

The Sequential Test (ST) and Appeal Decisions and Court Judgments

- **Dundee Judgement, March 2012** (<https://www.supremecourt.uk/cases/docs/uksc-2011-0079-judgment.pdf>)

Dundee City Council had granted permission for a rival supermarket 800 metres from Tesco's supermarket. Tesco sought to judicially review the Council's decision.

In the Dundee judgement the meaning of a "suitable" site in the sequential test is clarified. The Supreme Court established that if a site is not suitable for the commercial requirements of the developer in question, then it is not a suitable site for the purposes of the sequential approach. It also established that in terms of the size of the alternative site, provided that the applicant has demonstrated flexibility with regards to format and scale, the question is whether the alternative site is suitable for the proposed development, not whether the proposed development could be altered or reduced so that it can be made to fit the alternative site.

- **Rushden Lakes, June 2014 (PINS reference APP/G2815/V/12/2190175)**

This was a hybrid application for a mixed retail and leisure scheme at Rushden Lakes. In this case both the Inspector and the Secretary of State found no requirement to disaggregate any part of the proposed development. Following the Rushden Lakes decision it has become a commonly held view that the sequential test, as set out in paragraph 24 of the NPPF, provides no requirement for an applicant to disaggregate any proposed main town centre uses.

- **Scotch Corner, December 2016 (PINS reference APP/V2723/V/15/3132873 and APP/V2723/V/16/3143678)**

Here there were two alternative proposals for a new fashion outlet centre at Scotch Corner, North Yorkshire. The larger of the two consented schemes would have a total gross internal floor area (GIA) of some 23,381 sq. m comprising 84 Class A1 Retail units with mezzanine floors; 8 Class A3 Food & Drink units and 1,291 car parking spaces and would generate some 700 jobs. The smaller scheme would have a GIA of 16,178 sq. m comprising 70 Class A1 Retail units with mezzanine floors, of varying size; 8 Class A3 Food & Drink units and 1,138 car parking spaces and would create 500 jobs. The schemes were supported by the Local Planning Authority, Richmondshire District Council, but opposed by a number of local authorities on grounds of retail impact on local town centres.

The Inspector approved the schemes, stating "*paragraph 24 indicates that applicants should demonstrate flexibility on issues such as format and scale, it does not require the applicant to disaggregate the scheme. The sequential test seeks to see if the application, i.e. what is proposed, can be accommodated on a town centre site or on sequentially preferable sites.*"

There is nothing in the evidence before me to suggest that the applicant has pitched the scale of the scheme so that would be impossible to identify a town centre site". The decision was supported by the Secretary of State, who concluded that the sequential test had been passed.

- **Tollgate, August 2017 (PINS reference APP/A1530/W/16/3147039)**

This was an application for a mixed development comprising various elements of A1, A1-A5, A3-A5 and D2 uses on a site which had been split into three Development Zones. In this decision, the Inspector established that there may be some circumstances where an applicant would be required to separate certain constituent elements of an application (i.e. disaggregate) in order to consider whether the proposal could be accommodated in a more central sequentially preferable location. The Inspector notes the need to reflect the facts and circumstances of each particular case:

"In this case there is no evidence that the proposed format is necessary or fundamental to the proposal. Whilst the proposal is in outline, not a single retailer has been identified, and the size and location of units within the site has not been established and there is no defined timescale or phasing. It is difficult to conceive of a more open ended proposal. The parameters established by plans show a greater level of gross floor space than permission has been sought for. Most importantly the Appellants have themselves disaggregated within the appeal site with three distinct zones. DZ1 and DZ3 are some distance apart. In these circumstances disaggregation within the sequential test would be justified."

- **Land North of Ashcombe Road and Barnes Way, Kingswood, Hull, December 2017 (PINS reference APP/V2004/W/17/3171115)**

Most recently (and admittedly following submission of the application), an outline application for a terrace of A1 and A3/A5 retail units with no specified end users was dismissed in Hull. In his decision, the Inspector considered the concept of flexibility and disaggregation to be acceptable and referred to previous appeals and court decisions in his deliberations (including Dundee, Rushden Lakes, Scotch Corner and Tollgate). He concludes by saying:

"In this case there is no particular evidence that it would be commercially or functionally necessary to accommodate a variety of individual and as yet unidentified comparison goods retailers either in only one building or on only one site in the City Centre."