



Department for
Communities and
Local Government

Mr Alistair Ingram
Barton Willmore LLP
7 Soho Square
London
W1D 3QB

Our ref: APP/A1530/W/16/3147039
Your ref: 20638/A3/PN

04 August 2017

Dear Sir

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 78
APPEAL MADE BY TOLLGATE PARTNERSHIP LTD
LAND AT TOLLGATE VILLAGE, TOLLGATE WEST, STANWAY, ESSEX CO3 8RG
APPLICATION REF: 150239**

1. I am directed by the Secretary of State to say that consideration has been given to the report of Ken Barton BSc(Hons) DipArch DipArb RIBA FCIArb, who held a public local inquiry for 10 days between 10 January and 17 February 2017 into your client's appeal against the decision of Colchester Borough Council ("the Council") to refuse planning permission for a mixed use development comprising leisure uses (Use class D2) including a cinema, and retail (Use classes A1, A2, A3, A4 and A5), with associated parking including multi-storey car park, public realm improvements, access, highways, landscaping and associated works, in accordance with application ref: 150239, dated 4 February 2015.
2. On 4 August 2016, this appeal was recovered for the Secretary of State's determination, in pursuance of section 79 of, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990, because the appeal involves proposals which involve a town centre use or uses where that use or uses comprise(s) over 9,000m² gross floor space (either as a single proposal or as part of or in combination with other current proposals) and which are proposed on a site in an edge-of-centre or out-of-centre location that is not in accordance with an up-to-date development plan.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the appeal be allowed and planning permission granted. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions and recommendation. He has decided to allow the appeal and grant planning permission, subject to conditions. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

Matters arising since the close of the inquiry

4. The Secretary of State has had regard to correspondence submitted to him after the Inquiry, as set out in Annex A to this letter. He has carefully considered and taken into account these representations but he does not consider that they raise new planning issues that would affect his decision or require him to refer back to parties. Copies of these letters may be obtained on written request to the address at the foot of the first page of this letter.

Policy and statutory considerations

5. In reaching his decision, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.
6. In this case the development plan consists of the Core Strategy Development Plan document (DPD) (CS), adopted December 2008; the Development Policies DPD (DP), adopted October 2010; the Site Allocations DPD (SA), adopted October 2010; and the Proposals Maps, adopted October 2010. The Secretary of State considers that the development plan policies of most relevance to this case are those set out at IR5.5.
7. Other material considerations which the Secretary of State has taken into account include the National Planning Policy Framework ('the Framework') and associated planning guidance ('the Guidance').

Emerging plan

8. Paragraph 216 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework. The Secretary of State notes (IR5.2) that the current form of the emerging Local Plan 2017-2033 has yet to be examined and adopted. Consultation on the Publication Draft Local Plan runs from 16 June to 11 August 2017. The target for adoption is September 2018. Given that the emerging plan is at such an early stage, the Secretary of State considers that it can only be afforded limited weight.

Main issues

9. The Secretary of State agrees with the Inspector that the main issues are those set out at IR12.1.3.

The Development Plan

10. The Secretary of State has carefully considered the Inspector's analysis at IR12.2.1-12.2.16. For the reasons given at IR12.2.3-12.2.7 the Secretary of State agrees with the Inspector that Policy SD1 is up to date and attracts full weight. However, for the reasons given at IR12.2.8-12.2.13, he agrees with the Inspector that Policies CE1, CE2, CE3, STA3, DP5, UR1 and SA TC1 are out of date. He agrees with the Inspector at IR12.2.14 that all the policies that are out of date due to inconsistency with the NPPF should be given little weight.

11. The Secretary of State agrees with the Inspector at IR12.2.15 that Policy TA1 is consistent with the NPPF and should carry full weight. However he agrees with the Inspector that in this case the local area is recognised as being sustainable.
12. The Secretary of State agrees with the Inspector at IR12.2.16 that overall, some aspects of the proposal are not consistent with the development plan, in particular the retail policies; and that on balance the proposal is contrary to the development plan. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

The Sequential Test

13. The Secretary of State has carefully considered the Inspector's analysis at IR12.3.1-12.3.30. For the reasons given at IR12.3.23-12.3.26 he agrees with the Inspector that the propositions put forward by the Council and the Rule 6 parties in relation to the Vineyard Gate site would not be closely similar to the appeal scheme and cannot be considered available.
14. For the reasons given at IR12.3.27, the Secretary of State agrees with the Inspector that the St Botolph's is not sequentially preferable and does not need to be considered.
15. With regard to the Priory Walk site, the Secretary of State notes that both the Council and the Rule 6 Parties agreed that this site is not currently available. He agrees with the Inspector at IR12.3.28 that there is no evidence of anyone trying to assemble this site and no evidence that it would be viable to do so.
16. Overall, the Secretary of State agrees with the Inspector at IR12.3.29 that all the above sites have been found to be not suitable, not available, or not viable and that the sequential test has been passed.

The Impact Test

17. The Secretary of State has carefully considered the Inspector's analysis at IR12.4.1-12.4.38. For the reasons given at IR12.4.5-12.4.25, he agrees with the Inspector that, given the current health of the Town Centre and the projected growth, the proposal would not cause a significant adverse impact on the vitality and viability of the Town Centre.
18. For the reasons given at IR12.4.26-12.4.37, the Secretary of State agrees with the Inspector at IR12.4.38 that, although the proposal would have some impact, it cannot be concluded that there would be significant adverse impacts upon existing, committed and planned public and private investment. He considers that the impact test is passed.

Prematurity

19. For the reasons given at IR12.5.1-12.5.10, the Secretary of State agrees with the Inspector that in the absence of a published, draft plan, it is impossible to test whether the proposed development would pre-determine decisions that are central to it. He agrees that the proposal would not be premature (IR12.5.10).

Accessibility/Sustainability

20. For the reasons given at IR12.6.1-12.6.10, the Secretary of State agrees with the Inspector that the site is identified as being in a sustainable location and measures are proposed that would benefit the pedestrian and cycling environment and encourage

travel by modes other than the car. Like the Inspector at IR12.6.10, he concludes that the Council's third reason for refusal is not justified.

Impact on the Highway Network

21. The Secretary of State has carefully considered the Inspector's analysis at IR12.7.1-12.7.8. He notes at IR12.7.1 that only the Rule 6 Party and not the Council, Essex County Council (ECC), or Highways England consider that the residual impact would be severe. For the reasons given at IR12.7.5-12.7.8 he agrees with the Inspector that, although there would be some impact on the highway network, this residual impact would fall short of the severe impact required by paragraph 32 of the Framework.

Benefits

22. For the reasons given at IR12.8.1-12.8.3, the Secretary of State agrees with the Inspector that the benefits of the scheme would include provision of construction and operational employment; £16.9m p.a. gross value added to the local economy; promotion of the Town Centre through the contributions provided for in the s106 Agreement; provision of local employment opportunities for nearby residents; enhancement of retail choice and competition for local residents; provision of substantial public realm improvements; increase of pedestrian, cycle and public transport links; and, provision for the linkage of the disparate parts of the district centre by creating a permeable and pedestrian friendly development.

Planning conditions

23. The Secretary of State has given consideration to the Inspector's analysis at IR12.9.1-12.9.13, the recommended conditions set out at the end of the IR and the reasons for them, and to national policy in paragraph 206 of the Framework and the relevant Guidance. He is satisfied that the conditions recommended by the Inspector comply with the policy test set out at paragraph 206 of the Framework and that the conditions set out at Annex B should form part of his decision.

Planning obligations

24. Having had regard to the Inspector's analysis at IR11.1.1-11.1.4, the planning obligation dated 17 February 2017, paragraphs 203-205 of the Framework, the Guidance and the Community Infrastructure Levy Regulations 2010, as amended, the Secretary of State agrees with the Inspector's conclusion for the reasons given in IR12.9.14-12.9.20 that the obligation complies with Regulation 122 of the CIL Regulations and the tests at paragraph 204 of the Framework and is necessary to make the development acceptable in planning terms, is directly related to the development, and is fairly and reasonably related in scale and kind to the development.

Planning balance and overall conclusion

25. For the reasons given above, the Secretary of State considers that the appeal scheme is not in accordance with Policies CE1, CE2, CE3 and STA3 of the development plan, and is not in accordance with the development plan overall. However, these policies are not consistent with the Framework, are out of date and attract limited weight. The Secretary of State has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

26. The Secretary of State considers that both the sequential and impact tests set out in the Framework have been passed. The proposal would not be premature and the location is accessible. The retail scheme would have a slight impact on the vitality and viability of the Town Centre but not the severe adverse impact required by paragraph 27 of the Framework. Whilst there would be some impact on the highway network it would also fall short of the severe impact required by the third bullet point in paragraph 32 of the Framework to prevent development. In addition, the proposal would provide a number of social, economic and environmental benefits, as set out above, to which the Secretary of State gives significant weight. These benefits and the fact that the proposal does not conflict with national policy on ensuring the vitality of town centres and promoting sustainable transport, amount to material considerations that would justify a decision other than in accordance with the development plan in this case.

27. The Secretary of State therefore concludes that the appeal be allowed and planning permission granted.

Formal decision

28. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby allows your client's appeal and grants planning permission subject to the conditions set out in Annex B of this decision letter for a mixed use development comprising leisure uses (Use class D2) including a cinema, and retail (Use classes A1, A2, A3, A4 and A5), with associated parking including multi-storey car park, public realm improvements, access, highways, landscaping and associated works., in accordance with application ref: 150239, dated 4 February 2015.

29. This letter does not convey any approval or consent which may be required under any enactment, bye-law, order or regulation other than section 57 of the Town and Country Planning Act 1990.

Right to challenge the decision

30. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the Town and Country Planning Act 1990.

31. An applicant for any consent, agreement or approval required by a condition of this permission for agreement of reserved matters has a statutory right of appeal to the Secretary of State if consent, agreement or approval is refused or granted conditionally or if the Local Planning Authority fail to give notice of their decision within the prescribed period.

32. A copy of this letter has been sent to Colchester Borough Council and Rule 6 parties, and notification has been sent to others who asked to be informed of the decision.

Yours faithfully

Merita Lumley

Authorised by Secretary of State to sign in that behalf

Annex A SCHEDULE OF REPRESENTATIONS

General representations

Party	Date
Marcos Gilson, local resident	20 January 2017
Mark Payne, local resident	17 February 2017
Jeremy Hagon, local resident	27 April 2017
The Rt. Hon Priti Patel MP	16 March 2017
Bryn Morris, University of Essex	13 July 2017

Annex B List of conditions

1) Reserved Matters – Details Required

Details of the appearance, landscaping, layout, and scale, (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development takes place and the development shall be carried out as approved.

2) Time Limit – Reserved Matters

Application for approval of the reserved matters shall be made to the local planning authority before the expiration of three years from the date of this permission

3) Time Limit - Outline

The development hereby permitted shall be begun before the expiration of two years from the date of approval of the last of the reserved matters to be approved.

4) Approved Plans

Details of Reserved Matters shall generally accord with the Tollgate Master Plan (January 2015) as shown on page 24 of the Design & Access Statement (Section 4.0; 4.1.11) as supported by the Parameter Plans (amended March 2015), Design Principles (January 2015) and section 4 of the Planning Statement (February 2015) hereby approved insofar as these are in conformity with all of the restrictions contained in conditions 9, 10, 11, 12, 13 and 14 below. In the event that the Parameter Plans, the Design Principles or section 4 of the Planning Statement are not in conformity with any of condition 9, 10, 11, 12, 13 or 14 then the condition will take precedence. Without prejudice to the generality of the foregoing, the gross area, use classes, maximum developable commercial floorspace and building heights in each Development Zone shall be in accordance with the table in paragraph 4.7 of the Design Principles.

