be an ideal location for a development providing a small number of unit shops to attract the type of “high street” comparison retail outlets presently missing from Malton’s offer. It further suggests that such units could potentially form part of a mixed-use development, described as possibly including a basket foodstore and/or residential/office uses, although a supermarket-only scheme is not advocated. The study also comments that the WSCP site is located about 160m to the north-east of the Town Centre Commercial Limits and is more suited to convenience rather than comparison retail development.

25. A final point of note is that the LM report to Committee acknowledges that the LM site is not specifically allocated for comparison retail development at the present time. The report does indicate that the supporting text to policy SP7 of the LPS publication draft refers to the LM site as being particularly suitable for non-food retailing, but there is nothing to suggest that this need be to the exclusion of other uses. In any case, I understand that objections have been lodged to this policy and its supporting text, including from the appellant, and in these circumstances I can only give this emerging policy limited weight.

26. Taking the above points into account it is my view that the LM site is the sequentially preferable site to accommodate the development proposed and that its development for such uses would be in line with guidance in the Framework. Moreover, no firm evidence has been placed before me to suggest conflict with any adopted development plan policy in this regard.

...

32. However, whilst it is common ground that the grant of planning permission for a larger store on the WSCP site would make it more difficult for an operator to be found for the appeal proposal, this underscores the need and purpose of the sequential approach in seeking to promote and strengthen town centres. Despite the Officers' conclusion in the LM Committee Report, the submitted evidence as a whole, leads me to conclude that the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site. Moreover, having visited both sites as part of my inspection I consider that a development on the WSCP site would have poorer pedestrian links to the town centre than the LM site, notwithstanding the fact that enhancement works to the connecting route are proposed.”

12. The Inspector then turned to consider the question of the fourth reason for refusal and matters related to retail impact. He first looked generally at the relationship between the LMS site and the town centre to assess whether or not there would be an adverse effect on the town centre in principle and concluded as follows:

“36. The SoCG indicates that the Council does not accept that the LM site forms a logical extension to the town centre, but this does not sit comfortably with its first reason for refusal, which quite clearly states a contrary view. However, notwithstanding this point the fact remains that at the present time the Council is promoting, through its emerging LPS, a “northern arc” (which includes both the LM site and the WSCP), to the north of the existing town centre, to

accommodate new retail space to support the role of the town centre. In addition, paragraph 5.25 of the LPS Submission document of May 2012 notes that the LM site has the ability, overtime to form a logical extension to the town centre.

37. Having regard to these points and the fact that there would be good linkages between a development on the appeal site and the town centre, I consider it reasonable to assume that the appeal proposal would strengthen and enhance the town centre, rather than adversely impact upon it. In coming to this view I have also had regard to the retail advice consistently given to the Council by RTP prior to this inquiry, through the various retail assessments referred to earlier, that the LM site would be an appropriate location for further retail development. I do not believe that this advice would have been given if RTP considered that it would result in harm to the existing town centre.”

13. The Inspector determined that the WSCP scheme could not be regarded as a commitment in the light of the concession that the resolution to grant planning permission had arisen from a committee report which had provided the members with erroneous advice as to the proper application of the sequential test and that resolution would need to be revisited. Nevertheless in considering the arguments in relation to impact the Inspector provided conclusions on the analysis provided by Mr Goddard on cumulative impact. His conclusions were as follows:

“41. Finally on this issue, I briefly consider the scenario whereby the WSCP scheme is granted planning permission. The first point of note is that there is agreement within the SoCG that the cumulative scale of both the appeal proposal and the WSCP scheme would significantly exceed the retail capacity identified for Malton within the RTP 2008 Retail Study. In addition, the submitted evidence indicates that the WSCP scheme would draw trade from the town centre Morrison’s store, which is currently over-trading. However, I accept that in resolving to grant planning permission for the WSCP proposal the Council considered that the overall impact on the town centre, including linked-trips, would be acceptable.

42. Nevertheless, trade would be drawn from the existing centre, and this impact would be increased if the appeal site was also granted planning permission. In such circumstances a judgement has to be made as to the overall extent of any impact, having regard to the specific details of the cases and the locations of the respective sites. In this regard it is of note that in asserting that the appeal proposal would result in harm to the vitality and viability of the town centre, the Council has not undertaken any specific assessment of this matter.

43. In contrast, the appellant has argued that although a greater impact on the existing town centre would arise if both the WSCP and the appeal proposal were to proceed, custom drawn to the LM scheme should be seen as contributing to town centre turnover, in view of the general acceptance that it would function as a logical extension to the town centre. Indeed the appellant argues that on this basis the appeal proposal would lead to an overall positive impact of 24%, compared to the situation if only the WSCP scheme proceeds.

44. I fully accept that such arguments have to be treated with some caution, in light of the view expressed by the Inspector and endorsed by the Secretary of State, in a call-in case in Stoke on Trent⁴, that including edge-of-centre stores in assessments of “functional” centres could generate misleading conclusions. However, I am not persuaded that the particular circumstances of that case, which related to a much larger centre and a different disposition and juxtaposition of foodstores, are directly comparable to the current situation which involves a relatively modest development immediately adjacent to an existing market town centre. On balance, and particularly having regard to the Council’s aspirations for additional retail areas in the “northern arc”, set out within the emerging LPS, I consider that the appellant’s assessment of this matter is to be favoured.

45. Having regard to all the matters detailed above, I conclude that the proposed development would accord with the sequential approach to town centre uses, set out in the Framework, and would not have an unacceptable effect on the vitality and viability of Malton town centre. Accordingly I find no material conflict with policies YH5 or E2 of the RSS which seek, amongst other matters, to make Principal Towns (such as Malton) the main local focus for shopping activities and facilities, and to strengthen the role and performance of existing city and town centres.”

14. In the light of these conclusions the Inspector granted planning permission. He also concluded that the defendant had behaved unreasonably in relation to “the very significant admission that it had misapplied the sequential test” and the members had been wrongly advised that the WSCP site was sequentially preferable to the LMS site. The Inspector further concluded that the defendant’s fourth reason for refusal was also unreasonable and costs were awarded against them in respect of that issue as well.
15. On 19th November 2013 the interested party submitted revised documentation in respect of their application which had a resolution to grant consent. The size of the foodstore was reduced from 5,205 square metres gross to 4,530 square metres gross and other changes of detail were made in the application. A suite of updated documents including in particular an updated Retail Statement from Nathaniel Lichfield and Partners (“NLP”) was provided.

16. In September 2013 the defendant adopted its “Ryedale Plan – Local Plan Strategy”. This observed that current commitments which had been granted consent accounted for most, if not all, of the quantitative additional food retail floor space which was required to 2026. It indicated that if commitments failed to come forward then any outstanding requirements within the district would be directed to Malton in order to improve the range and choice of food stores in that town. It will be recalled that the Inspector had made reference to a “Northern Arc”. This was explained in paragraph 5.25 of the local plan strategy which provided as follows:

“5.25 Excellent edge of centre opportunities exist to accommodate new retail space to support the role of Malton Town Centre. A “Northern Arc” lies to the north of the town and it stretches from the existing Livestock Market to Wentworth Street Car Park. It is a band of existing and former agricultural buildings and spaces that were carved out of the medieval street pattern to relocate livestock trading in the mid 19th century. Today, whilst this broad area is not derelict, parts of it are under used and there are opportunities to redevelop sites and buildings to accommodate additional retail space with excellent connectivity with the existing town centre. Although this document does not allocate specific sites for new uses, it is considered that within this “Northern Arc”, the Livestock Market area is of strategic significance. It provides a key opportunity to accommodate a mix of uses and in particular to provide much needed space for additional non food retailing. Whilst it currently occupies a location which abuts the existing town centre, it has the ability – once developed – to form a logical extension to the town centre. Currently outline planning consent has been granted for a mixed convenience and comparison retail scheme on the site.”

17. In order to assess the revised application which had been provided by the interested party the defendant commissioned two pieces of independent work from consultants. Firstly they commissioned a review of the NLP retail planning work which they received in February 2014. It is unnecessary to set that material out in detail at this stage since it was, understandably, heavily drawn upon in the compilation of the committee report on the application. In summary England and Lyle (“EL”) endorsed the conclusions of the NLP retail work that there was greater potential for the creation of retail floor space for convenience retailing and that the LMS site and the WSCP site were sequentially equal. In the light of this and also the fact that the scale of the foodstore proposed in the interested party’s application could not physically be accommodated on the LMS site they accepted NLP’s conclusion that the sequential test was passed.
18. In relation to impact on planned investment EL relied upon the second piece of independent work commissioned by the council, namely a report from DTZ dated 11th February 2014, in relation to the commercial viability of both the claimant’s consented scheme and the interested party’s proposed scheme. In their report DTZ concluded that none of the principle foodstore operators would be interested in the

consented scheme on the LMS site and that whilst that location might appeal to Booths or Aldi the form of the consented scheme would be unacceptable to them. It would require redesign before having any chance of attracting commercial interest.

19. Further objections were made to the application by the claimant's planning consultant on 11th March 2014. That letter coincided with a letter from the claimants enclosing a letter of support from EH Booths and Company Limited ("Booths") expressing Booths' interest in the site and the fact that they were in the process of negotiating an agreement for a lease with the claimant for the foodstore element of the LMS site. In the letter the chairman of Booths indicated that they remained "very concerned" about the interested party's unresolved planning application. Following this up on 25th March 2014 the claimant wrote in the following terms:

"The estate company is willing to accept the scale and risk profile of investment required to develop the LMS. However the threat of a large area of excess retail capacity in an edge of town centre location with a surface car park on WSCP significantly increases the risks of the investment in LMS. With that threat hanging over the town, the Estate Company will be unlikely to proceed with the LMS development."

20. On 1st April 2014 Booths again wrote to confirm for the avoidance of doubt that the outline consent on the LMS site was acceptable. In the light of these new developments EL provide further advice to the council on 9th April 2014. Amongst a number of matters they addressed the recent confirmation of interest from Booths and observed as follows:

"We have allowed for a foodstore of the size approved on the Livestock Market site in the capacity analysis and the cumulative impact assessment. Although a Booths store would provide an improve range of choice and convenience retailing, as sought by the Ryedale Plan there remains a need for another large foodstore in Malton to provide choice and competition for Morrison's in main food shopping and claw back leakage that is going to large stores elsewhere. But the need for a large foodstore could not be met in the Livestock Market scheme. A store on the WSCP and a Booths store on the Livestock Market site would have a complimentary role."

21. EL went on to consider the question of retail impact in particular in terms of the criticism raised by the claimant's planning consultants that no scenario had been provided seeking to test foodstores being present on both the LMS site and the WSCP in the opening year of 2018. They advised as follows:

"In terms of retail impact, GVA criticise the fact that NLP considered only two scenarios, precluding new foodstores on the WSCP and Livestock Market sites in 2018. Our review considers a third scenario in which foodstores are developed on both sites and are trading in 2018. The largest overall

cumulative impact is predicted to be on the Morrison's store, representing three-quarters of total trade diversion from Malton town centre. We do not anticipate that there would be a significant adverse impact upon the overall vitality and viability of Malton town centre which has a high level of vitality and viability. The predicted overall trading impacts on the other town centres are small. We have assessed that the WSCP proposal would have a trading impact of 16% on a foodstore in the Livestock Market scheme. This is a matter of competition with a store located outside the town centre, not a town centre impact, not a material planning consideration.”

22. The day before the planning committee was due to meet the claimant provided final objections to the defendant in relation to the application. They alluded in that correspondence to a letter of objection from Booths in relation to the WSCP proposal. In relation to the impact upon planned investment in the form of the LMS scheme their observations were as follows:

“For the avoidance of doubt, Fitzwilliam Malton Estate (FME) is willing to make the investment in redeveloping the Livestock Market Site (LMS) as soon as it has secured a pre-letting of the main food store to Booths. Whilst the preference is to have one or more of the smaller retail units let before we start on site, the development is not conditional upon retailer commitment for those units. However, the prospect of almost double the retail floor space being given consent by RDC is considered to be a considerable threat to FME’s investment in LMS. FME will not make that investment if consent is given to the GMI application...for a large superstore on Wentworth Street car park.”

23. On 24th April 2014 the defendant’s planning committee met to consider the interested party’s application. In addition to a lengthy committee report the members had a number of matters appended to the report including the EL report and letter of 9th April 2014 together with the advice which had been received from DTZ (which included a response to the claimant’s planning consultant’s objections) also included in the appendices were correspondence from the claimant planning consultant and from the claimant’s themselves and Booths. Not included within the appendices circulated to the committee but provided to them at the meeting was a copy of the Inspector’s report in relation to the claimant’s appeal.
24. The committee report summarised the objections which had been received to the applications along with the other representations which had been made. The first topic that was addressed by the officer’s conclusions was the question of retail planning policy. The report noted the content of the local plan strategy which has been set out above. It went on to set out the provisions of the National Planning Policy Framework and, whilst the contents of the report ranged far wider across the Framework for present purposes two paragraphs of the Framework were central, namely paras 24 and 26 which provide as follows:

“24. Local planning authorities should apply a sequential test to planning applications for main town centre uses that are not in an existing centre and are not in accordance with an up-to-date Local Plan. They should require applications for main town centre uses to be located in town centres, then in edge of centre locations and only if suitable sites are not available should out of centre sites be considered. When considering edge of centre and out of centre proposals, preference should be given to accessible sites that are well connected to the town centre. Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale.

...

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

- The impact of the proposal on existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal; and
- The impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and wider area, up to five years from the time the application is made. For major schemes where the full impact will not be realised in five years, the impact should also be assessed up to ten years from the time the application is made.”

