

RETAIL DEVELOPMENT PROPERTY BRIEFING PAPER 11

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NEED AND THE SEQUENTIAL APPROACH SECTION 73 APPLICATIONS

Introduction

- Mr Caborn's clarification to PPG 6, issued in February 1999, established that a failure to demonstrate a need for a retail or leisure development on an edge or out of centre location would normally justify the refusal of planning permission. The sequential approach was first promoted in PPG 13 (March 1994) and subsequently enshrined in PPG 6.
- Both the 'tests' of need and sequentially preferred sites have been the subject of much debate and there remains considerable uncertainty as to how to define need and how to properly interpret the government's approach to sequentially preferred sites.
- Our Property Briefing Papers 8 and 10 set out our views on these issues. In this Brief we explore a somewhat more specific point: whether the need and sequential 'tests' should bite in connection with proposals submitted under Section 73 to vary a condition imposed on an existing retail unit.

Exeter Appeal (March 1998)

- An early appeal dealing specifically with this issue was heard in March 1998 at Exeter (Ref P/51110/A/97/28/3391/P7). The proposal was to vary a condition limiting sales from an existing retail warehouse unit to DIY goods only, to allow additional bulky goods to be sold, such as floor coverings and furniture. This appeal decision pre-dated Mr Caborn's clarification on the issue of need. In his decision letter, the Inspector set out that one of the main issues was:

'the extent to which the proposal accords with the sequential approach set out in PPG6'

- In the event, the Inspector felt that the appeal site was an inappropriate location for retail development in terms of the sequential approach to site selection. The point was made at the appeal that the sequential test should not be applied to a proposal to widen the permitted use of an existing retail warehouse. The Inspector did not accept this argument and set out that there was nothing in PPG6 to suggest that development of the type proposed falls outside the policies in question.
- Recently, however, various appeal decisions have been issued which have taken an entirely different view.

Trafford Appeal (November 1999)

- This appeal involved a proposal to use an existing retail warehouse unit as a travel agency without complying with a condition restricting such a use (Ref: APP/P4225/A/99/1029182/P2). Since this appeal post-dates Mr Caborn's 'clarification', the Inspector also addressed the issue of need. In this way, he considered that one of the main issues was:

'whether there is a requirement to consider the appeal proposal against government advice in respect of need and the regimental approach to site selection.'

- In this case, the Inspector set out his views clearly:

'The advice of both PPG6 and the Minister's Answer in respect of need focuses on new retail development. Although I do not regard this description as necessarily excluding changes of use of existing buildings to retail use, in my opinion it cannot encompass adjustments between different categories of shop within Class A1 of the Use Classes Order. The root planning permission for the Trafford Retail Park refers specifically to Class A1 development, which is thus the approved use of the appeal building. The condition, the subject of this appeal, limits the permission to a particular category within Class A1, but in my view a change to another category within the same class does not constitute new retail development for the purpose of interpreting the advice within PPG6 about demonstrating need'. (para 8).

'Similarly, throughout its consideration of the sequential approach to site selection, PPG 6 emphasises its applicability to new retail development. Adopting the same argument as in respect of the need test, I do not believe it is intended that a proposal to change one type of retailing for another should be subject to the sequential approach set out in paragraph 1.11 of the PPG.' (para 9).

Rochdale Appeal (February 2000)

- In this case, the development proposed was to vary a condition to allow the sale of sports goods and accessories from an existing retail warehouse unit. Once again, the Inspector determined that for this type of proposal there was no requirement to demonstrate that the sequential test or the test of 'need' is satisfied. His reasoning was more detailed, as follows:

'Section 73 of the TCPA makes provision for the modification of conditions, the mechanism for which is the issue of a new planning permission. However, this does not alter the meaning of development defined in TCPA Section 336 (1) which refers back to Section 55, and does not include the variation of a condition. In addition, paragraph 3 of the T & CP (Use Classes) Order

addition, paragraph 3 of the T & CP (Use Classes) Order 1987 indicates that the use of a building or land for any other purpose of the same class shall not be taken to involve development of the land. The lawful use of unit 6 is within Use Class A1, albeit with restrictive conditions and the unit would remain in the Use Class A1 if the proposal were to be allowed. I therefore conclude that this proposal does not constitute new retail development. Consequently, there is no requirement to demonstrate that the sequential test, or the test of 'need' is satisfied.'
(para 10).

Implications

- To our knowledge, neither the Trafford nor the Rochdale appeal decisions have been the subject of Judicial Review and taken at face value, they comprise important precedents.
- If the need and sequential 'tests' are not material in connection with this type of proposal, the most likely planning policy consideration will be impact on the vitality and viability of town centres. If the proposal is only for one unit, we believe it will be difficult for most local planning authorities to show material adverse impact. As such, the probability is that planning permission will be forthcoming. Since precedent itself is not generally supported on appeal (every application falls to be determined on its merits) it does seem that planning authorities should brace themselves for the possibility of a series of proposals under S.73 being made to widen the range of goods to be sold from existing units.
- Perhaps when the long awaited 'flexibility' clarification is issued the Minister might turn his policy thoughts to the above.

FURTHER INFORMATION

Further copies of this and previous briefing papers may be obtained from Jim Morrissey as may additional information or assistance on planning and development issues.

Chase & Partners provide comprehensive retail planning and development services to the private sector and Local Authorities, including 'health checks' and retail impact assessments, and the sequential approach. Graham Chase and Jim Morrissey, Directors of Chase & Partners, have advised over 100 private sector clients and 50 Local Authorities on retail planning matters in the past 4 years.

Other Papers available in this series:-

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