

Member of North Planning Committee
Shropshire Council
Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND



05 January 2018

Ref: 002092/L009

Dear Councillor,

PROPOSED ALDI STORE, WREXHAM ROAD, WHITCHURCH – 17/01152/FUL

The above application is due to be considered by Committee on 9 January 2018. Whilst it has been recommended for refusal by your officers, my client (Lidl UK GmbH) continues to have concerns with the lawfulness of the case presented by the applicant and has, therefore, sought legal advice on the matter, which is enclosed for your attention. We trust that the Opinion will assist your consideration of matters and provide further confidence to follow the officer recommendation and refuse planning permission.

The Opinion does, however, question the strength of the proposed grounds for refusal with regard to the impact on the vitality and viability of Whitchurch Town Centre. Officers recommend that permission be refused on the basis that *'the proposed development will have an adverse impact on the vitality and viability of the town centre, albeit not a significant adverse impact, there remains an impact'*. We contend that officers have under-estimated the potential impact on the town centre in drawing this conclusion and it is also inconsistent with officers previous conclusions on the matter.

Aldi expects the proposed store to draw half of its turnover away from town centre stores, which it estimates could result in an impact of approximately -15% on the town centre. However, this is a best-case scenario and it is highly likely that the actual impact could be significantly higher. Aldi's own evidence demonstrates that a number of shops in the town centre are performing below average expectations, with evidence presented by my client confirming that the Lidl store also performs below the company average. The loss of trade from several under-performing stores is likely to result in a greater impact on their viability and the town centre as a whole. It is not just Lidl that is under threat.

Whilst it is a matter of judgement whether an impact of at least -15% will be significantly adverse upon the town centre as a whole, granting planning approval for a new foodstore located outside the town with a forecast turnover in excess of £12m presents a significant risk to Whitchurch Town Centre. In light of this risk, paragraph 27 of the NPPF advises:

'Where an application... is likely to have significant adverse impact... it should be refused' [emphasis added].

Plan A (North West) Limited
32 Aughton Road
Southport
PR8 2AG

We trust that you will agree that there is a reasonable likelihood that the proposed Aldi store could very well have a significant adverse impact on Whitchurch Town Centre and, therefore, a '*significant adverse impact*' should be stated in the grounds for refusing planning permission.

Yours faithfully,

Chris Smith
chris@planalimited.co.uk

Enc: Legal Opinion dated 3 January 2018
Cc: All Members of North Planning Committee – Shropshire Council
Ms K Townend – Shropshire Council

IN THE MATTER OF:

**PROPOSED ALDI STORE, WREXHAM ROAD, WHITCHURCH,
SHROPSHIRE**

OPINION

Introduction

1. I am instructed on behalf of Lidl UK GmbH ("Lidl").
2. Lidl operates a store located on Bridgewater Street in Whitchurch Town Centre. Aldi, a rival discount food operator, has submitted an application to Shropshire Council to develop a new-out-of-town store on land off Wrexham Road. Lidl, together with others, has objected to this proposal on various grounds, including conflict with Policy CS5 of the development plan (which prohibits this type of development outside the defined settlement limits of the town) and conflict with the sequential and impact tests as set out in the National Planning Policy Framework ("NPPF") and reflected in the development plan (SAMDev Policy MD10b).
3. In support of its application Aldi has submitted to Shropshire Council two opinions from Mr Anthony Crean QC in which he urges the council to take a particular approach to the determination of the application. I am asked to advise whether the approach advised by Mr Crean would be lawful, and/or whether it is a balanced approach.

4. In commenting upon Mr Crean's opinion I restrict myself to matters of law only. Questions concerning the weight to be attached to the benefits and adverse impacts of the proposal; whether competing sites are available and/or sequentially preferable, and whether the proposal will have a significant adverse impact on the vitality and viability of the town centre all require the exercise of planning judgment, and it is for the planning authority as the decision-taker to exercise that judgment.
5. I am of the opinion that the approach suggested by Mr Crean is flawed as a matter of law, and is so for two reasons. The first relates to the correct legal and policy test for determining the application and the second concerns Mr Crean's misinterpretation of the government's policy on ensuring the vitality of town centres.

The Relevant "Test" for Determining the Application

6. In his first opinion (dated 27 October 2017) Mr Crean states (at para. 5) that if the application is refused an appeal against that refusal would be determined applying the test set out in NPPF14, thereby implying that the Council too ought to apply that test. The opinion criticises Ms Townend (the council's planning officer) for proceeding on the basis that "it is simply a question of comparing harm against benefit as though each were accorded equal weight in that balance." The NPPF14 test that Mr Crean states should be applied is a "tilted balance" because it tilts the scales in favour of the grant of planning permission (permission can be refused only if the adverse impacts "significantly and demonstrably" outweigh the benefits). It is this which leads Mr Crean to argue (at para.9) that landscape harm cannot be a legitimate reason for refusal unless it "significantly and demonstrably" outweighs the benefits of the scheme. It also explains para. 19 of his second opinion (dated 12 December 2017) in which Mr Crean states that "Where NPPF14 moves the balance in favour of Aldi the balance becomes overwhelming in favour of permission."
7. The starting point for the determination of all planning applications is s.38(6) of the Planning and Compulsory Purchase Act 2004. This provides that planning applications must be determined in accordance with the development plan unless

material considerations indicate otherwise. The courts have interpreted this to mean that there is a presumption in favour of refusal if the proposal would contravene the development plan (see in this regard *Barwood Strategic Land II LLP v East Staffs BC and SSCLG* [2017] EWCA Civ 893, at paras. 10-12, and also para. 16 in which the Court endorses NPPF 12's interpretation of s.38(6), namely that a proposal that conflicts with the development plan "should be refused" unless material considerations indicate otherwise).