5) Phasing

The development shall be carried out in accordance with a phasing plan and no development shall commence until a phasing plan has been submitted to, and approved in writing by, the local planning authority.

6) Demolition and Construction Hours

No demolition or construction work shall take outside of the following times;

Weekdays: 08.00 to 18.00hrs

Saturdays: 09.00 to 13.00hrs

Sundays and Bank Holidays: none

7) Opening Hours

The use hereby permitted shall not be open to customers outside of the following times:

Weekdays: 07.00-23.00

Saturdays: 07.00-23.00

Sundays and Public Holidays: 09.00-23.00

With the exception of the Class A3, A4, A5 and D2 uses which can open until 01:00 7 days a week.

8) Delivery Hours

No deliveries shall be received at, or despatched from, the site outside of the following times:

Weekdays: 07.00 to 22.00

Saturdays: 07.00 to 22.00

Sundays and Public Holidays: 09.00 to 22.00

9) Use Classes and Floor Space

The Class A1, A2, A3, A4 and A5 floorspace hereby permitted shall not exceed 24,122 sq.m. gross. Notwithstanding this, the maximum floorspace within individual use classes shall not exceed: -

- Class A1 comparison goods: 21,314 sq.m. gross, of which no more than 14,920sq.m net shall be sales area.
- Class A1 convenience goods: 1,858sq.m. gross, of which no more than 1,394sq.m. net shall be sales area
- Class A3, A4 and A5 floorspace shall not exceed 2,100 sq.m gross

The Class D2 floorspace hereby permitted shall not exceed 6,690sq.m and any floorspace within Class D2 used for the purposes of a cinema shall in aggregate be of no more than 3,450 sq.m. gross, and have no more than 1,300 cinema seats and no more than 8 screens.

10) Net Retail Sales Area

The net retail sales area defined as the area within the walls of the shop or store to which the public has access or from which sales are made, including display areas, fitting rooms, checkouts, the area in front of checkouts, serving counters and the area behind used by serving staff, areas occupied by retail concessionaires, customer service areas, and internal lobbies in which goods are displayed; but not including cafes and customer toilets, in the development hereby permitted shall not exceed the net floorspace levels permitted and identified in Condition 9.

11) Use Class

Notwithstanding the provisions of the Town & Country Planning (General Permitted Development) Order 1995 (as amended), or in any amending Order, the floorspace hereby approved shall be limited in accordance with the following schedule;

- a) The A1 convenience goods floorspace hereby approved shall not be used for any other purpose whatsoever, including for the sale of comparison goods
- b) The Class A3, A4 and A5 floorspace hereby approved shall not be used for any other purpose whatsoever
- c) The Class D2 floorspace hereby approved shall not be used for any other purpose whatsoever

12) Small Local Shops

Development of Development Zone 1 and Development Zone 2 shall include the completion to core and shell of the three small freestanding buildings shown in the East Plaza prior to any other part of development on Development Zone 1 or Development Zone 2 coming into beneficial use.

13) Maximum and Minimum Unit Sizes

All Class A1 retail units hereby permitted shall have a minimum unit size of 500 sq m gross, with the exception of a maximum of 10 units which shall have no minimum unit size and a maximum unit size of 500 sq m gross.

14) Restriction on Mezzanine Floor Space

Notwithstanding the definition of development the creation of any mezzanine level or intermediate floorspace within any building or part of a building within this development is not permitted without the further grant of planning permission for an expansion of floorspace from the local planning authority.

15) Construction Method Statement

No works shall take place, including any demolition, until a Construction Method Statement has been submitted to and approved, in writing, by the local planning authority. The approved Statement shall be adhered to throughout the construction period and shall provide details for:

- the construction programme;
- the parking of vehicles of site operatives and visitors;
- storage of plant and materials used in constructing the development;
- the erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate;
- wheel washing facilities;
- measures to control the emission of dust and dirt during construction; and
- a scheme for recycling/disposing of waste resulting from demolition and construction works.
- routing for vehicles delivering construction materials
- location of compounds
- health & safety measures to protect public during construction
- methodology for breaking up concrete slab and crushing
- noise suppression measures
- arrangements for exceptional events
- arrangements for the display of contact details on site in prominent locations for the public to report issues to the site manager

16) Contamination – Investigation and Risk Assessment

No works shall take place in any Development Zone until an investigation and risk assessment, in addition to any assessment provided with the planning application, has been completed for that Zone in accordance with a scheme to assess the nature and extent of any contamination on the site, whether or not it originates on the site. The contents of the scheme are subject to the approval, in writing, of the local planning authority. The investigation and risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing of the local planning authority. The report of the findings must include:

- (i) a survey of the extent, scale and nature of contamination, including contamination by soil gas and asbestos;
- (ii) an assessment of the potential risks to:
 - human health,
 - property (existing or proposed) including buildings, service lines and pipes,
 - adjoining land,
 - groundwaters and surface waters,
 - ecological systems,
 - archaeological sites and ancient monuments;

- (iii) an appraisal of remedial options, and proposal of the preferred option(s). This must be conducted in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11' and the Essex Contaminated Land Consortium's 'Land Affected by Contamination: Technical Guidance for Applicants and Developers'.

17) Contamination – Remediation Scheme

No works shall take place in any Development Zone until a detailed remediation scheme to bring that Zone to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment has been prepared and then submitted to and agreed, in writing, by the local planning authority. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, timetable of works and site management procedures. The scheme must ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

18) Contamination – Remediation Scheme Notification of Works and Verification/Validation report

The local planning authority must be given two weeks written notification of commencement of the remediation scheme works and the approved remediation scheme must be carried out in accordance with the details approved before the development is first occupied/brought into use. Following completion of measures identified in the approved remediation scheme, a verification/validation report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the local planning authority before the development is occupied/brought into use.

19) Site and Floor Levels

No works shall take place in any Development Zone until detailed scale drawings by cross section and elevation that show the development of that zone in relation to adjacent property, and illustrating the existing and proposed levels of the site, finished floor levels and identifying all areas of cut or fill, have been submitted to and agreed, in writing, by the local planning authority. The development shall thereafter be completed in accordance with the agreed scheme before each of the relevant Development Zones is first occupied.

20) Details of Materials

Notwithstanding any details shown on the illustrative elevations, no works shall take place in any Development Zone until precise details of the manufacturer and types and colours of the external facing and roofing materials to be used in construction for that Zone have submitted to, and approved in writing by, the local planning authority.

21) Landscape Works

No works shall take place within any Development Zone until full details of all landscape works in that Zone have been submitted to and agreed, in writing, by the local planning authority and the works shall be carried out prior to the occupation of any part of the development unless an alternative implementation programme is subsequently agreed, in writing, by the local planning authority. The submitted landscape details shall include:

- Proposed finished levels or contours;
- Means of enclosure;
- Car parking layouts;
- Other vehicle and pedestrian access and circulation areas;
- Hard surfacing materials;
- Minor artefacts and structures (e.g. furniture, play equipment, refuse or other storage units, signs, lighting etc);
- Planting plans;
- Written specifications (including cultivations and other operations associated with plant and grass establishment);
- Schedules of plants, noting species, plant sizes and proposed numbers/densities where appropriate; and
- Implementation timetables.

Any planting plan submitted and agreed to must include provision that any tree, shrub or hedge plant (including replacement plants) removed, uprooted, destroyed, or caused to die, or which become seriously damaged or defective, within five years of planting, shall be replaced by the developer or their successors in title, with species of the same type, size and in the same location as those removed, in the first available planting season following removal.

22) Details of Cycle Parking Facilities

Prior to the commencement of the development within any Development Zone, details of the number, location and design of cycle parking facilities for that Zone shall be submitted to and approved, in writing, by the local planning authority. The approved facility shall be secure, convenient and covered and shall be provided prior to occupation within that Zone (including those located within other zones but serving the Zone in question) and retained for that purpose at all times thereafter.

23) Details of Loading, Unloading and Manoeuvring Areas

Prior to the commencement of development within any Development Zone the areas within that Zone for the purpose of loading, unloading and manoeuvring of all vehicles including construction traffic, as well as a timetable for their implementation, (including those located within other zones but serving the Zone in question) shall have been submitted to and approved, in writing, by the local planning authority. The areas for loading, unloading and

manoeuvring shall then be provided in accordance with the agreed details for that Zone and shall be retained at all times for that sole purpose .

24) Highway Improvements

No work shall commence until the following design details relating to improvements to the A12 Eight Ash Green (Junction 26) have been submitted to, and approved in writing by, the local planning authority. The scheme shall generally conform to the arrangements shown in outline (including the signals to be provided by others) on drawing IT698/SK/09 Improvements at A12 Eight Ash Green Interchange, dated June 2015.

Scheme details shall include drawings and documents showing:

- How the improvement interfaces with the existing highway alignment and carriageway markings including lane destinations;
- Full construction details relating to the highway improvement. This should include any modification to existing structures or proposed structures, with supporting analysis;
- Full signing and lighting details where applicable; and
- Confirmation of full compliance with Departmental Standards (DMRB) and policies (or approved relaxations/departures from standards from the local planning authority).

The scheme shall be implemented and completed as approved. No beneficial occupation shall take place unless and until the junction improvements (including the signalisation of both the Ipswich bound and London bound off slips of the A12) have been delivered and are fully operational.

25) Highway Works

No occupation of the development shall take place until the following have been fully completed and made available for use:

- a) Signalisation of the A12 Trunk Road Junction 26 as shown in principle on planning application drawing number IT698/SK/09
- b) The road markings amended at the Stanway Western Bypass/Sainsbury's access roundabout as shown in principle on planning application drawing number IT698/SK/10. Works to include 'Get in lane' road signs
- c) The road markings amended at the Stanway Western Bypass/London Road roundabout as shown in principle on planning application drawing number IT698/SK/11. Works to include 'Get in lane' road signs
- d) Widening of and the road markings amended at the Tollgate West (East) arm at the Stanway Western Bypass/Tollgate West roundabout as shown in principle on planning application drawing number IT698/SK/12
- e) The repositioning and enlargement of the Tollgate Road/Tollgate West roundabout, widening of Tollgate Road north arm, enlargement of the Tollgate West/Tollgate Retail Park access/site access roundabout and widening of Tollgate West between the two roundabouts to provide two full width running lanes in both directions as shown in principle on planning application drawing number IT698/TA/03A
- f) An egress from the proposal site car park onto Tollgate Road, widening of Tollgate Road and a central island in Tollgate Road as shown in principle on planning application drawing number IT698/SK/13A
- g) A minimum 3 metre wide shared footway/cycleway from the toucan crossing in Essex Yeomanry Way to Cherry Tree Farm in London Road with

a minimum 2 metre wide uncontrolled crossing point within the existing London Road splitter island

- h) A minimum 3 metre wide shared footway/cycleway along the proposal site's London Road and Tollgate Road frontage
- i) Upgrade the zebra crossing in Tollgate Road south of its junction with Tollgate East to a toucan crossing unless otherwise agreed in writing by the local planning authority.
- j) A toucan crossing in Tollgate West
- k) A minimum 3 metre wide shared footway/cycleway along the proposal site's eastern frontage adjacent the Tollgate Retail Park. Footway/cycleway shall be open to the proposal on its western side
- l) A minimum 3 metre wide shared footway/cycleway along the proposal site's northern frontage onto Tollgate West
- m) An uncontrolled pedestrian crossing (with central refuge) in Tollgate West in the vicinity of the footpath which runs behind Chiquito and Frankie & Benny's
- n) Upgrade the two bus stops in Tollgate West to current Essex County Council specification
- o) Real Time Passenger Information in two prominent locations within the proposal site, one in that part of the site to the north of Tollgate West and one in that part of the site to the south.