25. Dealing firstly with the sequential test derived from paragraph 24 of the Framework and the comparative conclusions which had been reached by the Inspector in the claimant’s appeal, the officers concluded as follows:

“6.27 The Livestock Market Site in Malton is also considered in detail within the submitted Updated Retail Statement. The Livestock Market site benefits from an extant planning permission for retail development for four new retail units, comprising of a 2,360 sq.m (gross) foodstore and three smaller comparison goods units (1,732 sq.m gross in total) and a three-storey car park, granted on appeal on 29th October 2012. The Inspector concluded that the Livestock Market site was both sequentially preferable to the WSCP site to accommodate the actual development proposed but also that the Livestock Market site was generally sequentially preferable, stating at Paragraph 32: *‘However, whilst it is common ground that the grant of planning permission for a larger store on the WSCP*

site would make it more difficult for an operator to be found for the appeal proposal, this underscores the need and purpose of the sequential approach in seeking to promote and strengthen town centres. Despite the Officers' conclusion in the LM Committee Report, the submitted evidence as a whole, leads me to conclude that the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site. Moreover, having visited both sites as part of my inspection, I consider that a development on the WSCP site would have poorer pedestrian links to the town centre than the LM site, notwithstanding the fact that enhancement works to the connecting route are proposed.'

6.28 The Livestock Market Inspector's Appeal Decision is an important material consideration and must carry significant weight in decision-making. However, it is not a binding precedent. The Inspector's conclusion as to why the Livestock Market site is sequentially preferable to the WSCP is not fully reasoned other than pointing to poorer pedestrian links. The issue of sequential preference is one for informed planning judgement. Officers have commissioned an independent review of the applicant's Updated Retail Statement by England & Lyle, who have submitted a report dated February 2014. In the report they consider whether the Livestock Market site is sequentially better located than the WSCP site. England & Lyle note that both sites are within the '*Northern Arc*' and that the differences in accessibility to the town centre are minimal. Officers agree, for the reasons set out below that the differences are so negligible that the sites are, for all practical purposes, on an equal footing in terms of sequential testing.

6.29 The Livestock Market Site lies adjacent to the defined Town Centre Commercial Limits of Malton Town Centre and is therefore located slightly closer to the town centre than the application site, although the difference is minimal given the application site itself only lies 30m to from the Town Centre Commercial Limits and it is noted that both sites lie within the extent of the '*Northern Arc*', which is identified as an area that offers opportunities to redevelop sites and buildings to accommodate additional retail space with excellent connectivity with the existing Town Centre. Furthermore, it is considered that there are minimal differences between the sites in terms of accessibility and connectivity with the town centre, and the consequent ability to generate linked trips. Both sites offer easy access to the town centre for pedestrians using existing connections that are easy to follow. On this basis, it is considered that the application site and Livestock Market site should be considered as being '*sequentially equal*'.

6.30 It is noted that applications for planning and listed building consent have recently been submitted by Fitzwilliam (Malton) Estates for the erection of a two storey retail extension to existing store with attached stairwell building on three levels and external flight of steps together with formation of retail unit(s) on two floors within Building D to include installation of new shop fronts, windows and chimneys all following removal of three existing outbuildings (LPA Ref. 14/00059/FUL & 14/00060/LBC) at Kings Head Yard, which lies to the direct south of the consent Livestock Market site. The Planning Statement that accompanies the Kings Head Yard application confirms that the development proposed can be viewed as a stand-alone proposal, albeit a precursor to the Livestock Market development. It is suggested that the proposed development will support the expansion of an existing retail business, as well as opening up a key route into the town centre from the Livestock Market development and residential properties to the east. It is accepted that the Kings Head Yard proposals will provide an improved link between the town centre and the Livestock Market site, however, these improvements are not considered to be so significant as to alter the conclusion that the Livestock Market site and WSCP should be considered '*sequentially equal*', notwithstanding the fact that the Kings Head Yard proposals do not yet benefit from planning and listed building consent.

...

6.35 The applicant's supplementary information concludes that, in the context of the issues outlined above, a large foodstore on the Livestock Market site, which is comparable to that proposed by the current application, could only be developed over two or more storeys. It is also likely that such a store would need to be accommodated by decked parking, in order to provide a sufficient number of spaces. The applicant contends that this would be unacceptable to the main foodstore operators, who do not split their convenience goods sales area over different floors and such a compromised scheme would be highly unlikely to attract any retailer interest. These findings have been broadly endorsed by DTZ, who were appointed by the Council to advise on the commercial retail considerations in relation to the planning application. The applicant also suggests that it is also highly questionable as to whether a scheme could be developed which would be satisfactory in heritage, residential amenity and highways / transportation terms.

6.36 The applicant's findings in this respect are broadly accepted and, even taking into account the scope for flexibility in the format and scale of the proposal, it is not considered that the Livestock Market site offers a suitable practical alternative

to accommodate the proposed development. However, even if the Livestock Market site was considered to be a suitable practical alternative to accommodate the proposed development, the WSCP and Livestock Market sites are considered to be '*sequentially equal*' and, accordingly, would not result in the sequential test being failed.

6.37 The NPPG advises, in applying the sequential test, that it is necessary to consider what contribution more central sites are able to make individually to accommodate the proposal and it is noted that an objection received from GVA on behalf of Fitzwilliam (Malton) Estates suggests that the sequential assessment has failed to consider whether there are available sites within or better integrated sites on the edge of the town centre that could accommodate the proposed smaller retail unit. The constituent main town centre elements of the application proposals comprise of a foodstore (4530 sq.m), a retail unit (227 sq.m) and office accommodation (253 sq.m) and, based upon Officer's local knowledge of centres and a review of commercial property websites to identify potential available sites / premises, Officers are satisfied that there are no suitable and available sequentially preferable premises or potential development sites that could accommodate any of the constituent main town centres uses. Furthermore, it is considered that the provision of the stand alone retail unit provides benefits from a design perspective, helping to create an active and interesting public frontage along the Wentworth Street frontage.

6.38 It is therefore accepted that the application complies with the sequential approach to site selection set out at Paragraph 24 of the NPPF and there are no sequentially preferable sites that are suitable and available alternatives to accommodate a large foodstore development.”

26. The report then turned to the question of retail impact and advised members as follows:

“6.42 The planning application is accompanied by an Updated Retail Statement prepared by Nathaniel Lichfield & Partners. The impact assessment contained within the Updated Retail Statement considers two potential scenarios:

- **Scenario 1** – this is based upon what NLP regard as the '*most realistic scenario*' taking into account advice received from commercial agents outlining a lack of operator interest in the Livestock Market Site. This scenario therefore assumes that WSCP site is developed for a new large foodstore in isolation over the period to 2018.

- **Scenario 2** – this scenario considers a situation whereby a store of the size approved on the Livestock Market site is developed out over the longer period to 2023, although NLP suggest that this scenario is unlikely.

6.43 NLP state that the assumption that the Livestock Market store comes forward over the period to 2023 is considered to be a cautious approach, particularly in the context of the views from their commercial agents that there is no demand for a foodstore of the size currently proposed on the Livestock Market site and that the approved scheme is undeliverable. Notwithstanding this, the Retail Review undertaken by England & Lyle agrees that Scenario 2 represents a possible cumulative impact situation in Malton if both schemes were to be developed.

6.44 England & Lyle have therefore undertaken an independent review of the retail impact assessments for convenience and comparison goods and have fully reviewed NLP's Scenario 1 and Scenario 2 assumptions. In addition, although NLP have not considered the potential cumulative impact of the proposed and consented development on the WSCP site and Livestock Market site coming forward by 2018, England & Lyle have reviewed a scenario for 2018 in which both schemes are developed for sensitivity purposes.

6.45 It is noted that Fitzwilliam (Malton) Estates have suggested that they would not bring forward the approved Livestock Market site if the current proposals are approved and this would represent a significant impact on planned investment in the town centre. However, the Livestock Market lies to the northern edge of the defined Town Centre Commercial Limits and is not therefore in-centre, which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF. In any event, the Livestock Market site is a sequentially equivalent site to WSCP. It is noted that the Local Plan Strategy identifies that the Livestock Market site abuts the existing town centre and has the ability, once developed, to form a logical extension to the town centre. Whilst the WSCP lies slightly further from the town centre, the difference is minimal and both sites lie within the identified '*Northern Arc*,' which is identified as an area that offers potential to redevelop sites and buildings with excellent connectivity to the town centre. It is considered that the application proposals provide an opportunity to improve choice and competition in Malton and to claw back expenditure, thus helping to broaden the town's consumer base.

...

6.60 It is anticipated that in convenience goods the proposed development on the WSCP site would draw 15% of its trade

from inflow / visitor spending, 40% from claw back of leakage and the remaining 45% from trade diversion within the catchment area. In comparison goods, the proposed development on the WSCP site is expected to draw 15% of its trade from inflow / visitor spending, 55% from claw back of leakage and the remaining 30% from trade diversion within the catchment area. In terms of cumulative impact, it is assumed that, to an extent, the WSCP scheme and the Livestock Market scheme would compete with each other and draw some of their trade from the other scheme, albeit that, were both to commence trading, there is plainly an increased opportunity for clawing back trade to the town which presently leaks outside of the district.

6.61 In convenience goods, the largest cumulative impacts of the proposed development together with the Livestock Market scheme and commitments in 2018 are predicted to be on Morrison's in Malton (30%), the Co-op in Pickering (16%), Lidl and Asda in Norton (11%), the new Tesco in Kirkbymoorside (8%), Kirkbymoorside centre (7%) and other shops in Malton (6%). The predicted cumulative impacts in 2023 are very similar to those predicted for 2018 because the turnovers of stores / centres and the turnovers of the proposed schemes have been increased in line with expenditure growth.”

27. In respect of impact on planned investment in centres the officers advised as follows:

“6.69 Fitzwilliam (Malton) Estates in their objection have stated that they will not bring forward their consented scheme if the current application is approved and this would represent a significant impact on planned investment in the town centre. However, the Livestock Market lies to the northern edge of the defined Town Centre Commercial Limits and is not therefore in-centre, which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF. In any event, the Livestock Market site is a sequentially equivalent site to WSCP.

...

6.74 Despite the advice received from DTZ highlighting concerns over the deliverability of the approved foodstore on the Livestock Market site, the subsequent correspondence received from GVA highlights retailer interest on behalf of Booths and suggests that the outline consent delivers a store and layout with adequate parking and servicing to meet their requirements. The confirmation of interest from Booths in the approved scheme on the Livestock Market site is acknowledged and Booths will be a welcome addition to the retail offer in Malton. However, the expression of interest in the Livestock Market site from Booths should not, in Officer’s view, be seen

as a reason to prevent the provision of a larger foodstore on the WSCP.

6.75 The independent review of the application undertaken by England & Lyle illustrates that, whilst the capacity for two new foodstores (i.e. Livestock Market site and WSCP) in 2018 is marginal, the impact assessment demonstrates that the two stores would not have a significant adverse impact on town centre vitality and viability in 2018, which is the policy test set out in the NPPF. Furthermore, there would be more than sufficient capacity in both convenience and comparison goods for both stores in 2023, based on a revised and more up-to-date assessment than that used to inform the preparation of the Ryedale Plan – Local Plan Strategy. Although it is evident that a Booths store would provide an improved range and choice of convenience retailing, as sought by the Local Plan Strategy, it is accepted that another large foodstore in Malton would provide choice and competition for Morrison's and claw back leakage that is going to stores elsewhere and this has been reflected within a number of letters of support received from local residents in respect of the application. A large foodstore on WSCP and a Booths store on the Livestock Market site would have a complementary role to one another.

6.76 The correspondence received from GVA indicates that Booths remain '*very concerned*' regarding the WSCP proposals, although it is not explicitly stated that they would not proceed if the WSCP proposals were approved and it is noted that Booths have expressed an interest in the Livestock Market site in full knowledge of the planning application that has been made on the WSCP site. Fitzwilliam (Malton) Estates have, however, suggested that they be unlikely to bring forward the Livestock Market site scheme if the WSCP proposals were approved, which would represent a significant impact on planned investment in the town centre. However, Officers are of the view that this statement should be treated with a degree of caution given that, whilst '*very concerned*', Booths have not explicitly stated that they would not proceed with a store on the Livestock Market site were the WSCP proposals to be approved. With this in mind, there is no reason to believe that further investment in the Livestock Market site in the form of comparison shopping development would not follow the development of a Booths store, as it is considered that Booths would act as a catalyst for the development of the consented non-food retail units. On this basis, Officers are of the opinion that Fitzwilliam (Malton) Estates' comments in respect of not bringing forward the Livestock Market site should planning permission be forthcoming for the WSCP proposals should be treated with a degree of caution.

6.77 Notwithstanding this, the Livestock Market site lies to the northern edge of the town centre and is not therefore '*in-centre*,' which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF and, in any event, the Livestock Market site is a sequentially equivalent site to WSCP. The planned investment within the Livestock Market site is not therefore conferred policy protection under the provisions of the impact test contained at Paragraph 26 of the NPPF and, as such, any impact on investment in the Livestock Market site would not form reasonable grounds for refusing planning permission for the WSCP proposals."

28. The officers summarised the retail policy considerations as follows:

"6.79 Capacity is not a policy test; it is simply an indicator of whether any retail impact may occur. Policy SP7 of the Local Plan Strategy indicates that current commitments account for the quantitative convenience retail needs to 2026. The recognition within Policy SP7 that current commitments meet convenience retail needs to 2026 was based upon the findings of the '*Ryedale Retail Capacity & Impact Assessment Update*' prepared by Roger Tym & Partners, which formed part of the evidence base for the Local Plan Strategy. However, it should be acknowledged that the Retail Capacity & Impact Assessment Update was prepared in 2011 and it is clearly important that forecasts of need are kept under regular review. The assessment of capacity for additional retail floorspace must be considered on the basis of the latest available evidence to ensure that retail needs are met. The independent assessment of the proposals undertaken by England & Lyle demonstrates that the capacity for the proposed foodstore, as well as the approved scheme on the Livestock Market site, would be marginal in 2018, however, the impact assessment demonstrates that the development of both schemes would not have a significant adverse impact on town centre vitality and viability in 2018, which is the policy test outlined in the NPPF. Furthermore, there would be more than sufficient capacity in both convenience and comparison goods for both stores in 2023, within the Local Plan period.