8. Even if one leaves aside disputes relating to landscape, heritage and the sequential and impact tests, this is a proposal that is clearly contrary to the development plan because it is in breach of Policy CS5. Aldi's Planning and Retail Statement accepts as much – the proposal is put forward not on the basis that it accords with the development plan, but on the basis that although there is breach of the development plan other material considerations justify approval. There is therefore both a statutory and policy presumption in favour of refusal, and Ms Townend is therefore correct to ask herself the question whether there are material considerations of sufficient importance and weight that would justify taking a decision contrary to the development plan.

9. The tilted balance contained with NPPF 14, which Mr Crean suggests should be applied here, cannot as a matter of law be applied unless and until it is demonstrated that the development plan is absent, silent or that relevant policies are out of date. As the Court of Appeal made clear in *Barwood* (above) there is no "free-standing" presumption in favour of sustainable development (see judgment para. 35). In the present case, neither Mr Crean nor Aldi's planning consultants in their Planning and Retail Statement assert (let alone demonstrate) that the development plan is absent, silent or that relevant policies are out of date. No reason is provided by them as to why the tilted balance is engaged in this case. In fact, there can be no doubt at all that the development plan in the present case is up to date as regards retail policy, and its policies in this regard are fully consistent with the NPPF for determining such applications. It follows that application of the NPPF 14 tilted balance in this case would amount to a clear error of law.

The Government's Policy on Ensuring the Vitality of Town Centres

10. In both opinions, but particularly in his second Opinion, Mr Crean QC puts forward a free-standing public interest test that he suggests should be applied in determining this application. Mr Crean states "improving the shopping experience" is aligned with the public interest (para.3); that such improvement (as a benefit) "would require a matter of great significance to outweigh" it (para. 4); that the relevant question is whether closure of Lidl would "harm the public interest" (para. 12); and that the loss of a "tired, old and unsatisfactory" location would not be contrary to the public interest (para. 17).
11. This approach is wrong because it fails to appreciate that the government's view of what is in the public interest is set out in section 2 of the NPPF and the relevant sections of the PPG. The "public interest" is furthered by correctly interpreting and applying that policy, not by formulating and applying an ill-defined public interest test outwith that policy.
12. The dangers of the latter approach are evident from the way in which Mr Crean's approach leads him to assume that government policy is to "improve the shopping experience", and that closure of Lidl would not contravene government policy because it would lead to the closure of an unsatisfactory store and the provision of a "modern store with proper and adequate facilities". A proper understanding of government retail policy (as set out in the NPPF) demonstrates that neither of these matters are relevant considerations in the application of the guidance as set out in section 2 of the NPPF. The government has decided that the public interest is best served by protecting town centres, and that they are best protected by applying a strict rule that out of centre proposals "should be refused" if a sequentially preferable site is available and/or the proposal is likely to have a significant adverse impact on the vitality and viability of the town centre (NPPF27).
13. If this proposal fails either the sequential or impacts tests, it must be refused regardless of whether it improves the shopping experience. If closure of the Lidl store is likely to have or contribute to an overall impact on the town centre that is

judged to be significantly adverse, the proposal must be refused regardless of how "tired, old or unsatisfactory" Aldi and Mr Crean believe the Lidl store to be.

Other Matters

14. I note that Mr Crean QC suggests that it would be unlawful for the Council to have regard to the information submitted by Lidl to support its claim that its town centre store is trading below benchmark levels. The information has been submitted in confidence, and Mr Crean argues that for the Council to have regard to this without sharing it with Aldi would be unfair. He goes onto equate unfairness with irrationality.
15. I do not agree with Mr Crean's analysis of the situation.
16. Whether Lidl is trading below or above benchmark is clearly highly relevant to whether it is likely to be able to withstand the impact of the new Aldi store. The Council is obliged to have regard to all of the information that it has on this issue, and this includes Lidl's turnover figures for the last trading year which demonstrate that it is trading below benchmark. Aldi not having access to the precise turnover cannot change a mathematical fact, and there is no suggestion by either the Council or Aldi that Lidl has misreported its turnover. The actual trading figures for that particular store represent the best evidence of whether it is trading above or below benchmark, and the Council has those figures.
17. I note that in its Report to Committee the officers of the council have proceeded upon the basis of assuming benchmark turnover for the Lidl store. On this basis they accept that the new Aldi store could lead to the closure of the Lidl store (RTC para. 6.3.17), but that Lidl does not operate as a "key part" of the town centre. It is this which appears to support their conclusion (at paras. 6.3.21) that whilst there will be an adverse impact on the town centre, this impact will not be significant.
18. Although the question of whether the likely impact on the town centre will be adverse or significantly adverse requires the exercise of judgment on the part of the

council, it must exercise that judgment in a logical and consistent manner. In their first response to the consultation, its policy officers also assumed benchmark turnover for Lidl, and on this basis came to the conclusion that the impact on the town centre would be high and “potentially significant”. The RTC leaves it unclear as to why this potentially significant impact on the town centre has been downgraded to a non-significant impact. The only reason provided is that Lidl does not operate as a key part of the town centre, yet Aldi’s own planning consultants in their letter dated 15 June 2017 accept that Lidl “is an important part of the offer within Whitchurch.”

SATNAM CHOONGH
Number 5 Chambers

3 JANUARY 2018

IN THE MATTER OF:

**PROPOSED ALDI STORE, WREXHAM ROAD,
WHITCHURCH, SHROPSHIRE**

OPINION

Counsel: Satnam Choongh

YOUR REF:

Plan A (North West) Limited
32 Aughton Road
Southport
PR8 2AG