26) Travel Plan

No part of the development hereby approved shall be brought into use until a Travel Plan has been submitted to and approved, in writing, by the local planning authority. The Travel Plan shall include, as a minimum a five year commitment to:

- The identification of targets for trip reduction and modal shift and the methods to be employed to meet these targets;
- The mechanisms for monitoring and review;
- The mechanisms for reporting;
- The mechanisms for mitigation;
- Implementation of the travel plan to an agreed timescale or timetable and its operation thereafter;
- Mechanisms to secure variations to the travel plan following monitoring and reviews.

27) Vehicle Parking Provision

Prior to the first occupation of the development within any Development Zone, the vehicle parking area indicated on the approved plans for that Zone (including those located within other zones but serving the Zone in question) including any parking spaces for the mobility impaired, shall have been hard surfaced, sealed, marked out in parking bays and made available for use. The vehicle parking area shall be retained in this form at all times and shall not be used for any purpose other than the parking of vehicles that are related to the use of the development.

28) Site Management and Security Plan

No part of the development hereby permitted shall be brought into beneficial use until an entire application site wide Management and Security Plan has

been agreed in writing with the local planning authority. This plan shall include a description of: -

- CCTV coverage and monitoring arrangements
- On-site security presence
- Methods for securing the site (particularly the car parking areas) outside of business hours
- Litter control and site cleaning
- Public realm maintenance
- Full hoarding details

29) Scheme to Deter the Removal of Trolleys

No works shall commence within any Development Zone until a scheme to deter the removal of trolleys from the site has been submitted to and approved, in writing, by the local planning authority. The scheme shall then be implemented as approved prior to the commencement of the first use of the development hereby permitted within that Zone (including those located within other zones but serving the Zone in question) and retained as such thereafter.

30) Details of Refuse and Recycling Storage Facilities

Prior to the first occupation of the development hereby permitted in any Development Zone, refuse and recycling storage facilities for that Zone (including those located within other zones but serving the Zone in question) shall be provided in accordance with a scheme which shall have been previously submitted to and agreed, in writing, by the local planning authority. Such facilities shall thereafter be retained at all times.

31) Details of Equipment, Facilities, and Arrangements for Disposal and Collection of Litter

Prior to the first occupation of the development hereby permitted in any Development Zone, equipment, facilities and other appropriate arrangements for the disposal and collection of litter for that Zone (including those located within other zones but serving the Zone in question) shall be provided in accordance with details that shall have previously been submitted to, and agreed in writing by, the local planning Authority for that Zone.

Any such equipment, facilities and arrangements as shall have been agreed shall thereafter be retained and maintained in good order.

32) Scheme for the Control of Fumes, Smells, and Odours

Prior to the first use of the development hereby permitted in any Development Zone, control measures shall be installed in accordance with a scheme for the control of fumes, smells and odours and noise attenuation to external plant shall have been previously submitted to, and agreed in writing by, the local planning authority for that Zone. Where appropriate this scheme shall be in accordance with Colchester Borough Council's Guidance Note for Odour Extraction and Control Systems. Such control measures as shall have been agreed shall thereafter be retained and maintained to the agreed specification and working order

33) Landscape and Management Plan

Prior to the first occupation of the development within any Development Zone, a landscape management plan including long term design objectives, management responsibilities and maintenance schedules for all landscape areas for that Zone shall be submitted to and agreed, in writing, by the local

planning authority. The landscape management plan shall thereafter be carried out as approved at all times.

34) Unexpected Contamination

In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the local planning authority. An investigation and risk assessment must be undertaken in accordance with the requirements of condition 13, and where remediation is necessary a remediation scheme must be prepared in accordance with the requirements of condition 14, which is subject to the approval in writing of the local planning authority. Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the local planning authority in accordance with condition 17.

35) Dual Representation

None of the approved retail or cinema floorspace should be occupied by any retailer or cinema operator (as relevant) who at the date of such occupation, or within a period of 12 months immediately prior to occupation, occupies retail or cinema floorspace within the Inner or Outer Core of Colchester Town Centre (as defined on the Colchester Central Area Inset Proposals Map, October 2010); unless a scheme which commits the retailer or cinema operator to retaining their presence as a retailer or cinema operator within that Town Centre, for a minimum period of 5 years following the date of their occupation of retail or cinema floorspace within the development, or until such time as they cease to occupy retail or cinema floorspace within the development, whichever is sooner, has been submitted to and approved in writing by the local planning authority.

36) Access

Prior to commencement of development, details of the service access road for Development Zone 1 and Development Zone 2 must be submitted to and agreed in writing by the local planning authority. Such access road shall be constructed prior to occupation of Development Zone 1.

37) Multi-Storey Car Park

The multi-storey car park hereby approved shall have two vehicle egress points which shall be retained at all times following occupation of any part of the development. Such egress points may not be located on the same side of the multi-storey car park.

Report to the Secretary of State for Communities and Local Government

by Ken Barton BSc(Hons) DipArch DipArb RIBA FCI Arb

an Inspector appointed by the Secretary of State for Communities and Local Government

Date: 2 May 2017

TOWN AND COUNTRY PLANNING ACT 1990

APPEAL BY TOLLGATE PARTNERSHIP LIMITED

COLCHESTER BOROUGH COUNCIL

Inquiry opened on 10 January 2017

Tollgate Village, Tollgate West, Stanway, Essex CO3 8RG

File Ref: APP/A1530/W/16/3147039

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File Ref: APP/A1530/W/16/3147039

Tollgate Village, Tollgate West, Stanway, Essex CO3 8RG

- The appeal is made under section 78 of the *Town and Country Planning Act 1990* against a refusal to grant outline planning permission.
- The appeal is made by Tollgate Partnership Ltd against the decision of Colchester Borough Council.
- The application Ref 150239, dated 4 February 2015, was refused by notice dated 19 February 2016.
- The development proposed is mixed use development comprising leisure uses (Use class D2) including a cinema, and retail (Use classes A1, A2, A3, A4 and A5), with associated parking including multi-storey car park, public realm improvements, access, highways, landscaping and associated works.

Summary of Recommendation: The appeal be allowed, and planning permission granted, subject to conditions and a Section 106 Obligation.

1.0 Preliminary Matters

- 1.1 The Inquiry sat for a total of 10 days between 10 January and 17 February 2017. An accompanied visit was made to the site and its surroundings on 10 January. Unaccompanied site visits to Colchester Town centre were carried out on 9 January and 9 February 2017.
- 1.2 In exercise of his powers under section 79 and paragraph 3 of schedule 6 of the *Town and Country Planning Act 1990* the Secretary of State (SoS) directed, in a letter dated 4 August 2016, that he would determine this appeal himself. The reason for this direction is that the appeal involves proposals which involve a town centre use or uses where that use or uses comprise(s) over 9,000m² gross floorspace (either as a single proposal or as part of or in combination with other current proposals) and which are proposed on a site in an edge-of-centre or out-of-centre location that is not in accordance with an up-to-date development plan.
- 1.3 The application is in outline with all matters, except for access, reserved for future consideration. The drawings have been treated as illustrative in respect of the reserved matters. The application was validated on 5 February 2015 and refused on 19 February 2016 where the decision notice set out 4 reasons for refusal.¹
- 1.4 However, on 24 November 2016, the Planning Committee resolved, to amend the reasons for refusal. Reason for refusal 1, relating to loss of employment land, has been removed. Reason for refusal 2, conflict with retail hierarchy policy, Urban District Centre policy and the NPPF, has been expanded to include: A significant adverse impact on the vitality and viability of Colchester Town Centre; and, a failure to satisfy the sequential test. The Council continues to defend reasons for refusal 3, Prematurity, and 4 Sustainability.²
- 1.5 Although not raised by the Council, the Rule 6 Parties maintain a Highways objection to the proposal.

¹ N.1 Paras 1.2-1.3

² N.1 Para 1.4

1.6 This report includes a description of the site and its surroundings, a summary of the planning policy background, the gist of the representations made at the Inquiry, and in writing, and my conclusion and recommendation. Lists of appearances and documents, a schedule of conditions should the SoS be minded to allow the appeal, and a glossary of abbreviations, are also attached as appendices.

2.0 The Site and Its Surroundings³

- 2.1 The site is broadly 'L-shaped' and has a total area of approximately 11.75 hectares to the north and south of Tollgate West. It has been split into three Development Zones (DZ). DZ1 lies to the north east of the site on land formerly occupied by a Sainsbury's supermarket that was demolished in 2011. The site has since remained vacant.
- 2.2 DZ2 is within the defined Tollgate Urban District Centre. This part of the site contains existing retail units including Staples, B&M Bargains, Currys PC World and Hughes Electrical and is known as Tollgate Retail Park. Access is from Tollgate West with customer parking to the front and delivery access to the rear. DZ3 comprises vacant land and lies immediately west of the Tollgate Centre.
- 2.3 The areas north of Tollgate West are relatively flat, although there are substantial level changes on the northern and eastern boundaries. Existing landscape is most pronounced on the northern boundary in the form of a 'buffer' to the rear of the former Sainsbury's, although some frontage landscaping exists on parts of the Tollgate West frontage to the northern half of the site.
- 2.4 There are bus stops on Tollgate West and on London Road to the north. There are no public rights of way across the site, which is not within a conservation area, contains no listed buildings or heritage assets and has no Tree Preservation Orders covering existing trees.
- 2.5 The site is at the heart of the wider Tollgate area. To the east of the site is a mix of commercial uses known as Tollgate East, which was the first element of the Tollgate area to be developed in 1985. To the south is the Tollgate Centre Retail Park dating from 1989. There are two drive-thru units occupied by Boots and McDonalds as well as a number of national operators occupying the conventional units. Further to the south is the Lakelands residential area, which is part complete, and part under construction.
- 2.6 West of the site is Tollgate Business Park. It was constructed in 2010 and comprises office, industrial and storage floorspace. Recently, new business incubator units have been completed. Further west is Foakes a Grade II listed building. Beyond the appeal site to the north, with access from London Road, is a medical centre, a family restaurant and a detached residential property. On the opposite side of London Road is the new Sainsbury's that opened in 2010 and has a gross internal area of

³ N.1Sect 4

13,313m². North of Sainsbury's is the Grade II listed Cherry Tree Farm although views of it from the appeal site are very limited.

2.7 To the north west of the appeal site is Stane Park. Applications for 6 pub, café, restaurant units at Stane Park were allowed at appeal on 14 July 2016 (APP/A1530/W/15/3139492 & 313339492).

3.0 The Proposal⁴

3.1 The proposed development would include the following new floorspace:

- (i) 16,304m² (gross) A1 Use (comparison goods), excluding comparison goods floorspace under (iii);
- (ii) 1,858m² (gross) A1 Use (convenience goods);
- (iii) 5,010m² (gross) flexible Class A1-A5. The application tested this component on the basis that it could consist exclusively of Class A1 comparison goods floorspace;
- (iv) 950m² (gross) flexible Class A3-A5; and,
- (v) 6,690m² flexible Class D2 Use including a 1,300 seat cinema.

4.0 Planning History⁵

4.1 There have been no significant relevant applications on DZ1 since Sainsbury's relocated. The Staples and B&M Bargains units in DZ2 were allowed on appeal (APP/A1530/A/94/240436/P4) in January 1995. Condition 3 restricted the retail use to the sale of bulky goods but the Council varied this in October 2012 to allow a range of goods. The remaining units in DZ2 also have a condition 3 restricting retail use to bulky goods. DZ3 is vacant land but planning permission has been granted in the past for a distribution centre and a car show room and workshops. None of the permitted schemes has been implemented.