...

6.82 It is agreed that the proposed foodstore on the WSCP site is not likely to have any adverse impact upon the ability to bring forward any other planned investment in existing centres. Whilst it has been suggested that Fitzwilliam (Malton) Estates would not bring forward the Livestock Market site scheme, which has secured retailer interest from Booths, if the WSCP proposals were approved, it has been demonstrated that, whilst the capacity for two new foodstores (i.e. Livestock Market site and WSCP) in 2018 is marginal, the two stores would not have

a significant adverse impact on town centre vitality and viability in 2018, which is the policy test set out in the NPPF. Furthermore, there would be more than sufficient capacity in both convenience and comparison goods for both stores in 2023, based on a revised and more up-to-date assessment than that used to inform the preparation of the Ryedale Plan – Local Plan Strategy. Although it is evident that a Booths store would provide an improved range and choice of convenience retailing, as sought by the Local Plan Strategy, it is accepted that another large foodstore in Malton would provide choice and competition for Morrison's and claw back leakage that is going to stores elsewhere and this has been reflected within a number of letters of support received from local residents in respect of the application.

6.83 Officers are of the view that the statement from Fitzwilliam (Malton) Estates that they would not bring forward the redevelopment of the Livestock Market site if the WSCP proposals are approved should be treated with a degree of caution given that, whilst '*very concerned*,' Booths have not explicitly stated that they would not proceed with a store on the Livestock Market site were the WSCP proposals to be approved. With this in mind, there is no reason to believe that further investment in the Livestock Market site in the form of comparison shopping development would not follow the development of a Booths store, as it is considered that Booths would act as a catalyst for the development of the consented non-food retail units.

6.84 Notwithstanding this, the Livestock Market site lies to the northern edge of the town centre and is not therefore '*in-centre*,' which is a pre-requisite of the impact test contained at Paragraph 26 of the NPPF and, in any event, the Livestock Market site is a sequentially equivalent site to WSCP. The planned investment within the Livestock Market site is not therefore conferred policy protection under the provisions of the impact test contained at Paragraph 26 of the NPPF and, as such, any impact on investment in the Livestock Market site would not form reasonable grounds for refusing planning permission for the WSCP proposals."

29. In the light of these views the officers concluded that the relevant retail planning policy tests had been passed. Having appraised a range of other topics unrelated to retail planning the overall conclusion reached by the officers was that planning permission should be granted. That conclusion was accepted by the members and permission was ultimately granted following the completion of a S106 obligation on 12th September 2014.

30. The grant of planning permission is governed by s70(2) of the Town and Country Planning Act 1990 which requires the decision maker to have regard to the provisions of the development plan and any other material considerations. Additionally s38(6) of the Planning and Compulsory Purchase Act 2004 provides that if the determination is being made with regard to the development plan then it must be made in accordance with the plan unless material considerations indicate otherwise. The interpretation of the development plan, and indeed any other planning policy, is a matter of law for the court (see Tesco Stores Limited v Dundee City Council 2012 UKSC 13).
31. Here, as is good practice, the planning application was determined by a committee having the benefit of an officer's report. The principles governing the approach to a committee report to seek to establish whether or not there may have been an error of law were captured by Hickinbottom J in R (Zurich Assurance Limited t/a Threadneedle Investments) v North Lincolnshire Council 2012 EWHC 3708 at paragraph 15 as follows:
- “i. In the absence of contrary evidence it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted
- ii. When challenged such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole consequently:
- “An application for Judicial Review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at a meeting of the planning committee before the relevant decision is taken.” (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18th April 1997) 1997 WL 1106106 per judge LJ as he then was)
- iii. In construing reports it has to be borne in mind that they are addressed to a “knowledgeable readership”, including council members “who, by virtue of that membership, may be expected to have a substantial local and background knowledge” (R v Mendip District Council ex parte Fabre (2000) 80 P and CR 500 per Sullivan J as he then was). That background knowledge includes “a working knowledge of the statutory tests” for determination of a planning application (Oxten Farms per Pill LJ).”
32. One of the matters capable of being a material consideration in the determination of a planning application is a previous decision, in particular a previous appeal decision. The commencement of the jurisprudence in relation to this issue is the case of North Wiltshire District Council v Secretary of state for the Environment [1993] 65 P&CR 137 at page 145 where Mann LJ observed as follows:

“To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the Inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the Inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement in aesthetics. On other occasions they may have to be elaborate.”

33. This issue was further considered by the Court of Appeal in the case of Dunster Properties Limited v FSS 2007 EWCA Civ 236 where Lloyd LJ at paragraph 23 stated as follows:

“In my judgment, notwithstanding Ms Olley’s submission to the contrary, Mr Mead did not adequately perform his obligation to give reasons for this decision in respect of his refusal to follow the basis of the earlier appeal decision which was a material consideration. In this respect it seems to be that by declining to comment, other than to refer to his own reasons already expressed, Mr Mead appears not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. An omission to deal with the conflicting decision, as in the North Wiltshire case, mightn’t have been sufficient in itself. But Mr Mead’s last sentence in paragraph 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons.”

34. The essence of the principle has also been applied, as a matter of common law, to previous decisions of the local authority and their relevance to subsequent decisions. In the case of R (Thompson) v Oxford City Council 2014 EWCA Civ 94 Lloyd Jones LJ stated at paragraph 34 as follows:

“The principles stated in Dunster are of general application and are not limited to planning cases. The explanation provided by Lloyd LJ as to why the reasons provided were inadequate was in no sense dependant on the planning context: on the contrary it flows from the function of reasons as a safeguard to sound

decision making. Moreover, I do not consider that Dunster turned on its particular facts or the refusal to give reasons following a request. Accordingly, I consider that while it was open to the Sub-Committee in the present case to depart from the decision of its predecessor, it was under a duty to take account of the earlier decision, to grasp the nettle of any disagreement with the earlier decision and to state its reasons for coming to a different conclusion. That obligation to give reasons arises at common law...”

35. Turning to the issues arising in relation to Environmental Impact Assessment, Regulation 3(4) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 prevents the decision maker from granting planning permission for development which is EIA development without having first considered the environmental information relevant to the development in the form of an Environmental Impact Assessment. Regulation 5 entitles a proposed developer to request from a local planning authority a Screening Opinion, namely a determination as to whether or not their proposed development is EIA development.
36. In this case the question has arisen as to the correct approach to when, as a matter of law, a development which has been the subject of a Screening Opinion may require a further Screening Opinion in order to discharge the obligation under Regulation 3 of the 2011 Regulations. Reference was made to the decision of Lindblom J in The Queen (on the application of CBRE Lionbrook (general partners) Limited) v Rugby Borough Council and another 2014 EWHC 646. The circumstances of that case were that a planning application had been made by the interested party and been the subject of a negative Screening Opinion in September 2011. The application then changed and in November 2012 consultants instructed on behalf of the interested party drew attention to the changes which were considered to be slight and invited the local planning authority to consider whether or not the Screening Opinion remained valid, it being the opinion of those consultants that a fresh Screening Opinion was not needed. The council’s officer considered that enquiry and concluded that it was not necessary to submit a fresh EIA Screening Opinion.
37. The main submission made in the challenge brought by an interested developer was that the council were compelled by the 2011 Regulations to re-screen the development or to treat the enquiry of the consultants as a request for a Screening Opinion. The judge concluded that the consultant’s letter was not a request for a Screening Opinion. It was in truth the assertion that no further Screening Opinion was necessary as there had not been any material alteration to the proposal or its environmental context. The judge concluded that the council’s position was lawful and he expressed the principles as follows:

“47. The thrust of this submission [from the defendant and interested party], which I accept, is that the concept of a development having been the subject of a Screening Opinion is broad enough to include a previous screening process for an earlier version of the proposal, so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through. This is classically a

matter of judgment for “the relevant planning authority”. It will always turn on the facts of the particular case.

48. The essential point is that Regulation 7 allows the authority to judge whether any changes to a proposal are such as to cast doubt on the continuing validity of the screening opinion for the proposal in its previous form. In principle, and subject to review by the court on Wednesbury grounds, it is open to an authority to conclude that in the screening process it has already conducted the essential characteristics of the site of proposal bearing on the crucial question - whether the development is likely to have any significant effects on the environment – have been taken into account and the relevant screening thresholds criteria applied.

49. If the result of that process was a Screening Opinion determining that the project was not “EIA development”, and if the result of a further screening process for the revised proposal would inevitably be the same, the authority would be able to conclude that it’s Screening Opinion is competent for the proposed development in it’s modified form. The judgment embodied in that Screening Opinion will be no less valid and effective for the proposal as revised as it was for the proposal as originally conceived. The potential effects of the development will already have been dealt with in a formal screening process. The development would have been “the subject of a Screening Opinion” – the concept in Regulation (b). The provisions of paragraphs (4) and (5) of Regulation 5 will not be engaged. The screening process will not have to be repeated. If it were repeated it would be of no benefit to the authority, no benefit to anyone likely to be affected by the outcome, and no benefit to the public interest and the EIA regime being operated being operated with the rigour required.”

38. It will be apparent from the facts of that case that the point which arises in this case, namely what is the threshold at which a previously negatively screened proposed development needs to be re-screened in the light of changed circumstances, did not directly arise. On the facts of that case there had been no change in the environmental context and such changes as were proposed to the application were insignificant. Active consideration had been given to whether the new proposals would have given rise to a potentially different outcome to the Screening Opinion.
39. During the course of argument reference was made to the case of Mageean v SSCLG and another (2011) EWCA Civ 863 (which was subsequently applied in the case of Smyth v SSCLG and others 2013 EWHC 3844). The circumstances of that case were that following a positive Screening Opinion by the local planning authority the proponent of the development asked the Secretary of State for a screening direction under Regulation 6 of the 2011 Regulations. Such a direction is binding on the planning authority for the purpose of reaching its decision on the application. The Secretary of State concluded that the proposed development was not EIA development. After the screening direction and before the consideration of an appeal

against the subsequent refusal of planning permission the site became part of an area designated a World Heritage Site. The challenge proceeded on the basis that the Inspector ought to have invited the Secretary of State to reconsider the screening direction which had been issued in the light of the World Heritage Site designation. Lord Justice Sullivan expressed his conclusions on this point as follows:

“20. It is common ground that an Inspector determining an appeal on behalf of the Secretary of State does have power to invite the Secretary of State to reconsider a screening direction. Although the observations of Simon Brown LJ in paragraph 24 of Evans were obiter they do in my judgement provide eminently sensible guidelines as to the circumstances in which an Inspector not merely may but should invite the Secretary of State to reconsider a screening direction with a view to deciding that an application for planning permission is after all an application for EIA development. An Inspector is under an obligation to invite the Secretary of State to reconsider the matter only if the Inspector considers that, because for example of a change of circumstances, such as the inscription of the WHS in the present case, there is “at the very least a realistic prospect” of the Secretary of State coming to a different screening conclusion. Although Evans was a case where the screening direction had preceded an inquiry by only a few months, I do not accept Mr Kolinsky’s submission that the observations in paragraph 24 of Evans are not applicable to the circumstances of the present case where there was a change of circumstances by reason of the inscription of the WHS after the screening direction. The court plainly had in mind cases where “other material facts [come] to light” after the screening direction. Whether those other material facts come to light because they were not appreciated at the time of the direction or because of a subsequent change of circumstances is in my judgment immaterial. The guidance is equally well applicable.

21. Although as Mr Kolinsky submits, it is for the Secretary of State to decide whether a proposed development is likely to have significant environmental effects for the purpose of issuing a screening direction, whether there is a “realistic prospect” of the Secretary of State changing his or her opinion as to the likely environmental effects on the development is pre-eminently a matter of planning judgment for the Inspector. The Inspector’s judgment on that issue can be challenged on rationality ground: see Evans. It is not for the court to decide for itself whether there was or was not a “realistic prospect” of the Secretary of State making a different screening direction.

22. Precisely because an Inspector has to use his or her own planning judgment on that issue the mere fact that he or she has not been asked by any of the parties to the appeal to exercise the power to refer the matter back to the Secretary of State will

not necessarily be fatal to a legal challenge to a failure to exercise power. However, an applicant under S288, which is of course concerned with an error of law on the part of the Inspector determining the appeal, will face a formidable task in such a case. A S288 challenge in those circumstances will succeed only if the court is satisfied that any reasonable Inspector would, on the facts before the Inspector in that appeal, have concluded that they should exercise the power to refer the matter back to the Secretary of State of their own motion, notwithstanding the fact that they had not been asked to do so by any party to the appeal.”

40. The decision in the case of Mageean (and to some extent in the CBRE case) was different to the present circumstances. In Mageean the Inspector had to consider exercising his or her planning judgment as to whether on the facts as known at the time of the appeal the screening direction should be referred back to the Secretary of State. Here the question is when, in the absence of that obligation, the point arises where consideration should be given as to whether or not the Screening Opinion ought to be revisited. The challenge is not therefore to a positive decision not to reconsider an earlier Screening Opinion; the challenge is to a failure to consider the point at all.
41. In my view the germ of the answer to this question is to be found in both of the authorities to which I have referred. In paragraph 47 of the CBRE case Lindblom J caveated the breadth of a previous screening process by stating that it would continue to have validity “so long as the nature and extent of any subsequent changes to the proposal do not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through”. In the Mageean case the question for the Inspector distilled in paragraph 21 of the judgment is “whether there is a “realistic prospect” of the Secretary of State changing his or her opinion”. Thus the trigger point, if a development has been previously negatively screened, to determine whether any change in its environmental context or its proposals require consideration to be given as to whether or not the Screening Opinion ought to be revisited in order to discharge the duty under Regulation 3(4) at the point at which consent is granted is whether or not those changes create any realistic prospect of the Screening Opinion being different. If such circumstances arise and the local authority apply their mind to the point and reach a further negative Screening Opinion then that is a decision challengeable on the normal public law grounds. Failure to give any consideration to the issue places the local authority in the position of subsequently granting permission for EIA development without having gone through the procedure required for EIA development by the 2011 Regulations.
42. It is correct to observe that the 2011 Regulations do not expressly contain any continuing duty in relation to Schedule 2 development which has been previously negatively screened. However, I accept the submission made on behalf of the claimant by Mr Strachan QC that the effect of Regulation 3(4) is that the discharge of the requirements under the Regulation crystallises at the point at which planning permission is granted since at that point the Regulations preclude the grant of consent for development which is in truth EIA development. It follows that in order to discharge that obligation it is necessary for a decision maker, dealing with a Schedule

2 development subject of a negative Screening Opinion (and not the subject of a definitive direction in that respect under Regulation 4(3) of the 2011 Regulations) to continue to ensure that the requirements of the Regulations and the directive are met throughout the lifetime of the application prior to consent.

