

Case Name: *R (on the application of Tesco Stores Limited) v Stockport Metropolitan Borough Council and Lidl Great Britain Limited* [2025] EWCA Civ 610 (9 May 2025)

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Commentary: The appellant, Tesco Stores Ltd, unsuccessfully appealed the order of Karen Ridge, sitting as a deputy judge of the High Court, by which she dismissed a claim for judicial review of the decision by Stockport Metropolitan Borough Council (“the Council”) to grant planning permission for the “[erection] of a new Lidl food [store] (Class E) with associated carparking and landscaping” in Stockport. Tesco submitted that the Council misunderstood and misapplied the “sequential test” in national and development plan policy for retail development when determining Lidl’s application.

The Court agreed with the submission of counsel for the Council that the crucial question was whether it could lawfully conclude that no sequentially preferable site was “available” within the meaning of paragraph 87 of the NPPF. Whether and when a site becomes or ceases to be “available”, and why this is so, are questions for the decision-maker to establish on the facts. Two potential sites were taken into account, the owners of one of which were in negotiations with a proposed occupier who intended to open a food store, and the owners of the other site had entered into a legally binding agreement with Aldi. The Court held that *“It was not a misinterpretation or misunderstanding of the NPPF policy, or a misapplication of it in the circumstances here, for the council to find that both of the two sites in question were not “available” in the relevant sense. The policy was in sufficiently broad terms to make that conclusion possible as a lawful application of it. And in the particular circumstances of this case, which can be materially distinguished from those in Aldergate Properties, this was a perfectly reasonable and lawful conclusion for the council to reach as a matter of planning judgment.”*

The facts

The site of Lidl’s proposed new store was outside of any designated town centre, and so was “out-of-centre” development under planning policy for retail development. Tesco has two out-of-centre superstores in Stockport. When considering Lidl’s proposal, the council assessed the suitability and availability of several sites said by objectors, including Tesco, to be “sequentially preferable” under the policy for the sequential test set out at paragraph 87 of the July 2021 version of the NPPF. Two sites in particular were taken into account, which could accommodate food stores in similar format and scale to Lidl’s. When Lidl’s proposals came before the planning committee, the members were aware that the owners of one site were in negotiations with a proposed occupier who intended to open a food store, and that the owners of the other site had entered into a legally binding agreement with Aldi. In the view of the Council’s officers and members, neither site could be properly regarded as “available” for the proposed development within the meaning of paragraph 87 of the NPPF.

The ground of appeal

Permission to appeal was granted on only one ground, which alleged an “erroneous interpretation of paragraph 87 of the NPPF” by the Council and subsequently by Karen Ridge in the High Court. Counsel for Tesco contended that on a proper interpretation of the NPPF, a site is “available” if it is available for the type of development proposed, even if it is controlled by another person drawing in particular on remarks of Ouseley J in *Aldergate Properties Ltd. v Mansfield District Council* [2016] EWHC 1670 (Admin) on the concept of “suitability.” In concluding that the sites were unavailable as they were controlled by someone else, the Council had misunderstood and misapplied the sequential test policy.

The Court of Appeal rejected this interpretation of the NPPF and confirmed that the approach taken by the Council and in the High Court was correct. Lindblom LJ set out the following conclusions on the interpretation of the policy in paragraph 87 of the NPPF:

1. The purpose of the sequential test for retail development is to steer such development and other “main town centre uses” to town centres, or sites on the edge of town centres, in preference to out-of-centre locations.
2. The sequential test sets a clear order of preference, or priority, for the location of main town centre uses. The first preference in the policy is “in town centres”. The second is “in edge of centre locations”. And the third, stated as a principle, is that “only if suitable sites are not available (or expected to become available within a reasonable period) should out of centre sites be considered.”
3. The policy is in everyday language. None of the terms are hard to understand. “Suitable” and “available” are ordinary English words and do not take on a different, technical or artificial meaning when used in planning policy or guidance.
4. Paragraph 87 says nothing about the identity of applicants for planning permission, or, for retail development, the identity of retailers. It does not say that a site must be exactly “suitable” in every respect.
5. The concepts of suitability and availability mean different things and are intended to apply in a wide range of circumstances, but both require the exercise of planning judgment on the facts as they are at the date of the decision. The question of a site’s suitability calls for judgment by the decision-maker about the form and scale of development on which to base the application of the sequential test. A site’s availability is also a question of fact and judgment.
6. The policy invites a view on the timing of a site’s availability, which may be a matter of prediction, on the facts, and those facts may be fluid. Sites can become “available” or cease to be so while a proposal is live before a local planning authority or on appeal. The policy is flexible, not prescriptive.

7. Finally, the application of the sequential test does not depend on there being a need for the development proposed. If the sequential test is met because sites in or on the edge of a town centre are being taken up by retailers intending to operate new stores, the decision-maker might still conclude that adding another store of a similar type on an out-of-centre site would harm the vitality and viability of the town centre.

The Court held that the Council's application of the sequential test was consistent with this understanding of the NPPF. The Court agreed with the submission of counsel for the Council that the crucial question was whether it could lawfully conclude that no sequentially preferable site was "available" within the meaning of the policy.

Whether and when a site becomes or ceases to be "available", and why this is so, are questions for the decision-maker to establish on the facts. The policy does not specify some definite event or provide any criteria, let alone a hard and fast rule, for ascertaining these matters. Neither does the PPG.

The Court of Appeal agreed with the conclusion reached in the court below, that, in the circumstances as they were at the time of its decision on Lidl's application for planning permission, the council could reasonably conclude that the proposal should not be turned away on the basis of any sequentially preferable site being "available". That was the decisive issue in the application of the sequential test. In accordance with the policy, it required an exercise of judgment on the facts. This was lawfully done. Events had moved on. The two sites on which attention was concentrated at this stage could now properly be seen as committed for retail use. They were not truly alternatives to the application site. The policy was in sufficiently broad terms to make that conclusion possible as a lawful application of it.

Case summary prepared by Gregor Donaldson