5.0 Planning Policy Context⁶

5.1 The Development Plan for the area comprises:

- (i) *Core Strategy DPD (CS)* adopted December 2008, including selected policies revised in July 2014 under a focused review;
- (ii) *Development Policies DPD (DP)* adopted October 2010, including selected policies revised in July 2014 under a focused review;
- (iii) *Site Allocations DPD (SA)* adopted October 2010 and;
- (iv) *Proposals Maps* adopted October 2010. The map for the Stanway UDC and Stanway Employment Zone was formally adjusted to reflect the Sainsbury's planning permission being implemented.

⁴ N.1Sect3.0

⁵ N.1 Paras 4.17-27

⁶ N.1 Paras 5.1-2

- 5.2 The Council is preparing a new Local Plan. The public consultation on the *Preferred Options Document* formally closed on 16 September 2016 and the August 2016 *Local Development Scheme* indicates further Public Consultation in February/March 2017. Submission to the SoS is expected in May 2017 with examination to follow. The *Local Development Scheme* shows an Interim Report in December 2017 and an adoption target of September 2018.
- 5.3 The *National Planning Policy Framework* (NPPF) is a material consideration and the *Planning Policy Guidance* (PPG) contains relevant guidance.⁷
- 5.4 The Council's *Proposals Map* confirms that the site is within Colchester's Settlement Boundary and is part of the wider Stanway Growth Area. It falls partly within a Strategic Employment Zone. The site falls partly within and partly adjoining the Tollgate Urban District Council and in retail policy terms is partly in and partly edge of centre.⁸
- 5.5 The most relevant development plan policies are CS Policies SD1, CE1, CE2b, and TA1 and SA Policy STA3. CS Policy SD1 seeks to locate development at the most accessible and sustainable locations. Policy CE1 sets out a hierarchy of centres whilst Policy CE2b refers to Urban District Centres. Employment and retail uses in the Stanway Growth Area are addressed in SA Policy STA3. This indicates, amongst other matters, that new town centre uses will not be permitted within the Stanway Growth Area. The Council's reasons for refusal do not mention Policy TA1 but it is raised by the Rule 6 Parties. It seeks to improve accessibility and states that developments that are car dependent or promote unsustainable travel behaviour will not be supported.⁹
- 5.6 The appeal site lies in/on the edge of a district centre. Part of the site is allocated as a Strategic Employment Zone which is the subject of Policy CE3 whilst Policy DP5 seeks to protect Employment Land. The Council no longer pursues a reason for refusal relating to the loss of employment land. Policy UR1 deals with regeneration areas and is not mentioned in the Council's reasons for refusal.¹⁰

6.0 The Case For Colchester Borough Council

6.1 Introduction

- 6.1.1 The proposal is for extensive new A1 retail floorspace, D2 leisure floorspace, A3-A5 food and beverage (F&B) floorspace and substantial new car parking. The proposed comparison floorspace, added to the existing, would be approximately 57,000m² gross, there would be substantial convenience floorspace at Sainsbury's and the total floorspace of the new centre would be just under 80,000m². The combined floorspace is likely to become unrestricted and designated in the retail hierarchy and this would

⁷ N.1 Paras 5.3-6

⁸ N.1 Para 5.7

⁹ F.3.1, F.3.3

¹⁰ F.3.1, F.3.2

create what is estimated to be one of the top 20 out of town destinations in the UK just 3 miles from Colchester Town Centre.¹¹

6.1.2 The correct interpretation of policy leads to the following breaches of extant planning policy.

- (i) The proposal would destroy any coherent retail hierarchy in the Borough;
- (ii) There would be massive harm to the Town Centre;
- (iii) There are Town Centre sites available and so the sequential approach would be breached;
- (iv) There would be substantial harm to the emerging plan process by pre-determining retail issues;
- (v) The proposal would not be sustainable as it would rely on the use of the private car. The proposed pedestrian routes would be perfunctory and would not encourage modal uses other than the car.

On any balancing exercise there would be more adverse impacts than benefits.¹²

6.2 The Development Plan

6.2.1 Section 38(6) of the *Planning and Compulsory Purchase Act 2004* requires the development plan to be considered as a whole whilst the weight to be given to each policy is a matter of planning judgement. The decision maker should reach an overall view on whether the proposal complies or not with the development plan.¹³

6.2.2 The starting point in this case is that the Appellant's planning witness accepts that policies CE1, CE2b, CE3, DP5, SA STA1 and SA STA3 are breached and that the proposal is not consistent with the development plan.¹⁴ In Stane Park the Inspector concluded that policy TA1 would be breached and there is no basis for reaching a different view as this application promotes over 1200 car parking spaces.¹⁵

6.2.3 Policy UR1 would also be breached as the commercial evidence in particular would preclude bringing forward retail floorspace at Vineyard Gate. The Appellant's planning witness accepted in cross-examination by the Council that UR1 was important but not breached which is not credible. In response to the Rule 6 Parties its relevance was denied which is also not credible. In re-examination the claim that the policy is out of date as it does not incorporate either the sequential or impact tests should be ignored as it is a regeneration policy and there is no need to address every element of the NPPF to attract full weight.¹⁶

¹¹ ID/72 Para 1.1-1.1.4

¹² ID/72 Paras 1.1.8-1.1.8..6

¹³ ID/72 Para 5.1.1-5.1.3

¹⁴ Newton Proof Para 5.99

¹⁵ ID/72 Paras 5.1.4-5.1.12

¹⁶ ID/72 PAra5.1.13

- 6.2.4 Policy SD1 is also breached as the proposal does not comply with any development plan policies relating to hierarchy. On any fair and balanced consideration the proposal does not comply with the development plan.¹⁷
- 6.2.5 The last issue is whether the fact that some policies engage the NPPF paragraph 14 presumption makes the tilted presumption overriding as the Appellant contends. The correct approach is that Section 38(6) requires all policies to be considered and a judgement made as to their weight. One factor affecting weight is whether and how far they comply with the NPPF. Finally one reaches an overall judgement in the context of Section 38(6). The paragraph 14 presumption in favour does not mean one ignores elements of the policy that are out-of-date when much if not the vast majority of policies of relevance are plainly not out-of-date.¹⁸
- 6.2.6 The correct approach is that of the Inspector in the September 2016 Stane Park decision. The fact that elements of a policy are out-of-date does not, and cannot in law, have the consequence of putting such policies aside. Being out-of-date affects the weight but they are still material to the Section 38(6) conclusion.¹⁹
- 6.2.7 The tilted balancing exercise is not engaged as much of the development plan is not out-of-date and many of the other policies are broadly compliant with the NPPF. The correct characterisation is that two policies CE1 and CE2 are materially out of date but the vast majority of policies are consistent with the NPPF and can be given full weight.²⁰
- 6.2.8 The next question is whether there are material considerations to justify the grant of permission. In this case there are 3, the guidance in the NPPF, the provisions of the emerging plan and the benefits of the proposal.²¹
- 6.2.9 In terms of the NPPF, the relevant considerations are the sequential assessment and the impact test. In terms of the emerging plan the position has hardened as a result of the retail and town centre study by Cushman and Wakefield (C&W) which identifies the growing threat of Tollgate to the Town Centre. The emerging plan does not accept or endorse additional floorspace at Tollgate. This position adds to the policy presumption against the proposal and should be given considerable weight.²²
- 6.2.10 The proposed development would breach section 38(6) and there is, therefore, a presumption against the grant of planning permission, unless there are material considerations that would indicate otherwise and justify setting aside the development plan presumption in favour of refusing the proposal.²³

¹⁷ ID/72 Paras 5.1.14-5.2

¹⁸ ID/72 Paras 5.4-5.8

¹⁹ ID/72 Paras 5.10-5.14

²⁰ ID/72 Paras 5.15-5.19

²¹ ID/72 Para 5.20

²² ID/72 Paras 5.21-5.26

²³ ID/72 Para 5.27

6.3 The Sequential Test

- 6.3.1 A failure to comply with the sequential test would justify refusal on its own. The Appellant asserts that the test does not require the disaggregation of the scheme but this is not the right test.²⁴
- 6.3.2 In Warners v Cotswolds DC the Judge stated that “Under paragraph 24 of the NPPF both applicants and local planning authorities are expected to ‘demonstrate flexibility on issues such as format and scale’. What bounds can reasonably be set on an applicant’s preference and intentions as to ‘format and scale’ in any individual case will always, and necessarily, depend on the facts and circumstances of that particular case. The policy in paragraph 24 of the NPPF should not be seen as prescriptive in this respect. It plainly is not”.²⁵
- 6.3.3 The overwhelming point is that the sequential test requires a planning judgment. If the planning judgement is that issues of format and scale should consider a combination of sites and locations then that is what should be considered. The contention that it is not permissible in law and policy is wrong.²⁶
- 6.3.4 In this case disaggregation is the only sensible approach. There is no commercial case to support what is sought and no evidence that the proposed format is required, necessary or fundamental to the proposal. Similarly there is no evidence that the proposal would only come forward in the form and location sought by the Appellant. The intended retailer line up is vague with not one identified or signed up. No unit size or where that size would be located within the development is established. In addition, there is no logical connection between the 3 DZS. It is impossible to conceive of any retail and leisure proposal that would be more open ended. This is also bizarre as the parameters established by plans show a huge level of gross floor space when permission is sought for a far lower amount. A significant part of the proposal would be barely touched by any new floorspace. Most importantly the Appellants have themselves disaggregated within the appeal site with three distinct zones.²⁷
- 6.3.5 The Appellant cannot have it both ways. As the scheme is one of the most fluid schemes promoted, the sequential test should also be very flexible. In contrast, the Appellants say that as they want 11 hectares for retail, they will have shown flexibility by considering 10% less size and floorspace. In reality, there are three large sites in the Town Centre, Vineyard Gate, St Botolphs and Priory Walk, where significant new floorspace could be provided, and without this proposal would be provided. The former two have development plan support, both have the flexibility, size and location to become important elements of the Town Centre and emerging retail led schemes that could provide a comparative quantum of floorspace to the appeal proposal.²⁸

²⁴ ID/72 Paras 10.1.1-10.1.3

²⁵ J.8 Para 30

²⁶ ID/72 Paras 10.1.5-10.1.9

²⁷ ID/72 Paras 10.1.14-10.1.15.12

²⁸ ID/72 Paras 10.1.17-10.1.26

- 6.3.6 The test is not perfection as the Appellants maintain but whether the sites are suitable, available and viable which again is a matter of planning judgement. Such sites are complex and take time to assemble but there is no reason why it cannot be done.²⁹
- 6.3.7 In Lionbrook it was stated that “suitability and availability are matters of planning judgment and the appropriate timescale for the sequential approach was for the Council to judge.”³⁰
- 6.3.8 Reference has been made to the Inspector’s decision at Stane Park but that differs from this appeal as every occupier had signed either a contract or heads of terms and the occupiers had a specific requirement for that location and format. Additionally, the SoCG required the application to be treated as one and not disaggregated.