43. Denial of this proposition could envisage a Schedule 2 application being made to the local authority and the subject of a negative Screening Opinion followed by a change in its environmental circumstances or in the nature of the proposal which would make it obviously EIA development but which as a result of the earlier Screening Opinion the local authority were under no duty or obligation to reconsider. Such an approach would lead to the grant of consent for that development without it having been the subject of EIA contrary to Regulation 3(4) and indeed the wider scope and broad purpose of the parent Directive. In such circumstances, therefore, the local planning authority are clearly under an obligation in order to discharge their duties under the 2011 Regulations to keep the circumstances of the application under review and, if there is a realistic prospect that a change of circumstances may lead to a different outcome to the Screening Opinion, to reconsider that question. That is the key difference between the present case and the CBRE case. In the CBRE case the question was considered and a conclusion reached; in the present case the question was never considered at all.

Conclusions

44. During the course of argument the grounds as originally pleaded by the claimant were refashioned and I propose to deal with them in the manner in which they emerged during the hearing.

Ground 1

45. Prior to embarking upon the substance of Ground 1 it is important to offer some observations about submissions that were made in relation to the correct approach to the officer's report. Attention was drawn to the extensive background documentation which was appended to the officer's report together with other documentation circulated during the committee meeting. Notwithstanding this material in my view it must be the officer's analysis which is the key to understanding the member's decision and the legality of it. In this case they followed the officer's recommendation and granted planning permission and therefore can be taken to endorse the officer's reasons in reaching that decision. The basis for the recommendation is, of course, set out in the officer's report not the background documentation. That material no doubt is present to provide further information but it is important to note that it contains material on both sides of the argument. The resolution of those issues and the justification for the decision to grant permission is found within the officer's report and in particular within the officer's conclusions on the various topics that were raised. It is therefore to the officer's report that it is necessary to look to see whether there has been any error of law.

46. Ground 1 is the allegation that the officer's report significantly misled the committee about the contents of the Inspector's report in relation to the sequential approach. Before engaging with that argument in detail it is worthwhile observing that in this case it is beyond argument that the Inspector's decision on the claimant's appeal was an important material consideration that carried significant weight. So much was

observed in terms in paragraph 6.28 of the officer's report. Thus whilst the Inspector's decision was obviously not binding on the members it was nonetheless a weighty and significant matter in their decision making process. It is also undoubted that in relation to the issue of the sequential test the Inspector had made an assessment of the same issue against the background of, for instance, the same physical circumstances on the ground in relation to the location of the sites, the disposition of surrounding uses and their relationship to the functioning of the town centre. Equally clearly the Inspector had reached a contrary conclusion to that which was contemplated by the interested party and the council's consultants in respect of the status of the WSCP site.

47. Having considered the material in this case I am satisfied that the officer's report did mislead members, and mislead them significantly, as to the findings and conclusions of the Inspector in relation to the sequential test. The starting point of the officer's report (having set out solely paragraph 32 of the Inspector's decision) was that the Inspector's conclusions were 'not fully reasoned other than pointing to poorer pedestrian links'. That observation which appears to be the summation of the officer's understanding of the Inspector's conclusions was not merely a gross over simplification but fundamentally misrepresented the Inspector's decision. As will be clear from the far more extensive passages from his decision that I have set out above his conclusions were fully reasoned and in a manner which was legally impeccable (regardless of the fact that there was no challenge by the council on this basis after the decision was received). The totality of the reasons for his decision are to be found from paragraphs 21 of the decision letter onwards. Without repeating them, those reasons were not only fully expressed but covered a range of evidence to which the Inspector was referring when, in paragraph 32, he related his conclusions to 'the submitted evidence as a whole'. The reasons provided engaged, firstly the consistent findings of RTP in relation to the sequential preference for the LMS site bearing in mind its ideal location for incorporation within the functioning of the town centre and its ability to operate as an extension of the town centre unlike the WSCP site. The Inspector's analysis also engaged with the erroneous approach of the defendant in their determination of the LMS application and, importantly, their revised stance that in fact the LMS site was the best site sequentially and their conclusions in the first reason for refusal could not stand to the extent that no further decision could be made on the WSCP site until the erroneous sequential analysis was corrected by a new report re-advising the committee. Whilst it is not made express no doubt such a corrected report would have involved re-advising members along the lines of the revised position which the council presented to the appeal. Further the Inspector's reasons engaged with the consistency of his conclusion with emerging development plan policy. Thus far from being 'not fully reasoned' the Inspector's decision, which was addressed to an informed audience not least the defendant, embraced in its full reasons a range of pieces of evidence all supporting the conclusion that the LMS site was decisively preferable to the WSCP site in terms of the sequential test.
48. This leads to the second way in which Ground 1 is put, namely that since the officers were inviting members to reach a contrary conclusion on the sequential test to that which had been reached by the Inspector, did they provide adequate reasons to justify that disagreement and an alternative decision? In my view it is clear that they did not. That is perhaps unsurprising given that they thought, erroneously, that the Inspector's report wasn't 'fully reasoned' save with respect to pedestrian links. As a result of not

having properly appreciated the wealth of reasoning provided by the Inspector they thereafter do not engage with those reasons in explaining why a different answer to the one reached by the Inspector should be provided. There is in the officer's report at paragraphs 6.28 – 6.38 (and in particular in paragraph 6.29) no mention of the previous consistent advice from RTP providing the evidence base for the local plan strategy, the council's previous position and no engagement with the substance of the points raised by RTP and the Inspector in relation to the capacity of the LMS site to integrate intimately with and function as part of the town centre without any intervening development which underpinned the preference for the LMS site and the conclusion in the RTP evidence that the WSCP site was far less suitable as an extension to the town centre. The principle paragraph which deals with the Inspector's conclusions, paragraph 6.29, focuses on distances between the town centre and the sites and the potential for linkage but does not deal with the capacity for physical integration. A subsequent assertion later in the report that the WSCP site 'also has potential to form an extension to the town centre' which was relied upon by the defendant and the interested party in their submissions does not assist in that regard. This is because that assertion does not engage with the conclusions of RTP and the Inspector that it was the absence of existing intervening development and uses between the site and functional town centre which rendered the LMS site preferable and, in terms, the WSCP less so. This observation does nothing to explain why those earlier, less assertive and more fully explained justifications for preferring the LMS site are to be overridden. The reasons therefore are inadequate.

49. I am unable to accept the submission made by Mr Tucker QC on behalf of the interested party that this was a matter, like for instance an aesthetic judgment, where reasons could be simple or brief. This was an issue which related to explaining earlier and fully reasoned conclusions in both earlier independent advice obtained by the council from RTP, and also the full reasons provided by the Inspector. These earlier judgments were not subjective assessments for instance in relation to visual impression, but were grounded in the physical circumstances of the sites and surrounding uses and their physical proximity and linkages to the functional town centre. It required in my judgment reasons and explanations which were at least comparable to those which the defendant was seeking to gain say, and met the points with which they disagreed. Little more than contradiction is not an adequate form of reasoning in these circumstances. It is notable that the officers did not in the material that they provided seek to rely upon any physical or other contextual or policy matters which had changed since the claimant's appeal. I am therefore satisfied that the reasons provided by the officers in support of the conclusion that a different decision should be reached from that of the Inspector was based on misleading advice to the committee and was inadequately reasoned. All that said there is an important issue for discretion which I shall analyse later.

Grounds 2 and 4

50. These two grounds run together and they are based on the allegation that the officer's report failed to take account of or advise members about the Inspector's conclusions in particular at paragraph 44 of his decision that the LMS site should be treated for planning purposes as part of the town centre in particular when assessing retail impact and its quantification.

51. Having analysed the officer's report there is no doubt that it did not refer at all to the Inspector's conclusions in paragraph 44 of the decision that 'having regard to the council's aspirations for additional retail areas in the 'Northern Arc' set out within the emerging LPS' the LMS proposal should be seen as contributing to town centre turnover and creating (in the analysis then available) a 24 % positive impact on the town centre's turnover. The question that arises is as to whether or not that omission mislead the members significantly, or alternatively whether that left out of account a material consideration in the analysis of retail policy and retail impact.
52. Having considered the submissions made in this respect I am in no doubt that this omission did amount to significantly misleading the members about an important material consideration, namely the conclusions previously reached by the Inspector. Although, as set out above, reference was made in the officer's report to the LMS site having the ability to form a logical extension to the town centre what was important in this respect was the failure of the analysis in the officer's report in relation to retail impact to treat the LMS site (as the Inspector had) as part of the town centre for the purposes of assessing impact. The economic modelling results which were presented to members detailing the effects of the establishment of the WSCP proposal did not either include the LMS site within the town centre overall or, more importantly, analyse in quantitative terms the impact of the WSCP scheme on the LMS proposals. As Mr Tucker on behalf of the interested party correctly observed the exclusion of the LMS site from the overall turnover of the town centre is perhaps of little moment. That is because its inclusion would have diluted the impact percentages created by the WSCP scheme. The real question that was obviously and in any event before the members was the effects of the WSCP proposal on the LMS scheme.
53. The officer's report repeatedly contends that the LMS site is not protected by paragraph 26 of the Framework because it is not in the town centre. That is an observation that is made in paragraphs 6.45, 6.69, 6.77 and 6.84. That is a conclusion which has, however, been reached without regard to the important material consideration that the Inspector concluded in analysing the impact of the LMS site that it should be included within the town centre. If the Inspector's approach had been taken into account that conclusion may well have been very different. His incorporation of the LMS site in the centre would have justified its inclusion in paragraph 26 as a commitment to planned in centre investment. Thus the exclusion of this aspect of the Inspector's decision on the claimant's appeal meant that the application of the Framework's policy occurred without taking account of a material consideration.
54. During the course of argument Mr Manley QC submitted on behalf of the defendant that the LMS site could only ever be an edge of centre site and therefore could never be protected by paragraph 26 because the LMS scheme had not been developed and the proposal had not been implemented. In my judgment that is an interpretation of the policy which is difficult if not impossible to sustain especially bearing in mind the particular circumstances of the present case. The reference in paragraph 26 to 'committed and planned public and private investment in a centre or centres' clearly contemplates developments which are planned for and have yet to materialise on the ground. The particular circumstances involved in the present case are that the LMS proposal was a commitment for which permission had been granted on the basis that it would function as part of the town centre and indeed the expenditure it generated

should be counted as part of the town centre. Furthermore the reference in paragraph 26 to the analysis of impact ‘up to five years from the time the application was made’ envisages a prospective examination of retail impact. Thus in the particular circumstances of this case the application of paragraph 26 to the LMS site cannot be excluded.

55. Mr Tucker submitted that there was no need for any quantified assessment of the impact on the LMS scheme, but the difficulty with that submission is that if paragraph 26 applied that is precisely what it requires and indeed what was undertaken and reported to members in terms of the impact upon both Malton town centre as a whole and individual elements of it such as the Morrison’s store. This (so far as possible) objective, transparent and quantified analysis is a well recognised means of testing the economic impact of retail proposals.
56. It is correct to observe that as set out above in their letter of 9th April 2014 EL appear to have undertaken some analysis of the impact on the LMS store and placed a figure of 16% as an outcome of their analysis. However, that material did not feature as any part of the officer’s conclusions and further, and perhaps more importantly, was accompanied by the obviously erroneous conclusion that the impact on the LMS proposal was not a material consideration. That was a proposition which neither Mr Manley nor Mr Tucker were prepared to support and rightly so. The approach which I take to this material is governed by what I have set out above in paragraph 45. The 9th April letter was part of the background material furnished to members but it is clear this element of their advice did not feature in the officer’s conclusions which are the important source for the member’s reasons. If I were wrong about that and reliance was to be placed upon this material as perfecting the absence of any analysis of impact on the LMS proposal then it is in turn affected by the legal error of suggesting that that issue was immaterial.
57. In a similar vein, both in relation to these grounds and also Ground 1, reliance was placed by the defendant and the interested party on the fact that members had access to the Inspector’s report. I am unable to accept that this step perfected or overcame the errors which I have identified. Firstly, for the reasons which I have given above, in circumstances where the members accepted the officer’s recommendation the basis for that recommendation provides the reasoning to justify it and in this case that is as set out in the officer’s conclusions. In any event it is clear that the Inspector’s decision was only provided to members on the night of the meeting and not as part of their pre-reading. Providing them with a relatively lengthy decision letter at the start of the meeting was no sensible substitute for the officers providing them with proper advice as to the content and conclusions of this earlier significant decision.
58. To conclude, the omission of any mention of the Inspector’s conclusions in relation to the incorporation of the LMS site within the town centre for retail impact purposes was a material and significant misrepresentation to members. No reasons were provided for departing from the Inspector’s conclusion. The conclusions which the officers reached and which the members adopted on the application of paragraph 26 of the Framework and the absence of protection for the LMS proposal were made without regard to that important material consideration and thus were unlawful.