6.4 The Impact Test

- 6.4.1 This proposal is likely to inflict significant harm on the Town Centre in two ways, firstly the impact of what is proposed and secondly the impact of the release of current restrictions on existing floorspace. It will condemn the Town Centre to a constant battle to retain its place in the retail hierarchy against a rival that is more flexible in every way.³¹
- 6.4.2 The Town Centre contains many heritage assets in the form of historic buildings and a large Conservation Area. Their wellbeing depends on a highly visited viable and vital Town Centre but it is accepted that out of centre floorspace has an inherent competitive advantage in terms of location and price.³²
- 6.4.3 The overwhelming characteristic of the proposed development is that it would be as flexible in its scope as it is possible to be. The only restriction in the proposal is that D2 uses cannot be on DZ2 and that floorspace cannot exceed the quantum set out in a suggested condition, unless a section 73 application is subsequently made. There is no commercial argument made in relation to the components of the scheme; no evidence of any nexus between leisure and retail floorspace, no evidence that the quantum of floorspace is required by retailers, their trading requirements, or why the proposal is as it is.³³
- 6.4.4 Not one occupier has signed up, said that they would take space, or agreed heads of terms and there is no limit in terms of phasing. The nature and form has been purposefully hidden. The commercial reality is that the most valuable scheme will evolve and the retailers that would be signed up would be those that would pay the most rent.³⁴
- 6.4.5 For the purposes of the sequential test, the proposal is incapable of definition or reference to commercial requirements. The new floorspace would be easier to get to, in a more attractive format with larger

²⁹ ID/72 Para10.1.27

³⁰ ID/72 Para10.1.27, J9 paras 164 and 171

³¹ ID/72 Paras 2.1-2.5

³² ID/72 Paras 2.6—2.9

³³ ID/72 Paras 2.12-2.20

³⁴ ID/72 Paras 2.21-2.28

floorplates allowing more stock to be displayed with a more attractive concentration of High Street retailers than the Town Centre. The proposal seeks to roughly double the existing floorspace at the Tollgate Centre and Tollgate West and would provide a massive expansion in retail floorspace at this location. The proposal would starve the Town Centre of investment, new floorspace, expenditure and visitors.³⁵

- 6.4.6 The three main parties agree that if there is a significant adverse impact on the vitality and viability of the Town Centre there would be a breach of NPPF paragraph 27 and the proposal should be rejected. In order to reach a judgement it is necessary to consider the current health of the Town Centre, the likely level and type of diversion, and whether that level of diversion would pass the paragraph 27 test.³⁶
- 6.4.7 The Appellant effectively maintains that the impact test on the Town Centre would be almost impossible to breach and the view is taken that only at a level of 22.9% would the test of significant adverse impact be breached. The contention that it is correct to consider Base Year against Design Year if it shows an increase in expenditure is rejected. This is because it completely ignores the issue of growth in expected expenditure.³⁷
- 6.4.8 Effectively about 1 in 4 pounds currently spent on comparison goods in the Town Centre could be diverted to Tollgate Village before there was any harm. That could not be right as it would blow a hole in the impact test for even the largest proposals. It was accepted that the correct approach is to make a judgement in the context of Colchester's current position.³⁸
- 6.4.9 Turning to the current health of the Town Centre, it is at best retaining its position against rival centres. In fact, it could be argued that it is declining as in two of the three ranking sources (or in all three depending on the year considered) its overall place has fallen.³⁹
- 6.4.10 Both Nathaniel Lichfield and Partners (NLP) and C&W have looked at the centre in the last 4 years. The level of out of town retailing is already very high and the Town Centre can be characterised as being at a crossroads. There is no evidence of the Town Centre trading at the levels identified by the Appellant based on unchanged survey results. The approach of adjusting the survey results to reflect reality more closely is clearly better. Peartree District Centre has a turnover of only £329m² and there are 4 units which have been on the market since at least the Stane Park decision and are still vacant.⁴⁰
- 6.4.11 The turnover of the comparison floorspace would be between £89.52 million (Appellant) and £105 million (Council) but the fundamental question is where that trade would be drawn from. The Council's view is more realistic being based on existing patterns of trade draw with

³⁵ ID/72 Paras 2.29-2.36

³⁶ ID/72 Paras 7.1.1-7.1.3

³⁷ ID/72 Paras 7.1.4.1-7.1.4.3

³⁸ ID/72 paras 7.1.4.4-7.1.4.7

³⁹ ID/72 Paras 7.1.5.1-7.1.5.3

⁴⁰ ID/72 Paras 7.1.5.6-7.1.5.8

adjustments at the design year to reflect possible retailer line up. The corresponding adjustments for the Town Centre are clear and sensible given that like affects like. The majority of the expenditure to support the new floorspace would be diverted in the Council's view.⁴¹

- 6.4.12 In contrast, the Appellant has not provided any in depth analysis to show how trade draw would change post development. Whilst customers would divert to comparative facilities, the proposal would be fashion led and occupied by national retailers. Bulky goods retailers would not be encouraged as they trade at lower financial levels. The Appellant's view is that from the catchment area only £36.5 million from the £85 million would come from the Town Centre. It is not credible that over 14,000m² of new floorspace would get only 40% of its income from the most comparable centre just 2.8 miles away.⁴²
- 6.4.13 The new floorspace would attract £69 million of new expenditure but the Appellant considers that no new expenditure would be spent in the existing floorspace. It is assumed that Tollgate Centre and Tollgate West would suffer a loss of £15.9 million. It is also assumed that the grant of planning permission would reduce the existing value of British Land's investment in Tollgate Centre and yet they support the proposal. In reality, the existing floorspace would receive a boost and many of the existing occupiers of Tollgate Centre would seek to remove any existing restrictions which the Council would find difficult to resist.⁴³
- 6.4.14 Even on the Appellant's figures the Town Centre is not strong enough to have at least £36.5 million diverted away from it but the Town Centre turnover is nothing like that contended by the Appellant. Tollgate Village turnover is underestimated by at least £15 million. The view that the unrestricted modern floorspace would trade at about 50% of the existing old restricted units is not credible.⁴⁴
- 6.4.15 A precautionary approach to prospective occupiers should be taken and the most attractive assumed in the absence of any confirmed retailer. It is material to note that conditions are ripe for retailers to exceed benchmark levels. Indeed, Sainsbury's achieved "best in portfolio" levels in 2013. This reflects the view of the experts who consider the location would be in the top 20 out of town destinations.⁴⁵
- 6.4.16 The actual expenditure diverted from the study area would be higher. It is not justifiable to account for 5% of expenditure from beyond the study area when the study area used by C&W has been extended far beyond that used by NLP. It is also unjustifiable on the basis that the Appellant accepts that the Town Centre secures just 1% of expenditure from beyond the study area. The Appellant keeps expenditure from beyond the study area the same.⁴⁶

⁴¹ Watts App10 tables 100 & 103, ID/72 Paras 7.1.6.1-7.1.6.3

⁴² ID/72 Paras 7.1.6.4-7.1.6.8

⁴³ ID/72 Para 7.1.6.9

⁴⁴ ID/72 Paras 7.1.7.1-7.1.7.3

⁴⁵ ID.72 Para 7.1.7.4

⁴⁶ ID/72 Para 7.1.7.5

- 6.4.17 Another impact is that a permission here would open the floodgates for bulky goods conditions to be lost, widening the overall turnover of Tollgate Village with no ability to argue harm in the light of this appeal succeeding. This is a realistic prospect, not least because some of those units are owned by the Appellant, and would have an even more significant adverse impact on the Town Centre.⁴⁷
- 6.4.18 The suggested dual representation condition is meaningless. If this appeal is successful retailers would be signed up in spring of 2018 well in advance of the condition having any relevance. If a retailer breached the condition the only remedy would be injunctive proceedings to compel them to stay open. In reality it would make no difference whatsoever.⁴⁸
- 6.4.19 There would also be a leisure impact. Odeon and Curzon have been part of recent investment and are important to the health of the Town Centre. A new multiplex on the appeal site would have ramifications for their enduring survival.⁴⁹
- 6.4.20 In summary on impact, the four biggest land interests in the Town Centre and their consultants maintain that the proposal would cause significant adverse impact on the Town Centre and must be given very significant weight in the balancing exercise.
- 6.4.21 It is necessary when considering impact to consider existing, committed or planned public and private investment. In the scheme world there would be no new expenditure to fund new floorspace in the Town Centre. It would all be eaten up by Tollgate Village. Even existing floorspace and investments would fail to benefit from growing their floorspace in line with commercial expectations of 2.5% per annum 2006-2021.⁵⁰
- 6.4.22 In the absence of the appeal the future looks exciting. Many companies are considering investing in the Town Centre. The Council takes a proactive approach. It is seeking to assist in St Botolphs and at Vineyard Gate and has historically brought forward the Culver Centre, Red Lion Court and, more recently, Angel Court. However, the appeal scheme casts a long shadow and was cited by Caddick as a reason why it struggled to progress a scheme for Vineyard Gate.⁵¹
- 6.4.23 There is agreement that the following investments fall to be considered: Curzon Cinema; Fenwicks, Lion Walk; St Botolph/Building Partnership; Priory Walk, Primark and Vineyard Gate. Whilst the Appellant asserted they would not be hurt this was on the basis of no meaningful analysis. The best evidence is from the Rule 6 Parties who concluded that the proposal would be harmful.⁵²
- 6.4.24 Granting planning permission for the appeal proposal would have an impact on the 27,000m² of comparison floorspace at Stanway that is subject to some form of restrictive condition either partial restriction or full

⁴⁷ ID/72 Para 7.1.7.6

⁴⁸ ID/72 Para 7.1.7.7

⁴⁹ ID/72 Para 7.1.7.8

⁵⁰ ID/17, ID/72 Paras 8.1.1-1.

⁵¹ ID/72 Paras 8.1.3-8.1.5

⁵² ID/72 Paras 8.1.6-8.2

restriction to bulky goods. Those conditions have been in place for many years and seek to distinguish the retail role and function of Stanway from that of the Town Centre. The grant of planning permission would make it impossible to resist the complete opening up of the restrictions that apply to 27,000m² of existing floorspace. This has already begun with Next and Argos and it would unarguably be very difficult for the Council to insist on the retention of existing floorspace restrictions.⁵³

- 6.4.25 It is also inevitable that the effect of a permission would be an attempt to have the whole location identified as a District Centre in the development plan. One which would be comparable in size to Colchester Town Centre's Primary Shopping Area. There would be no justification for restricting retail floorspace in such a location and every unit would be able to apply for the restrictions to be lifted. The consequence would be over 30,000m² of new floorspace added to which there would be some 27,000m² of existing A1 floorspace that would be unrestricted. Effectively there would be 57,000m² of A1 floorspace some 3 miles from the Town Centre.⁵⁴
- 6.4.26 There is also the Sainsbury's and Stane Park floorspace. The Tollgate Village area would have close to 80,000m² of A and D2 floorspace and would be in the top 20 out of town retail clusters in the UK. This would not be a benign scheme but would challenge the existing hierarchy.⁵⁵
- 6.4.27 The only commercial evidence is that in addition the principal Town Centre proposal, Vineyard Gate, would not go ahead. Competition between Tollgate and the Town Centre is skewed towards the former due to cheaper rates and rents, a fact that would be known to any potential investor in the Town Centre.⁵⁶
- 6.4.28 Fundamental to the planning system is that it should be plan led with succinct local plans that set out a positive vision for the future. Local planning authorities should define a network and hierarchy of centres.⁵⁷
- 6.4.29 The contention that some parts of the hierarchy are not fully compliant with the NPPF is a red herring as two levels of the hierarchy are established and agreed by all three retail witnesses. All three accept that the Town Centre should be at the top of the hierarchy with Tollgate at District Centre level.⁵⁸
- 6.4.30 A decision to grant planning permission would seriously undermine the hierarchy. Tollgate would be qualitatively superior on large modern footplates, be more accessible to the private car and it would be easier to park there. Collectively the development would seriously threaten the role and function of the Town Centre. The effect would be completely contrary to development plan policy.⁵⁹

⁵³ ID/72 Paras 2.37-2.40

⁵⁴ ID/72 Paras 2.41-2.46

⁵⁵ ID.72 Paras 2.47-2.52

⁵⁶ ID/72 Paras 2.53-2.59

⁵⁷ NPPF paras 17 and 23, ID/72 Paras 6.1.1-6.1.6.

⁵⁸ ID/72 Paras 6.1.7-6.1.8

⁵⁹ ID/72 Paras 6.1.9-6.1.12

- 6.4.31 The last 10 years have shown that the Appellants disregard what they say in relation to the planning system. In respect of DZ1 there was a commitment to use DZ1 for employment uses following a land swap with the Council, there was a commitment to submit a planning application and market the site. There was no objection to the employment designation in the development plan. Since 2004 those commitments have not been carried forward.⁶⁰
- 6.4.32 Similarly, in DZ2, the principle of using floorspace for bulky goods only was accepted but has now been cast aside. Planning permission was granted for a car showroom and for B8 use on DZ3, there was no objection to an employment designation in the development plan but none of these policy compliant developments have been implemented.⁶¹
- 6.4.33 In relation to the whole development area, a vision was evolved in the Tollgate Framework for discussion on future land uses and allocations to be through the emerging development plan. Again that commitment was cast aside within 6 months.⁶²
- 6.4.34 Up to December 2016 the Appellant's case asserted that the proposal accorded with the development plan. However, in a proof of evidence the clear stance is that the proposal does not comply with the development plan. Following examination in chief the picture changes once again with the statement that the proposal complies with the development plan. This complete change of view reduces any weight that can be put on the Appellant's planning judgement.⁶³
- 6.4.35 Additionally, the Appellant's judgement on the planning balance is that the Appellant's case is overwhelming and that the Council's case is unreasonable. If that is the case why is there no costs application? This is a partisan, rather than a balanced, case compared to the Council's fair and objective evidence which should be preferred.⁶⁴

6.5 Prematurity

- 6.5.1 Prematurity requires a planning judgement about the consequences of a decision on the emerging development plan. Whilst the PPG sets out specific examples, it also recognises that in other circumstances the decision maker can conclude the proposal is premature. This is such a case.⁶⁵
- 6.5.2 Extensive work has been done towards the emerging development plan, including a study by C&W to establish the likely retail capacity that would be required where and by when. Whilst there is disagreement about the conclusions of that work, there is no challenge to the scope of the study that seeks to address issues identified in the NPPF. The philosophy and direction of travel of the Local Plan submission version is set out in ID/59 and it will address capacity, hierarchy, town centre allocations, the role of

⁶⁰ ID/72 Paras 3.1.1-3.1.6

⁶¹ ID.72 Paras 3.1.7.1-2.1.8.3

⁶² ID/72 Paras 3.1.9.1-3.1.9.3

⁶³ ID/72 Paras 4.1.1-4.1.16

⁶⁴ ID/72 Paras 4.1.17-4.1.25

⁶⁵ ID/72 Paras 11.1.1-11.1.3

Tollgate and other District Centres, the sequential approach, and the overarching retail strategy for the Borough. It will address all the issues set out in NPPF paragraph 23.⁶⁶

- 6.5.3 Granting permission in this case would, at a stroke, reduce such questions to an irrelevance in considering the emerging plan. If prematurity cannot be alleged in this case it is difficult to imagine a retail context that could ever be credibly argued.⁶⁷
- 6.5.4 The emerging development plan is characterised by a collaborative approach with neighbouring authorities in bringing forward new settlements. These will require their own facilities that should be planned strategically. The consequences of allowing this proposal will possibly harm not just the emerging Colchester Local Plan but two others as well. Strategic planning of the emerging Local Plans should not be derailed by a massive non-plan led commercial development.⁶⁸

6.6 Accessibility/Sustainability

- 6.6.1 The Council's witness was not called but his proof of evidence was taken as read. However, as it was not tested in cross examination it should carry less weight than other evidence that has been tested.
- 6.6.2 The Appellant's Transport Assessment (TA) accepts that the proposal would lead to an additional 95,000 vehicle trips a week to the development. 70% would be primary trips whilst the rest would be pass by or diverted. Given the quantum of proposed floorspace, and the number of visitors forecast, it is surprising that in 2016 there was no attempt to quantify the modal split. Moreover, the sites used to show modal split indicate very low non car mode. The Council's untested evidence shows non car modal share would be 1-3%⁶⁹.
- 6.6.3 There is, therefore, an acknowledgement that the proposal would be overwhelmingly accessed by the private car. The location enjoys a reasonable level of accessibility, but if one makes a comparative assessment with the Town Centre, the accessibility is poor.⁷⁰
- 6.6.4 In relation to dependence on the private car, the Council relies on the Stane Park decision. The policy context of the two appeals is identical. Policy TA1 was deemed in accordance with the NPPF and a fundamental part of the policy is that largely car dependent development should not be permitted. The proposal in that case affected 288 parking spaces whilst this appeal would provide a net addition of over 1200 parking spaces. The Inspector concluded that the proposal in that case was contrary to policy and conflicted with the development plan.⁷¹
- 6.6.5 It is pertinent to consider Town Centre accessibility as well, as the Council considers that it has sequentially preferable sites. On any basis it would be

⁶⁶ ID/72 Paras 11.1.4-11.1.7

⁶⁷ ID/72 Paras 11.1.8-11.1.10

⁶⁸ ID/72 Paras 11.1.11-11.2

⁶⁹ Parfitt Rebuttal Part 5

⁷⁰ ID/72 112.2.2-12.2.9

⁷¹ ID/72 Para 12.1.10-12.1.16.6

more sustainable. The extent of population within walking distance is greater than Tollgate. The site would provide access to a 20 min service to perhaps 20% of the population whereas the Town Centre provides access to virtually the entire population of urban Colchester. The Town Centre benefits from a rail link which the appeal site doesn't. In addition, those undertaking car journeys to the Town Centre would be shorter minimising travel by all modes and reducing carbon dioxide levels generated. Pedestrian journeys are 4 times more likely in a Town Centre and bus use 4-15 times more likely. The site does not maximise the extent of travel by sustainable modes.⁷²

6.7 Other Matters

- 6.7.1 The pedestrian route between the existing Tollgate West and the British Land site is incredibly unfriendly with just one unloved formal crossing. Pedestrians are surrounded by hoardings and there is a drive thru Boots so you don't have to even get out of the car to collect your prescription.⁷³
- 6.7.2 It is difficult to see how the future will be more pedestrian friendly. Pedestrians will have to cross large car parks, busy roads and, in the case of those travelling from Sainsbury's, enter the back of development. The critical length of Tollgate West will become four lanes of busy highway. The road creates a barrier to pedestrians. In both qualitative and quantitative terms pedestrian routes are an afterthought.⁷⁴

6.8 Benefits

- 6.8.1 There will be economic, social and environmental benefits that will need to be weighed against potential harm. It is accepted that there would be significant diversion of monies from the Town Centre and the approach in Exeter is commended where the effect of the claimed benefits were weighed against the harm to the Town Centre sites. There will be social benefits. Again the Exeter approach could be adopted but in this case the same benefits would be provided by alternative schemes. There would be some environmental benefits and the scheme would bring some land back into use. In addition, there would be environmental disbenefits such as traffic generation and congestion.⁷⁵
- 6.8.2 On balance the proposal would be broadly neutral in terms of benefits. However, the benefits of progressing Vineyard Gate, St Botolph's, and other Town Centre sites would be much greater and more socially inclusive due to accessibility.⁷⁶

6.9 Overall Balance

- 6.9.1 A number of factors should be given significant weight. Firstly local members twice took the view the proposal was unacceptable. Moreover, the proposal would be contrary to the development plan. There would be massive consequences to the Town Centre due to the diversion of money

⁷² ID/72 Para 12.1.16.7-12.1.1.6.9

⁷³ ID/72 Para 13.1.1-13.1.3

⁷⁴ ID/72 Para 13.1.4-13.1.10

⁷⁵ I.3, ID/72 Paras 14.1.1-14.1.3.4

⁷⁶ ID/72 Para 14.1.4

and the proposal does not accord with the sequential test and there are sequentially preferable sites in and adjacent to the Town Centre. Finally, significant weight should be given to the fact that the proposal would prejudice decisions that should be determined in the emerging development plan process.⁷⁷

6.9.2 The proposed benefits are illusory and could be met by development of Town Centre sites with greater benefits to policy aspirations. There are no material considerations to justify setting aside the development plan, and the emerging plan is moving in the same direction. National policy relating to impact on the Town Centre, prematurity and the sequential approach all point to the proposal being dismissed.⁷⁸

7.0 The Case For Rule 6 Parties (GBRE Global Investors, Fenwick Limited, and M&G Real Estate)

7.1 Introduction

7.1.1 There are a number of reasons why this proposal should be refused planning permission. Impact and sequential tests and traffic considerations all justify refusal in their own right. There are also sound development plan reasons for refusal, including prematurity and that the development plan strengthens the impact, sequential and traffic reasons for refusal.⁷⁹

7.2 The Development Plan

7.2.1 Section 70(2) of the *Town and Country Planning Act 1990* indicates that a decision maker needs to consider what weight to give to all relevant "provisions" of the plan whilst NPPF paragraph 215 states that due weight should be given according to the degree of consistency with the NPPF and that "the closer the policies in the plan to the policies in the NPPF, the greater the weight that may be given". Weight is ultimately a matter for the decision maker. Section 38(6) of the *Planning and Compulsory Purchase Act 2004* provides that "determination must be made in accordance with the plan unless material considerations indicate otherwise". Accordance with the plan is to be assessed against the plan as a whole⁸⁰.

7.2.2 NPPF paragraph 14 deals with the presumption in favour of sustainable development and states: "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this NPPF taken as a whole; or
- specific policies in this NPPF indicate development should be restricted."⁸¹

⁷⁷ ID/72 Paras 15.1.1-15.1.5

⁷⁸ ID/72 Paras 15.1.6 -15.2

⁷⁹ ID/73 Paras 1 & 2

⁸⁰ ID/73 Paras 4-6

⁸¹ ID/73 Para7

- 7.2.3 This introduces a new presumption in favour in certain circumstances. As a matter of law what it does not do is alter the need to consider the weight to be given to all relevant provisions of the development plan. The weight to be attached to accordance or lack of accordance with each relevant provision goes into the scales in balancing benefits and adverse impact.⁸²
- 7.2.4 Suffolk Coastal states at paragraph 46: "We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make 'out-of-date' policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker." Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied. That idea appears to have found favour in some of the first instance judgments where this question has arisen. It is incorrect."⁸³
- 7.2.5 The Appellants' 'new' argument relates to the inclusion of similar wording to NPPF paragraph 14 in policy SD1 of the Focused Review. This policy again introduces a new presumption in certain circumstances but nothing in that policy requires relevant policies to be ignored in the balance. There is nothing in the policy which requires policies which have a material part which is inconsistent with the NPPF to be ignored. Indeed, failing to take into account such a policy would be contrary to Section 70(2). It would also be contrary to common sense to prevent a provision of a policy that is not out of date from being taken into account because another provision of that policy is out of date.⁸⁴
- 7.2.6 The appellants' new interpretation would allow policies that do not have a material part which is out of date to carry weight in the balancing exercise. Their interpretation requires all policies which have a material part which is out of date to be completely ignored and have no weight attached. In addition to being inconsistent with Section 70(2), that interpretation seems to be contrary to the approach set out in Aldergate Properties at paragraph 36: "The development control policy in NPPF paragraph 24 deals with applications for town centre uses out of centre where there is no up to date development plan embodying the policies of NPPF paragraph 23. But the development control policy aims to achieve as much of what an up to date plan would achieve as possible. It is not intended that the absence of an up to date plan creates a rather different world in which retailers could enjoy a much greater degree of temporary freedom based on their individual commercial interests."⁸⁵
- 7.2.7 The Appellant's interpretation also seems to be contrary to good planning sense. Why should a consistent provision within a policy that also contains