Ground 3

59. In this ground the claimant contends that, in particular in paragraph 6.76 of the officer's report, the defendant conflated the view of Booths (who were solely the proposed tenant and operator of part of the proposed scheme) with the views of the claimant (who had to fund and develop the totality of the proposal). Having reviewed this element of the officer's report it is clear in my view that each of the positions of the parties, both Booths and the claimant, were fairly and properly put before members. However, beyond the advice that the claimant's views should be treated with caution it is a little unclear what definitive view the officers formed about the prospects of the LMS proposal being implemented if consent was granted for the WSCP scheme. They seemed to conclude that it would still happen but during the course of argument Mr Manley was unwilling to be definitive as to what precisely the prospect of that scheme happening was in the minds of the officers. Whilst I am not satisfied that on a fair and full reading of the officer's report they muddled up or conflated the views of the claimant with that of Booths and therefore provided members with incoherent advice, the failure of this ground does not overcome in any way the problems which I have identified for the defendant in relation to Grounds 2 & 4.
60. The 'caution' that the officers counselled in relation to the claimant's views of the prospects for the LMS site coming forward is qualified by the contention that because the LMS site is not part of the town centre paragraph 26 of the Framework did not apply. For the reasons I have already given the latter conclusion was infected with error and led to a failure to undertake any quantified impact analysis on the LMS scheme. If the Inspector's conclusions had been taken into account and his approach of including the LMS within the town centre had been adopted then the economic impact of the WSCP would have been fully analysed and that would have provided an important means of testing the realism of what both the claimants and Booths were contending. As a result of the approach in the officer's report and the absence of analysing the impact on the LMS scheme the conclusions which they reached in relation to the impact on planned investment were inchoate. As a result simple reporting of the position of the claimant and its intended operator did not amount to reaching a decision on planned investment based upon all of the relevant or potentially relevant material considerations.

Ground 5

61. For the reasons which I have set out above in relation to the legal argument which relates to this ground I am satisfied that the correct approach is that the defendant needed to keep under continual review the validity of the Screening Opinion which it had given bearing in mind any changes in circumstances which might lead to a different conclusion. In the light of that legal background the factual question which then emerges is as to whether or not there were any changes in the circumstances of the WSCP proposal which might lead to a different conclusion being reached and which required attention to be given to whether the Screening Opinion needed to be reconsidered.
62. There is no doubt in my view that the original Screening Opinion request made by the interested party clearly drew attention to the existence of the LMS proposal as an application for planning permission at the time when the request was made. Equally

clearly the reference to it in paragraph 4.2 in relation to cumulative effect relates to environmental impacts caused by built development. Paragraph 4.3 of the request then goes on to deal with the economic effects and in particular considerations of retail impact. There can be no doubt that this paragraph in relation to economic effects is predicated on the NLP ‘conclusion that only one new large convenience store / foodstore can be accommodated in Malton or the district generally’. Those paragraphs, one dealing with effects from built developments and the other dealing with economic effects are the foundation of the conclusion suggested in paragraph 4.4 of the request that cumulative effects would not give rise to any significant environmental effects warranting EIA.

63. A witness statement has been produced from Ms Lancaster who was the officer of East Riding of Yorkshire Council who undertook the screening opinion. It should be noted that at the time when the Screening Opinion occurred the defendant had passed the assessment of the LMS and WSCP applications to East Riding of Yorkshire Council on the basis that they owned the WSCP site. In a witness statement dated the 10th December 2014 Ms Lancaster states that she ‘was fully aware and took into account the LM application as part of the cumulative impact of the respective retailing proposals’. It is understandable given the remove of time that Ms Lancaster is not able to provide any information beyond that observation. I have no doubt that she has been involved in considering many many other applications in the meantime. I have equally no doubt that she was aware and took account of the LMS application in forming her view as set out above that its existence was drawn to her attention through the screening request. However none of this answers the critical question which is whether or not the cumulative economic effect of both stores in operation was taken into account in the Screening Opinion. On the basis of the evidence which I have set out I am not satisfied that it was. Indeed, I can see no reason why Ms Lancaster would have considered the cumulative economic effect of both schemes trading when she had been told in the screening request that that was not a possibility.
64. It may be said that the suggestion that both schemes might be trading (and I bear in mind as I have already observed the absence of any absolute or definitive position adopted by the officers in their assessment of the contentions made by the claimant and Booths in respect of impact on planned investment) was not definitively concluded upon. Nevertheless once the position had changed from one where only one store could possibly be operating to circumstances where the council were undoubtedly contemplating the prospect of both stores operating the need to assess the cumulative effects of that in economic terms arose leading to the conclusion that on the basis that this might lead to a different outcome to the Screening Opinion consideration needed to be given to whether or not the screening process should be revisited. This issue was simply never considered prior to the grant of planning permission and that was, in my judgment, an error of law in dealing with the application.

Discretion

65. In the event of me reaching adverse conclusions in respect of the grounds of challenge the defendant and the interested party raised questions pertaining to the exercise of discretion. I deal with the matters raised in turn. In particular in relation to Ground 1 it was contended that whatever may have been the position about the Inspector’s approach to the sequential test, because of the scale of the proposal and the inability to

fit it on the LMS site the conclusion was bound to be reached that the WSCP proposal met the requirements of the sequential test because there was no other site suitable to accommodate it given its size. In my view there is force in this submission and it is one which is based clearly on the conclusions set out in the officer's report that the scale of the WSCP proposal could not be accommodated on the LMS site. That is a conclusion which has not and could not in substance be challenged. Thus were the errors confined to Ground 1 I would not have been persuaded that it was appropriate to grant relief so as to quash the decision.

66. I do not consider, however, that similar considerations pertain to Grounds 2, 4 and 5. So far as Grounds 2 & 4 are concerned the failure to take account of the Inspector's conclusions in paragraph 44 in the way that I have analysed above does not enable me to say that were the matter to be reconsidered the same decision would arise. Upon reconsideration it would be necessary for the defendant to actively consider whether the Inspector's conclusions in paragraph 44 are accepted, and in accordance with their legal duty explain why they were not accepted if that became their position. If they did accept the Inspector's conclusions then issues would arise in relation to the analysis of the impact on the LMS scheme which have not been undertaken. A range of planning judgments therefore would need to be reached and it is simply not possible to conclude that the decision would inevitably (or even very likely) be the same.
67. Similarly in relation to the Screening Opinion under Ground 5, whilst it was contended by the defendant and the interested party that there was no evidence to suggest that any different conclusions might be reached I am not satisfied that that is the case. As was pointed out by Mr Strachan in reply this is not a case like the CBRE Lionbrook case where the Council had indeed expressed a view about whether or not screening was required. The fact is that on the conclusions I have reached the defendant has never considered the point and on the evidence before me it is simply not possible to say that the difference between both schemes operating and only one of the schemes operating is so inconsequential that the outcome of re-screening would inevitably be the same. This is not a case therefore where the failure is purely procedural or trivial in character but is in truth a matter which calls for investigation and about which it would be improper to exercise discretion.

Overall Conclusion

68. For the reasons given the claimant's case succeeds on Grounds 1, 2, 4 & 5 and the decision of the defendant to grant planning permission on 12th September 2014 to the interested party should be quashed.

**RYEDALE DISTRICT COUNCIL
PLANNING COMMITTEE**

SCHEDULE OF ITEMS TO BE DETERMINED BY THE COMMITTEE

PLANS WILL BE AVAILABLE FOR INSPECTION 30 MINUTES BEFORE THE MEETING

Item Number:	6
Application No:	17/01249/FUL
Parish:	Norton Town Council
Appn. Type:	Full Application
Applicant:	BP Forward Planning
Proposal:	Erection of petrol filling station with forecourt shop sales building, canopy, car parking, 3no. fuel pumps, below ground offset fills, air/water bay, trolley compound, goods in delivery bay, bin storage, site floodlighting and ancillary arrangements to forecourt and boundary.
Location:	5 Welham Road Norton Malton North Yorkshire
Registration Date:	1 December 2017
8/13 Wk Expiry Date:	26 January 2018
Overall Expiry Date:	24 July 2018
Case Officer:	Alan Hunter
	Ext: Ext 276

CONSULTATIONS:

Parish Council	Recommend refusal
Designing Out Crime Officer (DOCO)	Recommend conditions
Building Conservation Officer	No objection with comments
Environmental Health Officer	No objection subject to conditions
Sustainable Places Team (Environment-Agency Yorkshire Area)	No comments
Archaeology Section	No objection
Countryside Officer	No objection
Sustainable Places Team (Environment-Agency Yorkshire Area)	Recommend conditions and informatives
Yorkshire Water Land Use Planning	Recommend conditions
Neighbouring Parish Council	Malton Town Council Recommend refusal
Head Of Emergency Planning	Mitigation condition
Flood Risk	Recommend conditions
Highways North Yorkshire	Recommendations and conditions

Neighbour responses:	Mr K M Barker, Mr Clive Orrah, Mr & Mrs Robin Hughes, Mrs Jackie Fox, Mrs Stacy Naylor, Mrs Kathleen Youngson, Mr shaun dale, R Abram, Mrs D Horsley, Mrs Nichola Zanda, Mrs Margaret Woodings, Mrs Gail Denney, S Wall, Mrs M A Fenwick, Mr glynne clemit, Mr Roger Wilson, Mr & Mrs B Coning, John Simpson, Jacqui Anspach, Mr P J & Mrs E C A Compson, Rachael Thacker, Karen Callender, Lisa Lavery, Sara Lavery, Sally-Jane Colthup, J. J. Sheardown, G Gibson, M. Gwilliam, Mr Tony Boorman, Mr James Binns, Mrs Fiona Campion, WYG (Graham Connell), Fitzwilliam (Malton) Estate, Mr John Gelson, Mr Edward Button, Mr Nicholas Brooksbank, Mr Richard Williamson, Mrs Emma Brooksbank,
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SITE:

The site of the proposed development is the former Dewhirst's Clothing Factory. The site is located on the east side of Welham Road, Norton approximately 30 metres to the south east of St Nicholas Street. The site covers an area of approximately 0.52 hectares. It is an irregular shape and measures approximately 106 metres in depth at its greatest, and 80 metres in width at its largest.

The site was previously occupied by a 3 storey red brick building fronting Welham Road with a single storey factory 'extension' running to the south. The site has now been cleared, and includes security fencing around its perimeters.

The site is bounded to the south by Springfield Garth, and to the north-east by dwellings on St Nicholas Street together with KM Barker's car sales on the corner of Welham Road and St Nicholas Street. Opposite the site is part of the Lidl store and No's 8-12 Welham Road. No 5a Welham Road adjoins the site, with the application site extending behind the rectangular shaped community office building. The Old Pottery (a dwelling) is located immediately to the eastern side of the application site and behind terraced dwellings on St Nicholas Street.

The Norton Conservation Area abuts the site along its north-eastern side. The site is also located within both an area of known archaeological significance, and within Flood Zone 3(a).

The site is currently identified as a commitment for a mixed use development comprising use Classes A1 and D1 in the Sites Document Published 2018.

PROPOSAL:

Planning permission is sought for the erection of a petrol filling station with a forecourt shop sales building, canopy, car parking, 3 no. fuel pumps, below ground offset fills air/water bay, trolley compound, goods in delivery bay, bin storage, site floodlighting and ancillary arrangements to forecourt and boundary.

The sales building will have a footprint of approximately 20m by 25m and be 9m at the ridge height taking into account the raised floor levels of approximately 1.2m. The building is proposed to have a brick 'slip' finish to give the impression of being brick built under a tiled roof, understood to be slate. The canopy area features a pitched roof design also with a tiled/slate roof being 7m at its highest point. The forecourt shop building is set back approximately 52m from Welham Road, and the canopy (covering the pumps) is located in front of the forecourt shop building, being 27m from Welham Road. There are two entrances to the shop forecourt building, one of the western side and one on the southern side. Given the levels changes, ramped access is available to the building.

The forecourt shop building will have a Gross Internal Area (GIA) of 495m² including an M&S shop and Wild Bean coffee establishment. Two ATM's are proposed on the front (western side) of the forecourt shop building.

It is proposed that deliveries are brought along the northern boundary to the rear of the forecourt building, where there is a designated delivery bay for goods vehicles to reverse into. The rear of the building also includes a trolley storage compound and the housing of various plant/machinery. 4no. parking spaces are proposed at the western part of the site facing Welham Road adjacent to an air and water bay, with underground storage tanks located between the canopy and Welham Road. The tanks each have a capacity of 80,000litres, or 123 tonnes of fuel in total. 11 no. parking spaces are proposed to the western (front) of the forecourt shop building with 24 no. spaces to the southern side of the shop building.

The supporting document states that the forecourt shop is a BP shop, operated by BP staff. It will sell M&S produce but is ultimately a BP forecourt shop. The shop will sell other produce to that supplied by

M&S. The shop will mainly sell convenience produce and top-up shopping. It is understood that this collaboration between BP and M&S has resulted in approximately 300 such stores nationwide. At 495m² GIA (260m² net), this proposed shop represents a significant use on its own, and a likely destination in its own right.

There is significant conifer planting on the boundary to Springfield Garth (southern boundary). This is shown to be outside of the application site and within the highway, no changes are proposed to this planting on this application.

The application is accompanied by:

- * A Design & Access Statement
- * Lighting Assessment
- * Flood Risk Assessment
- * Air Quality Assessment
- * Noise Assessment
- * Transport Assessment
- * Land Contamination Assessment
- * Details of the fuel engineering specification
- * Specification of plant and machinery

In accordance with The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, the proposed development has been screened by the Local Planning Authority, and it has been confirmed that the proposal is not 'Environmental Impact Assessment' development, consequently there is no requirement for an Environmental Statement pursuant to those regulations.

HISTORY:

2014: Reserved Matters approval for the erection of 3 no. retail units (Use Class A1) and children's day nursery (Use Class D1).