⁸² ID/73 Para 8

⁸³ J11, ID/73 Para9

⁸⁴ ID/73 Paras 10 & 11

⁸⁵ J3. ID/73 Paras12 & 13

an inconsistent provision be ignored and given no weight? See again in Aldergate Properties at paragraph 48: "Policy interpretations arising from litigation may be context and argument specific, and not intended as substitutes for the text at issue for all cases and contexts. The good sense of the planning consequences of any given interpretation may be a guide to its correctness." The proper interpretation of the additional wording in SD1 is that it brings the paragraph 14 presumption within the development plan, effectively combining the two parts of the decision making process, but it does not alter the substance of the weighing exercise.⁸⁶

- 7.2.8 All relevant provisions of the development plan should be considered, and weight attached. Where a policy contains a provision that is not consistent with the NPPF then that provision, or part of the policy, may be accorded less or little weight. However, provisions that are consistent may be given significant or full weight, whether or not other parts of the policy are inconsistent and carry less weight. The Appellant's planning witness was prepared to accept that in some circumstances this could be an acceptable approach.⁸⁷
- 7.2.9 This interpretation is consistent with the intention of the inclusion of the relevant wording in SD1. The wording comes from an Inspectorate model policy intended to reflect the operation of the NPPF, not to justify ignoring relevant development plan policies or to remove decision makers' discretion as to weight. Page 1 of the Focused Review states: "Sustainable development – the Government's model policy has been added, to reflect the NPPF's presumption in favour of sustainable development (Core Strategy Policy SD1)." The Local Plan inspector noted that: "...additional wording is added to SD1 about the council adopting a positive approach to development. This accords with the wording added to most local plans since the publication of the NPPF."⁸⁸
- 7.2.10 If the appellants' interpretation is correct then it is surprising that there are no other recorded instances of this interpretation being argued. It was certainly not argued in the Stane Park appeal. Such an interpretation is also likely to have wide ranging implications elsewhere in the country.⁸⁹
- 7.2.11 The appellants' new interpretation effectively involves a free-for-all of the sort that Aldergate Properties rejected, does not accord with the objective of achieving as much of what an up to date plan would achieve as possible, and does not make good planning sense.⁹⁰
- 7.2.12 Surely the intention, and the correct and common sense interpretation of the addition to SD1, is simply that it makes it clear that the normal NPPF approach will be adopted.⁹¹
- 7.2.13 If the proposals fail either of the sequential or impact tests set out in the NPPF then they should be refused. Similarly if the proposals would have a

⁸⁶ ID/73 Para 14 & 15

⁸⁷ ID/73 Paras 16 & 17

⁸⁸ F 4.10 / p.8 / 30, ID/73 Para 18

⁸⁹ ID/73 Para 19

⁹⁰ J3 Paras 36 & 48, ID/73 Para 20

⁹¹ ID/73 Para 21

severe impact on the surrounding road network then the proposals should be refused. However, the proposals also do not accord with development plan policy to an extent which justifies refusal, even in the absence of sequential, impact, or traffic reasons for refusal.⁹²

- 7.2.14 There are provisions of the development plan relating to the core of the Town Centre which are relevant and consistent with the NPPF. The Town Centre Core is at the top of the hierarchy, priority should be given to the regeneration of the Town Centre, retail and cultural developments will be Focused on the Town Centre, and, Vineyard Gate is promoted as part of the key St Botolph's Regeneration Area within the Inner Core. These should carry substantial weight, a fact that has not been contested.⁹³
- 7.2.15 There is no reason not to look at each provision to consider its conformity and weight and it may be appropriate to give different weight to different provisions. This approach would accord with the objective of achieving as much of what an up to date plan would achieve as possible, and makes good planning sense. It cannot be right that whether a consistent provision can be afforded weight depends on whether it is a separate policy or a provision of a policy which has other provisions which are not consistent.⁹⁴
- 7.2.16 It is accepted that Policy TA1 is consistent with the NPPF and should carry full weight. It states that "developments that are car dependant ... will not be supported". The Stane Park Inspector concluded that TA1 should be given full weight and that the proposal was car dependent and so conflicted with this policy. This proposal is also car dependant and contrary to this policy.⁹⁵
- 7.2.17 CE2b has 3 'provisions':
- a) New retail proposals in the centre will not be supported;
 - b) Expansion of the Urban District Centres will not be supported;
 - c) Setting the role of the centre.⁹⁶
- 7.2.18 The new retail provision was proposed to be deleted by post hearing modification MAJ 16: "New retail proposals (including change of use to retail) will not be supported, unless they meet identified local needs and do not compete with the Town Centre". The way in which the provision is expressed is not consistent with the NPPF and should therefore carry little weight. In any event, it is not particularly relevant in this case as very little development is proposed in the centre.⁹⁷

⁹² F.1 Para.27 and agreed Newton xx "showstoppers", ID/73 Paras 22 & 23

⁹³ F3.1 pp40-54 Policies CE1a, CE2a, UR1, Newton cross-examination by Hicks, ID/73 Paras 24 & 25

⁹⁴ J.3 Paras 36 & 48, ID/73 Paras 26 & 27

⁹⁵ Newton Proof p.17 Para 5.51, Parfitt Proof paras 3.4.1 and 6.2.12, H 5.7 Para.29, ID/73 Paras 28 & 29

⁹⁶ ID/73 Para 30

⁹⁷ F.4.8 p5, ID/73 Pras34 & 35

- 7.2.19 The expansion provision was considered to be sound by the Local Plan Inspector, despite the Appellant's objection. The question of expansion is clearly an appropriate one for a development plan. NPPF paragraph 23 requires policies for the management and growth of centres and the 6th bullet point of that paragraph deals specifically with whether there is a need to expand a centre. If a development plan is to make decisions as to the management and growth of a centre and whether it should expand, it must be able to say when it considers that there should not be expansion. Not all edge of centre development would count as expansion. It is a matter of judgment where the line comes. In this case there can be no doubt that what is proposed is a large scale expansion of the centre. The Appellant's planning witness accepts "It is not disputed that once delivered, Tollgate village will operate as part of an expanded Centre". The proposal is contrary to this provision which is consistent with the NPPF and should carry substantial weight.⁹⁸
- 7.2.20 The remainder of policy CE2b contains provisions setting the role of centres. "Urban District Centres should provide an improved public realm, urban character and a more diverse mix of uses. ... intensification within the Centre will be supported where the quality of the public realm and the built character is improved. Development within Centres should deliver a more diverse range of uses, including community facilities, services, offices and housing. Development should be oriented towards pedestrians and present active frontages to the street. Development will be encouraged to make more efficient use of land including alternatives to surface car parking." Defining a hierarchy with different roles for different centres is a development plan job which accords with the NPPF and such provisions provide a legitimate additional level of control in addition to the sequential and impact tests. If the role and function of a centre could not provide a control on development then such provisions would have no point. It is to be noted that account was taken of the "role and function" in relation to local centres in the Appellant's retail study.⁹⁹
- 7.2.21 The provisions of policy CE2b are consistent with the NPPF and the Appellant did not object to them during the Focused Review process. They should carry substantial weight. The proposal does not accord with these provisions, particularly in relation to the range of uses and being car, rather than pedestrian, orientated. This conflict is consistent with the conflict with TA1 because the proposal is car dependant.¹⁰⁰
- 7.2.22 Before the 'new' interpretation of 9 January when the Appellant's witness thought that weight needed to be considered for all relevant policies, he concluded that the proposal was contrary to the development plan as a whole, including SD1. That is the correct conclusion. The proposal is in conflict with the following provisions of the development plan which carry full or significant weight because they are consistent with the NPPF: The provision in CE2b that expansion of the District Centre will not be supported; The provision in CE2b which sets the role of the District Centre; Policy TA1, Policy DP17 in relation to highway impact. In addition, if it

⁹⁸ Newton Proof p.43 Para 7.30, F 4.9 p.3, F 4.10 p7, IFD/73 Paras 36-39

⁹⁹ I.3 p.39 Paras 11.20 -21, NPPF para 23 bullet 2, A.7 p23 para 5.4, ID/73 Paras40 & 41

¹⁰⁰ ID/73 Paras 42 & 43

would have an adverse effect on regeneration in St Botolphs', the proposal would also conflict with Policies UR1 and CE2a.¹⁰¹

- 7.2.23 These conflicts also make it clear that the proposal is not sustainable development and therefore the application of SD1 is not appropriate. Even if the presumption in SD1 is applied then conflicts with the above policies carry substantial weight in the balancing exercise and are significant adverse impacts of the proposal.¹⁰²

7.3 The Sequential Test

- 7.3.1 Dundee decided that suitable means "suitable for the development proposed by the applicant." Aldergate Properties explained the position following the Dundee decision as: "The true focus of interpretative debate is still the wording of the policy in context, and here of the English policies. Policy interpretations arising from litigation may be context and argument specific, and not intended as substitutes for the text at issue for all cases and contexts. The good sense of the planning consequences of any given interpretation may be a guide to its correctness."¹⁰³
- 7.3.2 English Policy is in NPPF paragraph 24: "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..... Applicants and local planning authorities should demonstrate flexibility on issues such as format and scale."¹⁰⁴
- 7.3.3 'Suitable' means suitable and available for the broad type of development which is proposed in the application, and what is suitable and available and the appropriate timescale in a particular case is a matter of planning judgement as set out in Lionbrook. "The sequential test, which now appears in paragraph 24 of the NPPF, is not new. It has been an essential part of government policy for retail development for a long time. The sequence is familiar: town centres first, edge of centre sites second, and out of centre sites third. Out of centre sites can be considered only if "suitable sites" in the town centre or on the edge of a centre are "not available". Suitability and availability are matters of planning judgment. They are not matters on which the court will substitute its own view for that of the decision-maker. The decision-maker's exercise of judgment upon them will not be vulnerable to challenge except on Wednesbury grounds." And "The appropriate timescale for the sequential test was for the Council to judge. It was not dictated by any relevant statement of policy or guidance – in the development plan, in the NPPF, or in the practice guidance document."¹⁰⁵
- 7.3.4 The extent of flexibility required under paragraph 24 depends on the facts and circumstances of the case, and the discretion is wide as explained in Warners: "30. Under paragraph 24 of the NPPF both applicants and local planning authorities are expected to "demonstrate flexibility on issues such

¹⁰¹ Bell Apx.B p.19 Para 1.14, ID/73 Paras 44 & 45

¹⁰² ID/73 Paras 46 & 47

¹⁰³ J.1 Para.24, J.3 Para 48, ID/73 Paras 66 & 67

¹⁰⁴ ID/73 Para 68

¹⁰⁵ J.3 Para 35, J.8 Para 39, J.9 Paras 164 and 171, ID/73 Para 69

as format and scale". What bounds can reasonably be set on an applicant's preference and intentions as to "format and scale" in any individual case will always, and necessarily, depend on the facts and circumstances of that particular case. The policy in paragraph 24 of the NPPF should not be seen as prescriptive in this respect. It plainly is not." So long as the flexibility required doesn't go outside the bounds of what "suitable" can encompass as a matter of law it is a matter of planning judgement depending on the facts. That the lawful meaning of "suitable" does not preclude sub division is clear from the Dundee case itself where sub division was considered.¹⁰⁶

7.3.5 Guidance cannot alter the legal meaning of "suitable". The policy in paragraph 24 is not prescriptive much less the PPG. The PPG is in any event clearly not incompatible with sub division. It specifically refers to consideration of sites in the plural accommodating a proposal: "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." Guidance now leaves as a question of planning judgement whether in a particular case it is appropriate to consider sub division. It is absolutely clear that the extent of flexibility is not constrained by policy or guidance, and there is nothing in the PPG that suggests that sub division is not to be considered.¹⁰⁷