2013: Outline planning permission granted for a mixed use development comprising 3 no. retail units (Use Class A1) and children's day nursery (Use Class D1) with associated vehicular access, parking and landscaping (site area 0.73 ha)/

2009: Erection of a food store (Use Class A1) and day nursery (use class D1) with associated vehicular access, parking and landscaping (site 0.73ha).

1999: Planning permission granted for the erection of two extensions to rear to form additional office space.

1999: Planning permission granted for the renewal of consent for the change of use of part of car park for temporary siting of a portable building to form a factory shop.

1997: Planning permission granted for the change of use of part of car park for the temporary siting of a portable building to form a factory shop.

1997: Advertisement Consent granted for the display of externally illuminated wall mounted directional sign.

1994: Planning permission granted for the change of use of part of a car park for the temporary siting of portakabin sections to form factory shop.

1981: Planning permission granted for the change of use of former clothing factory into a private social club at Welham Road.

LEGISLATION & POLICY:

Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that 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 development plan unless material considerations indicate otherwise.

In respect to the proposed development, the Development Plan for the area of Ryedale (not within the North York Moors National Park) consists of:

- The Ryedale Plan – Local Plan Strategy (2013)
- Yorkshire & Humber Plan (RSS) – Green Belt policies
- ‘saved’ policies of the Ryedale Local Plan (2002) and the 2002 Proposals Map

The main statutory duties on planning authorities relevant to this application are:

- Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that with respect to any buildings or other land in a Conservation Area, special attention should be paid to the desirability of preserving or enhancing the character and appearance of that area.
- Section 40(1) of the Natural Environment and Rural Communities Act 2006 (the ‘NERC’ Act), imposes a duty on public authorities in exercising their functions, to have regard to the purpose of conserving biodiversity.
- All public bodies are required to comply with the rights and freedoms of the European Convention on Human Rights under the provisions of the Human Rights Act (1998).

Development Plan

None of the remaining 'saved' policies of the Ryedale Local or the Yorkshire and Humber Plan are considered to be relevant to the assessment of this application.

The Ryedale Plan - Local Plan Strategy (LPS) provides the adopted development plan policies which are compliant with national planning policy (the National Planning Policy Framework – NPPF). The current Policies Map is the 2002 adopted Proposals Map. The Council has published a Sites Document which proposes amendments to some of the development limits and Town Centre Commercial Limits together with new allocations and commitments. The Sites Document is due to be examined in Autumn 2018. In accordance with the Sites Document the application site is identified as commitment for mixed use development of Use Class A1 and Use Class D1 in recognition of previous planning permissions on this site, although these have now lapsed.

The LPS contains strategic policies to manage development and growth across Ryedale to 2027.

The following policies within the Local Plan Strategy are relevant to the assessment of the application:

Policy SP1- General Location of Development and Settlement Hierarchy

Policy SP7 - Town Centres and Retailing

Policy SP10 - Physical Infrastructure

Policy SP12 - Heritage

Policy SP14 - Biodiversity

Policy SP15 - Green Infrastructure Networks

Policy SP16 - Design

Policy SP17 - Managing Air Quality, Land and Water Resources

Policy SP18 - Renewable and Low Carbon Energy

Policy SP19 - Presumption in favour of Sustainable Development

Policy SP20 - Generic Development Management Issues

Policy SP22 - Planning Obligations, Developer Contributions and the Community Infrastructure Levy

The NPPF confirms that the purpose of planning is to contribute to sustainable development. Paragraphs 7-14 of the National Planning Policy Framework details how the presumption in favour of sustainable development is to be applied. Paragraph 12 of the NPPF makes it clear that:

"The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making. Where a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part of the development plan), permission should not usually be granted. Local planning authorities may take decisions that depart from an up-to-date development plan, but only if material considerations in a particular case indicate that the plan should not be followed."

Paragraph 11 specifically confirms that a presumption in favour of sustainable development is at the heart of the NPPF. It states that for decision-taking this means (unless material considerations indicate otherwise)

- "-approving development proposals that accord with an up-to-date development plan without delay; or*
- where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:*
 - i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or*
 - ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."*

Policy SP19 of the Local Plan Strategy is consistent with the above national presumption but makes specific reference to the Local Plan and Neighbourhood Plans; working proactively with applicants and clarifies the application of the second bullet of the national presumption. It states:

'When considering development proposals the Council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework. It will always work proactively with applicants jointly to find solutions which mean that proposals can be approved wherever possible and to secure development that improves the economic, social and environmental conditions of the area.'

The NPPF provides national planning policy and is accompanied by practice guidance. Both are significant material planning considerations in the decision making process.

Where specifically relevant to the application, the policies of the NPPF are considered against the proposed development:

- Building a strong, competitive economy;*
- Ensuring the vitality of town centres;*
- Promoting sustainable transport;*
- Achieving well-designed places;*
- Meeting the challenge of climate change, flooding and coastal change;*
- Conserving and enhancing the natural environment*

National Planning Policy Guidance (PPG) provides detailed guidance in the application of planning policy. Flood risk and retail policy are the central policy issues in relation to this proposal.

APPRAISAL:

The main considerations in relation to this planning application are:

- The principle of the uses proposed on this site;
- Flood risk and application of the sequential test;
- Application of the retail sequential test;
- The siting, design and appearance of the proposed development
- The impact upon the setting and views into and out of the Norton Conservation Area;
- Highway safety and the impact upon the surrounding highway network;
- Amenity impacts for surrounding occupiers;
- The impact of the proposal upon ground waters and potential contamination
- Drainage
- Biodiversity and ecological impacts
- The impact of the proposed development upon the Air Quality Management Area;
- Archaeology;
- Designing out crime; and,
- Other issues

This application was validated in December 2017. Due to the complexity of issues associated with this application additional information has been required from the applicant in regard to; a flood risk Sequential Test; a retail Sequential Test; highway related trip generation details; an Air Quality Assessment; neighbouring amenity information; and amendments to the design and appearance of the proposed development. Members will also note that one of the objections to this application is made on behalf of the landowner of the Malton Livestock Site (LMS) arguing that their site is sequentially preferable to the application site and that the proposed development should be located on that site. Officers have considered this application carefully and obtained both expert retail advice and expert Counsel advice to ensure compliance with the relevant statutory duties and planning policy requirements. This report is authored by the Case Officer, and reflects to collective views of relevant senior Officers. This matter is referred to Planning Committee to determine.

The principle of the uses proposed on this site

A petrol filling station is a *sui generis* use, which is a use on its own and not belonging to a defined Use Class. Given the size of the proposed forecourt shop, it is considered that it represents an A1 use. This site is located within flood zone 3(a) and in an edge of centre location. These two uses are coming forward together and case law confirms it is not possible to disaggregate these uses, and the application as a whole has to be considered.

As a result, in order to establish the principle of the proposed development, both a flood risk sequential test, and a retail sequential test will need to be met in order to confirm whether in principle, the proposed uses are acceptable.

WYG on behalf of the Fitzwilliam Estate have objected to the application on the basis of Malton Livestock Market (LMS) being suitable and available for the proposed development in both flood risk and retail terms (their comments can be viewed online). WYG on behalf of the landowner has confirmed that the site is available for the proposed development and they argue that this site is both available and suitable for the proposed use. Officers has asked WYG for details regarding its availability. WYG has confirmed that the site is available now, it can accommodate the proposed development; the landowner is willing to sell on a leasehold basis and begin negotiations immediately. WYG confirmed that the terms of the lease would be the subject of commercial negotiating between the parties to establish a viable solution for both parties.

Flood risk and retail sequential tests have been provided on behalf of the applicants (these can be viewed online). The case made on behalf of the applicants is also contained in their incoming emails, letters and with the aforementioned tests themselves (again these can be viewed online). The applicants case be summarised as:

- They argue the application site is the only available and suitable site;
- The LMS is not suitable for a petrol filling station because there is insufficient passing traffic. Their argument is supported by a letter from a Petrol Station site finder at Rapleys (agents for applicants) who also state that there is insufficient passing traffic and the local road network is not busy enough to support a petrol filling station. Mention is also made of the road network that crosses the LMS.
- M&S have confirmed their only interest in Ryedale currently is the collaboration with BP at the application site.
- The LMS is recognised by the Council as a ‘key development opportunity’ for contributing to the majority of non-food retail space which is also reflected by its proposed inclusion within the Town Centre Commercial Limits. The proposed development being located on the LMS would undermine both the Council and landowner’s efforts to deliver comprehensive, non-food retail-led development on the site, and fail to meet Ryedale’s requirements.
- The LMS has constraints in respect of heritage assets and given its closer location to the Air Quality Management Area (AQMA), it means the site is inappropriate.
- The ATS site has a very narrow road frontage that is not appropriate for a petrol filling station that requires an active frontage that is accessible to all motorists including HGV’s.
- The ATS is too constrained with residential development, a railway line and trees all in very close proximity making it inappropriate for the use proposed.
- The ATS site is 0.4 hectares in area;
- The limited access width of the ATS site will make it difficult for 2 – way traffic and risk pedestrian safety;
- The restricted frontage will mean any meaningful commercial signage will be very difficult to accommodate;
- The ATS site is located within a Conservation Area and such a proposal would not preserve or enhance the character and appearance of the Conservation Area. It is also located close to existing listed buildings.

The applicants have maintained that the LMS is not suitable for the proposed development. The main argument on behalf of the applicant is that the LMS does not have sufficient passing traffic (as outlined above). No evidence has been submitted to demonstrate what the traffic movements are to make it suitable for the proposed development; what the minimum number of daily movements are to make the development as proposed viable; and whether the scheme with a less amount of passing traffic can still be viable given the significant shop use within the scheme. Officers have obtained traffic count figures from NYCC Highways to assist in the application of this test. The traffic count figures are:

- Application site entrance – January 2018 - 53,130 weekly vehicle movements.
- LMS – July 2017 – 25,448 weekly vehicle movements - at a location 25 metres to the south of the Spittal street junction and cattle pens on Horsemarket Road.

The traffic count figures obtained by the LPA clearly show that even in what could be regarded as a quieter month of January, the weekly vehicle movements exceed by more than 100% those vehicles movements in July at the LMS. Equally it may be argued that there are local vehicle movements along the adjoining roads that are not captured as part of this basic data. Nonetheless it supports the applicant’s case that the application site has more passing traffic. However, there is no information as to whether the passing traffic has any relationship to viability of the proposed development based on the traffic count figures for the LMS. It could be that more revenue is projected from the application site, but the profit projected from the LMS could still make the scheme viable. There is no breakdown on how the profit is separated between retail sales and fuel sales. It would not be unreasonable to expect retail sales to be comparatively higher on the LMS by virtue of its more central location than on the application site.

The report shall assess the application against the two tests below.

Flood risk and the application of the sequential test

The aim of the sequential test which is embodied in both National and Local Policy is to steer development to appropriate sites with the lowest risk of flooding. Para 155 of NPPF states:

'Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere.'

Paragraph 158 of NPPF states

'The aim of the sequential test is to steer new development to areas with the lowest risk of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.'

The application site is located within Flood Zone 3(a), and the proposed use is classed as 'less vulnerable' in accordance with the flood risk classifications contained in PPG. There has been some discussion as to whether the proposal should be included as 'highly vulnerable' given its petrol filling station use. In fact, one of the applicant's flood risk supporting documents classed it as 'highly vulnerable'. After further consideration and in the context of The Planning (Hazardous Substances) Regulations 2015, the applicant's consultant has confirmed the use is to be classed as 'less vulnerable'. The Environment Agency has also regarded the proposed use as 'less vulnerable'. The use is not specifically listed in the land-use classifications for flood risk, and there is some degree of ambiguity here. The LPA has sought Counsel advice on this aspect, which has concluded that the use is to be regarded as 'less vulnerable'. This approach is also consistent with how other such proposals have been considered by other Local Planning Authorities. In accordance with both NPPF para. 158 and PPG, the proposed development is required to pass the sequential test, but not the Exception Test.

When applying the sequential test, PPG advises Local Planning Authorities to take reasonable approach to the search area, which should be framed by local circumstances. PPG also advocates a pragmatic approach, proportionate to the development proposed when defining the search area. In this case the development proposed contains forecourt shop comprises 495m² of GIA, mainly to be used for retailing convenience food. When considering a reasonable search area for the proposed development, Officers are mindful of this significant town centre use aspect of the scheme. Officers have therefore considered the search area based on the following criteria.

- Proximity to the Town Centres of Norton and Malton;
- Accessibility;
- Sustainability.

The applicant has supplied a Flood Risk Sequential Test. This has assessed sites based on those submitted as part of the Local Plan Sites Consultation (2015), and the Local Plan Sites Document – Malton & Norton Background paper (October 2017). The applicant's sequential test concluded that there are 9 alternative sites that were at a lower risk of flooding than the application site. These were all on the periphery of Malton and Norton and outside of the Towns development limits, there was no information on their availability. Examples of these sites include land in and around Brambling Fields junction and around the junction between the A64 and A169. The applicant's sequential test concluded that all 9 alternative sites were unsuitable as they were Greenfield sites and Brownfield land at risk of flooding should be developed in preference. The applicant's sequential test is considered to be wholly inadequate. Its search area is considered to be too wide given the significant town centre use component of the proposed development. Furthermore, their sequential test (flood risk) has failed to take account of

other sites in existing centres that have extant planning permissions for development.

The sequential test (flood risk) is for the Local Planning Authority to undertake, in conjunction with the Environment Agency, if appropriate. The Environment Agency has been consulted and made it clear that they are content for the LPA to consider the aspects of the sequential test. The EA advise the LPA, in accordance with para 158 of NPPF, not to permit the application if there are other reasonably available sites. Officers have excluded sites in locations out of town sites on the periphery of Malton and Norton, which are Greenfield sites, because of the significant retail component of the scheme. It is considered that these would be unsustainable locations with poor accessibility, for modes of transport other than a car, and be wholly inconsistent with the objectives of the retail sequential test and the Development Plan. Approaching the flood risk sequential test in this way, is also considered to be consistent with the sustainability objectives of NPPF.

Using the criteria above, Officers consider that there are three other possible alternative sites. The Officer level assessment of these two alternatives sites is:

Wentworth Street Car Park

Wentworth Street car park is owned by Ryedale District Council. It is understood to not be available, as it is proposed to be developed for a Public Sector Hub and town centre car park.

ATS

The ATS site is located in flood zones 1, 2 and 3. Technically this site could be regarded as sequentially preferable in flood risk terms as part of it is at a lower risk of flooding. However, the site is smaller than the application site (0.4 hectares compared with 0.52 hectares) and it has a narrow frontage that would make accessibility very difficult for larger vehicles. Pedestrian safety is also likely to be a factor for those using Commercial Street. Furthermore the site is located within the Norton Conservation Area and in close proximity to listed buildings. The restricted frontage and lack of opportunity for commercial advertising are also considered to make the site unsuitable for the proposed development. This site also has an extent planning permission for residential development and there is no information that the site is available for the proposed development. This site is not considered to be suitable or available for the development proposed.

LMS

This site is located in flood zone 1, representing the lowest possible risk of flooding. This site is considered to be sequentially preferable to the application site in terms of flood risk.

The LMS at 0.9 hectares can accommodate the proposed development. It is noted that the extant scheme included changes to the existing road network to allow a larger developable area. Whilst the site is constrained to an extent by being in close proximity to several Grade 2 listed buildings and adjoining the Conservation Area boundary, Officers do not see this as a reason why in principle the development could not be located on the LMS. A carefully and sensitive scheme would need to be prepared but this is not considered to be unduly challenging. It is noted that the site is identified for retail uses and non-food uses, however it is considered that site could still accommodate such uses if the proposed development were to be located on the site. The assertions about the AQMA are unproven by the applicant, some vehicles accessing the LMS from the south would need to pass through the AQMA, but the actual effect of this has not been shown to be a significant upon the AQMA.

Summary

In view of the above assessment it has not been demonstrated to the LPA that the LMS is not reasonably available as an alternative location for the proposed development. The LMS is at a much lower risk of flooding than the application site, consequently the development of the application site for the proposed development has not met the sequential test (flood risk).

The application of the retail sequential test

Para. 86 of NPPF advises Local planning authorities of the following:

'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.'

In regard to applying the retail sequential test PPG states:

'It is for the applicant to demonstrate compliance with the sequential test (and failure to undertake a sequential assessment could in itself constitute a reason for refusing permission). Wherever possible, the local planning authority should support the applicant in undertaking the sequential test, including sharing any relevant information. The application of the test should be proportionate and appropriate for the given proposal. Where appropriate, the potential suitability of alternative sites should be discussed between the developer and local planning authority at the earliest opportunity.'

The checklist below sets out the considerations that should be taken into account in determining whether a proposal complies with the sequential test:

- *with due regard to the requirement to demonstrate flexibility, has the suitability of more central sites to accommodate the proposal been considered? Where the proposal would be located in an edge of centre or out of centre location, preference should be given to accessible sites that are well connected to the town centre. Any associated reasoning should be set out clearly.*
- *is there scope for flexibility in the format and/or scale of the proposal? It is not necessary to demonstrate that a potential town centre or edge of centre site can accommodate precisely the scale and form of development being proposed, but rather to consider what contribution more central sites are able to make individually to accommodate the proposal.*
- *if there are no suitable sequentially preferable locations, the sequential test is passed.*

In line with paragraph 90 of the National Planning Policy Framework, where a proposal fails to satisfy the sequential test, it should be refused. Compliance with the sequential and impact tests does not guarantee that permission is granted – local planning authorities will have to consider all material considerations in reaching a decision.

How should locational requirements be considered in the sequential test?

Use of the sequential test should recognise that certain main town centre uses have particular market and locational requirements which mean that they may only be accommodated in specific locations. Robust justification must be provided where this is the case, and land ownership does not provide such a justification.

How should viability be promoted?

The sequential test seeks to deliver the government's 'town centre first' policy. However as promoting new development on town centre locations can be more expensive and complicated than building elsewhere local planning authorities need to be realistic and flexible in terms of their expectations.'

To summarise, the scheme proposed relates to an area of approximately 0.52hectares of land including a Petrol Filling Station, forecourt shop of 495m² GIA on an edge of centre site.

PPG advises it is a proportionate and appropriate approach should be taken when applying the sequential test. In the circumstances it is considered that the search should be limited to the centres and edge of centres of Malton and Norton, using the guidance within PPG.

Whilst disputing its requirement, Rapleys (planning agents for the applicant) submitted a retail Sequential Test that concluded that there was no available and suitable sites on either Malton or Norton that should be developed in preference to this site.

Officers consider that the same three alternatives sites (shown on an attached plan), and analysed above for the flood risk sequential test, should also be used in the consideration of this retail sequential test.

WSCP site

For the reasons outlined above, this edge of centre site is not considered to be available for the proposed development.

ATS

Part of the site (southern side) is located within the Town Centre Commercial Limits. In this respect the site can be regarded as sequentially preferable to the application site, which is located wholly outside the Town Centre Commercial Limits. The same site constraints stated in the above flood risk sequential test are considered to apply, and for reasons relating the size of this site, its configuration, limited frontage, heritage constraints, and highway safety matters, the site is considered to be unsuitable for the proposed development. Furthermore, as stated above the site has an extant planning permission for residential development and there is no information to confirm that the site is available.

LMS

This site is located immediately to the north of Malton's Town Centre Commercial Limits, however the site has an extant planning permission for retail development and a car park. The published Sites Document identifies the site as a commitment for retail development and proposes to include the site within the Town Centre Commercial Limits. The Sites Document is due to be examined in Autumn 2018 and there have been no objections raised to the changes within the Sites Document for the LMS. Against these circumstances it is considered that significant weight can be attached to the emerging Sites Document, to the extent that the LMS can be considered to represent a Town Centre site, and consequently it is sequentially preferable to the application site. Whereas the application site is identified as a commitment in the emerging Sites Document for mixed use development (Use Class A1 and D1). This proposed commitment is reflective of its previous two planning permission on the site for a food store (A1) and a children's nursery (D1); and 3 no. retail units (A1) and a children's nursery (D1). However, those two planning permissions have now lapsed and it is unclear at this point if the commitments on the application site will be taken forward within the examination into the Sites Document.

The LMS at 0.9 hectares can accommodate the proposed development. The above assessment in relation to AQMA issues; potential heritage issues; conformity with its retail use, and the size of the site has confirmed that there are considered to be significant issues at this stage that would suggest that the site was not suitable or capable of accommodating the proposed development.

Whilst BP are the owners of the application site, the guidance in PPG states that such ownership is not necessarily a relevant consideration when applying the retail sequential test.

Summary

On the basis of the above assessment, the LMS is considered to be sequentially preferable to the application site and no compelling information has been submitted that demonstrates that the LMS is not suitable or available as an alternative site for the proposed development.

The siting, design and appearance of the proposed development

Policies SP16 and SP20 of the Local Plan Strategy place great weight upon ensuring a high quality design that respects the character and appearance of the surrounding context.

Following negotiations, the applicants have revised the design and appearance of the forecourt shop building and canopy. The Canopy now features a hipped slate roof, and the forecourt building will have a brick external finish under a slate roof.

Officers were concerned at the appearance of the canopy and asked whether it is essential. The applicants are particularly keen to retain the canopy for protection from the elements. Offices are keen to achieve an outcome that enhances the character and appearance of the site. Accepting the need to have a canopy, it is considered the slate hipped roof design approach is considered to be acceptable. Furthermore the amendments to the forecourt shop building are considered to represent a significant improvement to the original submission, such as the pitched roof and materials proposed. It is considered that Officers have secured an acceptable design solution that respects the surrounding context of development, including views into and out of the Conservation Area. The exact finishes, including ground surfacing materials would be the subject of detailed conditions.

The illumination of the site is considered to be necessary for safety reasons, when there is reduced or no day lighting. There is a plan showing the amount of illumination and any indirect light spillage. It is considered that the locations proposed are broadly acceptable and subject to the condition mentioned below, there will be no unacceptable illumination or light trespass into the surrounding area or to surrounding occupiers.

The impact upon the setting and views into and out of the Norton Conservation Area;

The southern extent of the Norton Conservation Area boundary is located along the northern boundary of the site, and part way along the eastern boundary. There will therefore be views into the application site from within the Conservation Area. That said, the majority of these views would be from rear private gardens, with limited views from Welham Road. The proposed development has been advertised as Development affecting the setting of a Conservation Area.

S72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 states that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area. Policy SP12 of the Local Plan Strategy also seek to prevent new development that would result in harm to the significance of heritage assets.

The site is cleared and includes security fencing around its outer perimeter. The scheme has been re-designed following discussions with Officers. The Conservation Specialist has confirmed no objection to the proposed development in view of the existing mix of buildings type, uses, and forms and the presence of the car sales garage. The Conservation Specialist had however expressed preference for the canopy to be deleted from the scheme. Those comments were made before the design revisions to the scheme including the pitched slate roof to the canopy. Following re-consultation no further views have been received. In view of the above, it is considered that the proposed development will not result in harm to the heritage assets (which can be considered as a neutral effect to the existing situation), and the character and appearance of the Conservation Area will be preserved.

Highway safety and the impact upon the surrounding highway network;

The application proposes to use an access directly onto Welham Road. A new right-hand turn lane is proposed for vehicles approaching the site from the south, together with a new pedestrian crossing across Welham Road also to the south. The main road network between Norton and Malton is located to the north of the site, and includes a railway crossing and a bridge (Country Bridge) over the River Derwent. The main route between the twin towns is via Castlegate to a crossroads, known as 'Butcher

'Corner', which forms an interchange between Castlegate, Wheelgate, Yorkersgate and Old Malton Gate. This junction together with the four roads leading to and from it are within a designated Air Quality Management Area. The area is typified by tall street frontage buildings with relatively narrow road ways thereby restricting the dispersal of petrol and diesel emissions.

The immediate locality contains the York- Scarborough Railway line, which has currently has one train in either direction an hour. It is also noted that there are intended to be 2 trains in each direction shortly, meaning the barriers will in operation possibly twice as long as currently, in each hour. This has the potential to add to congested movements in the locality. St Nicholas Street runs parallel to the northern boundary, and opposite the site is a Lidl Store. There has recently been a junction priority change, with Welham Road becoming the main thoroughfare from County Bridge to the south. Previously the junction priority meant that traffic would be sent along Church Street in an easterly direction with a junction onto Welham Road. This has resulted in an increase of vehicles using St Nicholas in preference to the right turn from Church Street.

Many of the objections raised included reference to highway safety and increased vehicles movements in what this existing busy area. The Highway Authority considered that the application as originally submitted did not contain sufficient information to assess the impact of the proposed development upon the local highway network, in particular they sought the following information:

- Details of trip generation based on trips from similar stores instead of TRICS data
- Junction movement information, to support the applicant's assertion that only 10% of the trips to the site would be new, and the other 90% would be passing traffic or traffic with a short deviation.
- That a high end store could be a destination in its own right for traffic.

These views are shared by Officers who also consider that an M&S branded shop has the ability to become a destination in its own right. The applicants submitted further information in support of their proposal, however, this did not address the concerns of the Highway Authority. A second Trip Generation Report was submitted. The views of the local Highway Authority on this information is contained below:

'As you are aware, the applicant has submitted a second revised Trip Generation Note dated 7 June 2018, following my concerns raised in my letter dated 18 May 2018. This Note has assessed the traffic generation in two parts as described in the report, and applying those figures to the baseline existing traffic figures obtained by the turning count survey undertaken by the applicant on 20 February 2018.'

The local highway authority (NYCC) has also obtained traffic volume data in the locality during January 2018 and, whilst it does not include all turning traffic movements, it provides a useful comparison of traffic volumes using the roads close to the site and the ability to scrutinise the figures provided in respect of through traffic flows and therefore confirm or otherwise, their acceptability to incorporate in the report to determine the impact of new/diverted/pass-by trips formulated in Section 3 of the earlier Note dated 16 March 2018, and shown in Figures 3 to 8 of the current Note.

In both respects, only data recorded during the peak a.m. & p.m. traffic periods has been directly compared with. The applicants' traffic turning count survey was undertaken on a weekday, and therefore the NYCC data has been similarly assessed on that basis, given that it was collected over 7 days. The variation in traffic volume figures provided by both surveys averages within the range of 8 to 9.5%, with (for example) the traffic flows recorded travelling along Welham Road being under 3%.

Given the 7 day collection period, the NYCC results are able to indicate the daily fluctuation in traffic flows over different days of the week. The data for Saturdays and Sundays tend to show slightly lower overall traffic volumes than within the working week, and consequently it is considered that the applicants' own data is not un-representative of the typical existing traffic through flows and

consequent turning movements, and can therefore be considered acceptable to use as the baseline figures that then shows the additional impact of the new/diverted/by-pass vehicle trips in total as given in the current Note at Figures 7 & 8.

Section 4.3 of the Note details the change in traffic flows as a consequence of applying the additional trips. The highway authority notes that information and in respect of Welham Road the re-distributed trips represent the highest increase, with totals of 27 (new and re-distributed) vehicle trips towards St. Nicholas Street / Church Street junctions in the AM peak hour and 47 (new and re-distributed) vehicle trips in the PM peak hour. These need to be considered against the daily peak-hour fluctuations of traffic volumes on Welham Road in the same area and same direction as picked up in the NYCC survey data, which are 88 vehicle trips in the AM peak hour and 128 vehicle trips in the PM peak hour. As the new and re-distributed vehicle trips are well within these figures it is not considered that the traffic impact provides a defensible reason for refusal on the grounds that the impact is severe as stipulated in Paragraph 32 of the National Planning Performance Framework (NPPF).

With respect to the off-site highway works proposed, I would recommend that an alternative position is sought for the pedestrian island crossing point as indicated on the latest Site Layout Plan, as it would potentially block delivery vehicle access to the terraced properties opposite the site, and the alleyways through the buildings. An alternative pedestrian crossing point position further south should be agreed with the local highway authority in consultation with the local planning authority and a condition has been included as a recommendation as follows.'

Based on this detailed assessment of the impact upon the local highway network and pedestrian facilities there are considered to be no defensible reasons for refusal on highway grounds. The impact of the scheme upon existing junctions and the congestion issues relating to the wider movement of vehicles between the twin towns have been considered by the local highway authority as part of their assessment on this application.

After receiving the Highway Authority's recommendation, the applicants have amended their layout plan to include existing civil rights of access to the properties along the northern boundary. This plan has been sent to the Highway Authority to ensure these changes are acceptable in terms of highway safety. A condition to control the management of these areas was proposed by the applicant and accepted by the local Highway Authority, and should be imposed on any decision if approval is granted.

Amenity impacts for surrounding occupiers:

Along the north-eastern boundary are mainly terraced dwellings, with a detached dwelling (The Old Pottery) to the rear of the site (south-eastern side). There are also residential properties located on the opposite side of Welham Road, with residential development on the western side, some of which are separated by Spring Field Garth roadway. No 1 Spring Field Garth is located to the south of the site and is separated from the application site by land within the blue line. A community based office is located in front of part of its western frontage. KM Barker garage is adjoins the site to the north eastern side also having a frontage onto Welham Road.

Residential dwellings are considered to be the key sensitive receptors to the impacts of the proposed development. The impact can be from potential noise and disturbance, from the operation of the filling station, movements to and from the forecourt shop, including deliveries and the operation of the ATM. There could also be unacceptable light pollution by the illumination of the site. A filling station has the potential to create noise and disturbance through waiting vehicles, engines starting, and car doors opening and closing noise from customers etc. The ATM can also attract vehicle movements, although it is not envisaged the noise from its operation would cause any significant impacts.

Policy SP20 of the Local Plan Strategy states:

'New development will not have a material adverse impact on the amenity of present or future occupants, the users or occupants of neighbouring land and buildings or the wider community by virtue

of its design, use, location and proximity to neighbouring land uses. Impacts on amenity can include, for example, noise, dust, odour, light flicker, loss of privacy or natural daylight or be an overbearing presence.

Developers will be expected to apply the highest standards outlined in the World Health Organisation, British Standards and wider international and national standards relating to noise.

New development proposals which will result in an unacceptable risk to human life, health and safety or unacceptable risk to property will be resisted. Developers will be expected to address the risks/potential risks posed by contamination and/or unstable land in accordance with recognised national and international standards and guidance.

All sensitive receptors will be protected from land and other contamination. Developers will be expected to assess the risks/ potential risks posed by contamination in accordance with recognised national and international standards and guidance'

A Noise Assessment has been undertaken and submitted with the application to take account of the potential noise and disturbance from the proposed development and how this can affect the amenities of the surrounding occupiers. Members may also wish to note that planning permission has already been granted for 3no retail units on this site in 2013, and also for a food store earlier in 2013. The impacts from the operation of those uses was not considered to have a material adverse effect upon the amenities of surrounding occupiers subject to the imposition of appropriate conditions.

Many of the objections received have raised concerns regarding the potential impact from the proposed development upon the amenities of surrounding occupiers.

The Environmental Health Specialists, after initially raising concerns regarding the proposal, have confirmed that they have no objection to the operation of the proposed development, subject to conditions. These condition are:

- Opening hours of the filling station and forecourt and ATM's limited to only between 06:00hrs – 22:00hrs
- Deliveries to the site limited to only between 07:00hrs – 20:00hrs
- Lighting design and specification should be agreed with the Local Authority. This should include linking lighting levels with opening hours and delivery times so as to ensure the health safety and welfare of people at work and to protect the amenity of nearby residents.

In view of the above response from the Environmental Health Specialists (and subject to the conditions recommended) there are considered to be no sustainable objections to the proposal in terms of potential residential amenity impacts.

The impact of the proposal upon ground waters and potential contamination

A Land Contamination Report has been submitted and considered by the Council' Environmental Specialist. Given the end use proposed and the hard landscaping there is no objection to the proposed development.

An incoming document from the agent describes the specification of the tanks, and the sophisticated leak detection systems, together with the double lined tank. The 3 no. pumps are to be served by 2 no. 80,000 storage tanks (holding unleaded, diesel, ultimate unleaded and ultimate diesel). The tanks are to be double walled steel tanks with an anti-corrosive coating. They are to have active pressure monitoring systems to detect a leak from the tanks themselves or from surface water penetration into the tanks.

The application site is located within a Secondary A Acquifer consisting of Alluvian Drift. The site is not within a Source Protection Zone or a Drinking Water Protection Area. Technical mitigation has been proposed to mitigate its potential risk to groundwater. The Environment Agency has been consulted and considered the risk of the proposed development to ground water and has raised no objection. The EA has recommended an informative to advise the developer of several sources of information to help mitigate any risks. It is considered that this mechanism of control falls outside of the planning system.

Drainage

Both foul and surface water is proposed to be drained to the mains. The surface water system is proposed to be attenuated on site with allowance for climate change and discharge at a rate of 1 litre a second in to the mains sewer. Petrol/diesel interceptors are required for the surface water drain to prevent discharge into the public sewers. The LLFA has considered the revised details and is content subject to conditions that such a scheme can work. Satisfactorily one of the LLFA's comments is to ensure the FFL are 300mm above the 1 in 100 year storm event plus 40% climate change. This was calculated to be 19.15 AOD. This is 0.1m above the level shown on the proposed plans. If this application is considered favourably, this minor change could be controlled through condition. The LLFA has also questioned whether sufficient underground storage will be available based on the applicant's calculations in the event of a storm event. Again, the detailed design of the surface water drainage scheme could be addressed through condition, as it appears the broad drainage strategy is workable. The LLFA also suggest a condition in respect of exceedance flows.

NYCC'S Emergency Planning team has been consulted after recommendations from the Environment Agency and the LLFA, they have confirmed that they no objection to the proposal, subject to (which can be included as informatics should permission be granted):

- That BP 'sign up' to receive EA Flood warnings and have procedures in place to know what to do when one is received.
- That measures should be in place to close the filling station if there is an imminent risk of flooding.

Yorkshire Water has no objection to the proposed development subject to two conditions. One of these conditions requires the use of interceptors, as mentioned above for areas near to the pumps and areas used for washing vehicles. A condition is also recommended to ensure that there is no piped discharge of surface water from the site until the surface water drainage system has been installed.

In view of this, it is considered that the site can be satisfactorily drained subject to appropriate conditions.

Biodiversity and ecological impacts

The Countryside Specialist has been consulted regarding the potential impacts upon protected species and local ecological impacts. The Countryside Specialist has stated:

'I have no concerns regarding the impact of this development providing the system minimise spills and separate and process the runoff from the drainage system is instituted to ensure that no pollutant finds its way into the nearby watercourse and thereby the River Derwent SAC.'

Surface water is proposed to be drained into the combined mains, via interceptors. If approval were to be granted conditions could be imposed to control the above points mentioned by the Countryside Specialist. Hence, no adverse effects from the discharge of surface water is envisaged upon nearby protected sites of ecological importance or protected species.

The impact of the proposed development upon the Air Quality Management Area

At the request of the Environmental Health Officer, an Air Quality Impact Assessment has been undertaken to assess the impact of the proposed development upon the Air Quality Management Area (AQMA).

The Council's EHO has stated:

'The predictive modelling contained within the comprehensive Air Quality Assessment submitted by Wardell-Armstrong dated March 2018 shows that the proposed development would have negligible impact on Nitrogen dioxide levels in and around the Malton's Air Quality Management Area (AQMA). Based on this information I consider the effects on Nitrogen dioxide concentrations not to be significant I would however advocate the provision of two Electric Vehicle Charging Points within the 40 bay car park to promote the use of low emission vehicles and to promote sustainable transport.'

In view of the above assessment, there is considered to be no objections to the proposal in terms of its impact upon the AQMA, subject to conditions requiring two electric charging points on the proposed development.

Archaeology

Policy SP12 requires the Local Planning Authority to assess the impact of development heritage assets. The site is located within an area of known archaeological importance. The County Archaeologist initially requested a condition known as a 'watching brief' for the site, to agree a written scheme of investigation once site works commence. The applicant subsequently submitted details of trial trenching at the site, and the County Archaeologist has stated:

'The developer has provided a report on the excavation of three additional archaeological trial trenches along the frontage of the site. This has provided some useful information on the former course of the Mill Beck and an interesting sample of local pottery and bottles from a rubbish tip.'

However I agree with the conclusion of the report that no further archaeological work is necessary based on these results (and previous mitigation to the rear of the site).'

Consequently there is no identified harm to any heritage assets and there are no objection raised in regard to archaeology. The requirements of Policy SP12 of the Local Plan Strategy are considered to be met in this regard.

Designing out crime

NPPF (paragraph 95) aims to create developments with a safe and accessible environment where crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion. In addition Section 17 of the Crime & Disorder Act 1998 requires all Local Authorities to exercise their functions with due regard to reducing crime and disorder.

North Yorkshire Police's Designing Out Crime Officer (DOCO) has been consulted and considered the risks of crime from the proposed scheme. The DOCO has no objections to the scheme but has made recommendations about:

- Consideration of CCTV installations in accordance with the relevant regulatory requirements;
- Intruder alarm system;
- ATM security systems; and,
- Provision of secure cycle storage areas for staff and employees.

Subject to conditions to cover the above aspects, it is considered that the planning policy and legislature requirements have been met.

Other issues.

Norton Town Council recommend the application be refused due to the proposed development being in close proximity to residential development that could be adversely affected by noise and disturbance, particularly early on a morning and late at night; its location in the flood plain and possible leakage or seepage into the local environment; suggest a peripheral location for a Petrol Filling Station; and they suggest they would object to any road layout changes on Welham Road to accommodate the proposed development. Malton Town Council has also objected for similar reasons, these being; the close proximity of the application site to residential development; early morning and late evening noise and disturbance; suggest an edge of centre location is the preferred site; and they would not want to see a change to parking on Welham Road that would result in a loss of car parking. These issues have all been appraised in detail above.

There have been four letters of support received and 35 responses raising objection/concerns. All these responses can be view online under the application reference number. The support for the application mainly relates to the benefits of developing this site and improving its appearance.

The areas of objection/concerns include;

- Traffic and highway implications including congestion;
- Potential noise and disturbance and the impact upon surrounding occupiers;
- Anti-social behaviour;
- Flood risk implications with diesel and petrol in the floods in 2000;
- Need for an additional filling station;
- Civil rights of access;
- Views into and out of the conservation area;
- Reduced size of the area means it is not 'Major' development (less than 1 hectare);
- Air Quality implications;
- Contamination;
- Pile foundations;
- Contention that the forecourt shop is indeed a significant convenience store;
- That the LMS site is sequentially preferable in flood risk and retail sequential tests; and
- That the description should comprise a mixed use development and not a forecourt shop.

The majority of these issues have been addressed in detail in the appraisal above. The civil rights of access to adjoining properties falls outside the consideration of this planning application. In the event that this application is approved, no such approval would alter such civil rights relating to access. This is a matter between the respective landowners. The agents have amended the drawings (as mentioned above) to accommodate the existing rights of access, these amendments have been forwarded to the Highway Authority who are content with these changes in highway safety terms.

The LPA has a duty to process applications that are submitted to it in accordance with legislative processes and consider them against national and local planning policies, together with other relevant material planning considerations. The application is to be determined by Planning Committee and the LLFA have been consulted on this submission. Whether the application is regarded as a 'Major' application is not considered relevant.

Regarding construction disturbance, if planning permission is granted a condition could be imposed regarding a Construction Management Plan to ensure surrounding residential amenities are protected. The concerns regarding the seepage of fuels, and any additional risk of such during a flood, along with potential contamination to ground waters are noted. The applicant has provided their technical solutions to this issue in their submission (outlined above). The Environment Agency has no objection on these grounds and separate regulatory controls will address these aspects. There are considered to be no sustainable planning objections in this respect.

The objection regarding the description of the proposed development being amended to include a mixed use development referring to the shop use was passed to the applicants. They did not wish to change the description their application and considered that as described it reflects what they are proposing. It is considered that the suggested change is somewhat academic, as the above assessment has considered the scheme in detail and acknowledges that the shop use can be a significant use and a destination in its own right.

The proposed development would not be chargeable to CIL. This is because the retailing element is below 500m².

Summary:

In the absence of information for the LPA to conclude that the flood risk sequential test has been met, together with the inadequate information submitted regarding the retail sequential test, the recommendation is that the application is refused planning permission.

RECOMMENDATION: **Refusal**

- 1 It has not been demonstrated through the submission of sufficient evidence that the Malton Livestock Site (Horsemarket Road, Malton) which is at a much lower risk of flooding (Flood Zone 1) and sequentially preferable in flood risk terms to the application site (Flood Zone 3 (a)) is not a suitable and appropriate site to accommodate the proposed development. Consequently the flood risk sequential test required by paragraph 158 of the National Planning Policy Framework 2012 and Policy SP17 of the Local Plan Strategy has not been met in respect of the application site. The approval of this application would result in a development being located in an area at a higher risk of flooding than is necessary. The proposed development is therefore contrary to the requirements of Policy SP17 of the Local Plan Strategy and contrary to paragraphs 155 and 158 of NPPF 2018.
 - 2 It has not been demonstrated through the submission of sufficient evidence that the retail sequential test has been met. The Malton Livestock Market (Horsemarket Road, Malton) is considered to be sequentially preferable to the application site in terms of it being regarded as a Town Centre site in the Published Sites Document 2018. No compelling arguments have been made as to demonstrate why the Malton Livestock Site is not suitable or available for the development proposed. Consequently the proposed development is contrary to the requirements of paragraph 86 of the National Planning Policy Framework 2018.