7.3.6 There will be cases where, on the facts, consideration of sub division is not appropriate. For example:

- a) Scotch Corner: The proposal was very different. It was a Designer Outlet Centre whose business model requires an agglomeration of units of a certain scale, and which is tightly controlled by conditions to be different from ordinary Town Centre development.
- b) Rushden Lakes: In this case there was a strong development plan justification for a critical mass of units.¹⁰⁸

7.3.7 In this case the additional town centre uses are effectively split between 2 edge of district centre sites DZ1 and DZ3 which are several hundred metres apart. There is no restriction on the phasing, and no indication of what it might be. The Appellants agree that they are trying to establish the principle of a large amount of town centre development in this location. Options for potential disposition of the various elements shows the proposal could be sub divided into smaller blocks separated by several hundred metres with no defined timescale or phasing.¹⁰⁹

7.3.8 In respect of the cinema, the Appellants are not proposing a multiplex and would accept conditions to ensure that no more than 1,300 seats would be built. However, the expert evidence is that such a cinema will not be built in the foreseeable future. It cannot be right that the sequential test is

¹⁰⁶ J.1 paras. 16 & 28 – 30, J.8 Para 30, ID/73 Paras 70 & 71

¹⁰⁷ J.1 paras. 16 & 28 – 30, J.8 Para 30, ID 25 p.5 of 9, ID/73 Paras 72 & 73s

¹⁰⁸ I. 1 Paras 8.53 -4, I.7 paras 5.1 & 5.64 & Conditions 2 and 5, I.10 para 33

¹⁰⁹ Newton XX Hicks, ID/73 Para 77

passed because a sequentially preferable site cannot be found for a cinema which on the evidence has no prospect of being built.¹¹⁰

7.3.9 The core is the superior sequential location for retail development and includes:

- a) Vineyard Gate approximately 9,000m² net excluding restaurants;
- b) Priory Walk approximately 5,000m² net
- c) Co-op site approximately 2,500m² net assuming that all but the bottom 2 floors will be for residential.

Those sites are within a similar distance of each other, or closer, than the separate parts of the appeal proposal. They are connected by active Town Centre streets and cater for blocks of development of a similar size to those that might arise if the proposal went ahead. The overall quantum is as much as the proposal, which is effectively 14,000 m² net of comparison floorspace. There is no justification in this case for restricting the search to core sites that are a similar distance apart as in the proposal, so long as they would form an integral part of the Town Centre. On the above basis there is no need to consider any wider sub division or separation than is present in the proposal itself.¹¹¹

7.3.10 For retail uses "in centre" is defined by reference to the primary shopping area. For all other town centre uses "in centre" is defined by the town centre boundary. In Colchester, the Town Centre is significantly wider than the core, and covers the blue mixed use zones, including the whole St. Botolph's area. The blue area comes within the "Town Centre" as defined on the proposals map and its designation for mixed use is clear from Policy SA TC1 of the *Site Allocations Development Plan Document* which describes the blue area as: "Area of the Town Centre specifically designated as 'Town Centre Mixed Use' – Selected streets leading to the heart of the Town Centre and adjacent to the retail core are designated as 'Town Centre Mixed Use' on the Proposals Map where a range of residential, shopping, office and appropriate leisure uses are supported." The blue area is therefore sequentially superior to the appeal site's DZ1 and DZ3 for town centre uses other than retail.¹¹²

7.3.11 Uses A3–5 are not "retail uses" for the purposes of the NPPF. The proposal's A3–5 floorspace is to be limited to 2,100 m² gross (equivalent to approximately 1,680 m² net). Within the core, Vineyard Gate would have about 3000m² net for A3–5 (in addition to the retail space). In the immediate vicinity in the blue area there are 881m² net at the Curzon and 2045 m² lettable at St Botolph's, which is around 1,600m² net at 0.8. There are more than enough sequentially superior sites to accommodate the appeal proposal's A3–5 floorspace. All those sites are within the same sort of distance of each other and the retail sites, or closer, than the separate parts of the appeal proposal.¹¹³

¹¹⁰ ID/73 Paras 83 & 84

¹¹¹ ID/55, 56, and 62 and Newton XX Hicks

¹¹² NPPF Glossary, F 3.3 p.32 SA TC1 1 i

¹¹³ ID/73 Paras 90-94

- 7.3.12 The blue area is edge of centre for retail uses, and therefore sequentially at the same level as the appeal site. However, in development plan terms, the blue areas are clearly to be preferred. The development proposed on the appeal site is contrary to the development plan because it involves the expansion of the District Centre, is contrary to the role of the District Centre, and is car dominated. The blue areas are within the Town Centre, on the edge of the core, are allocated for mixed use development including shopping, and in the case of St. Botolph's area are within a Regeneration Area which is a development plan priority.¹¹⁴
- 7.3.13 The timescale for availability is a matter of planning judgment. In this case there is no evidence of any urgency in relation to the appeal proposal. There is no urgent development plan requirement (as in Rushden Lakes), and no urgent capacity or claw back need (as in Warner). There is no defined timescale for the proposal and no details or limits. Given the lack of demand for the cinema it is not likely to be completed for a considerable time. In appropriate cases that could be as long as 10 to 15 years (see Bath Press). The Co-op, Curzon and St. Botolph's will be available in the short term, Vineyard Gate is likely to be available for occupation in 5 to 8 years, and Priory Walk is likely to follow that. Each development would provide additional incentive for the next and together they would achieve a significant regeneration of the St. Botolph's Regeneration Area. Vineyard Gate, the Co-op, Curzon, and St. Botolph's are sufficient, even without Priory Walk, to provide in the circumstances of this case sufficient floorspace given the requirement to be flexible.¹¹⁵
- 7.3.14 It is accepted that Colchester needs to grow to retain its position in the regional hierarchy, and that it is always more difficult to develop in an historic town centre. These sites are the ones that need to be developed to secure that growth and regeneration. In the circumstances of this case those sites should be considered available within an appropriate timescale.¹¹⁶
- 7.3.15 The onus is on the Appellants to carry out a sequential assessment. As they have not done so then the sequential approach is failed and refusal follows. There is no sequential assessment in the circumstances of this case because:
- a) Sub division has not been considered. In this case it would be appropriate to consider sub division to a mixture of sites as long as they are all within the Town Centre Core.
 - b) Even if subdivision to sites anywhere within the Town Centre Core is not appropriate, the Appellants have not considered separate sites in broadly the same relationship to each other as those that form part of the proposal.
 - c) The Appellants have not considered the blue areas as in centre and sequentially superior for non-retail development.

¹¹⁴ ID/73 Para 95

¹¹⁵ I.1, I.8 Para 12.30, J.8, ID/73 Paras 96-100

¹¹⁶ ID/73 Para101

d) The cinema proposal is not a realistic one and should have been omitted from the sequential requirement.¹¹⁷

7.3.16 There is no onus on objectors to carry out the sequential assessment, but on the basis of the evidence:

- a) Broadly the same amount of retail development could be accommodated in sites within the core, in broadly the same relationship to each other as they might be in the proposal.
- b) There are more than enough sequentially preferable sites for A3–A5 uses on sites in the Town Centre in broadly the same relationship to each other, and to the retail, as they might be in the proposal.
- c) A long timescale is appropriate given the lack of urgency and open ended phasing of the appeal proposals.
- d) The sequential test should be considered failed and planning permission should be refused whatever the conclusions may be in relation to the other issues.¹¹⁸

7.4 The Impact Test

7.4.1 It is agreed that the proposal should be assessed on the basis of a fashion led/high street tenant mix which is the most likely result if planning permission is granted and is the “reasonable worst case”. It is also agreed that it is important to have a reasonable level of consistency within an assessment if weight is to be attached to it.¹¹⁹

7.4.2 It is informative to look at what has been happening. The Appellants have referred to the improvements to Tollgate over the last few years which are stated to have led to it becoming increasingly attractive. The 2012 and 2016 Survey evidence shows that the survey based Town Centre turnover has gone down by over £100m whilst the Tollgate survey based turnover has gone up by over £100m. Within the home Zone 1 the Town Centre’s attraction has gone down by 14% and that of Tollgate has gone up by 11%.¹²⁰

7.4.3 It is accepted that surveys are not precise and may need adjusting, but the size and direction of change are clear. They demonstrate the increasing competition represented by Tollgate and the significant increase in trade draw from the Town Centre. This suggests caution about permitting an even greater scale of development and more fashion and high street type retailers at Tollgate. It also suggests that in a do-nothing scenario (no Tollgate Village and no new Town centre development) the market share of the Town Centre is likely to reduce further, particularly once the Bond St development at Chelmsford with John Lewis as the anchor takes effect. Neither of the two assessments have sought to assess this possibility which would increase the adverse effect of the proposal on the Town Centre.¹²¹

¹¹⁷ ID/73 Paras 102-103

¹¹⁸ ID/73 Para 104

¹¹⁹ Newton XX Hicks

¹²⁰ ID/40 P1, ID/73 Paras 105-109

¹²¹ ID/73 Paras 110-111

- 7.4.4 Considering commitments, the Appellant has adopted the Council's approach and the change in turnover is £38.3m.¹²²
- 7.4.5 That £38.3m is derived from the Council's assessment and is the increase in Town Centre turnover due to Primark. That is a positive internal benefit of £5.9m. The Appellant's arguments to the contrary are incorrect as the evidence is headed at the top "committed retail development (Primark) in Colchester Town Centre diverting market shares from Tollgate from 2018".¹²³
- 7.4.6 For Tollgate the Council assumes no internal impact or benefit, but the Appellant incorrectly assumes a significant internal impact. This is incorrect because it is inconsistent to take such a different approach from that taken in the Town Centre, and because logic and the evidence point towards the proposal having a positive beneficial effect on the existing Tollgate retailers. The *Planning Statement* makes it clear that the proposals are anticipated to have a positive effect on existing retailers at Tollgate. The fact that British Land, which owns a significant amount of the existing floorspace, supports the proposal also suggests that it would have a positive, rather than a negative, effect on their turnover.¹²⁴
- 7.4.7 It is also reasonable to conclude that, as the centre becomes more fashion orientated, more fashion retailers would want to be represented near the critical mass of fashion and town centre goods retailers, and anchors such as M&S or a large Next. That would provide more incentive for applications to remove the bulky goods conditions on the existing units and to replace bulky goods tenants when the opportunity arose. Because the existing units are in the District Centre and given that a permission would have been given for a significant amount of new unrestricted floorspace, it is likely to be difficult to resist such changes. This will increase the turnover of the existing units further as the changes are made. In these circumstances, it is not reasonable to assume significant adverse internal impact. Indeed if the reasonable worst case is to be assessed then an increase (not a decrease) in turnover of the existing Tollgate floorspace should be assumed. At least it should be assumed, as the Council has done, that the turnover of the existing floorspace would not be adversely affected.¹²⁵
- 7.4.8 The Parties have taken different approaches to turnover and it is claimed that the Appellant's assessment is not internally consistent. The turnover that is assessed for the new scheme is only £6000 per m². This difference highlights the significant internal inconsistency. If other views as to the likely turnover of the proposal are considered the Council's judgment is £7,347 m², the Rule 6 Parties' is £6,500 – 7,500 m², and NLP used £7000 m² for a fashion led scheme. The Appellant's figure is well out of line and simply not credible¹²⁶

¹²² ID/73 Paras 112-114

¹²³ F 6.3 p.44 para. 5.44, ID/73 Paras 115-116

¹²⁴ A.6 p.2 4th bullet from top & Paras 6.35, 6.40, and 7.10, B.6

¹²⁵ ID/73 Paras 119-120

¹²⁶ D.4 Para 2.52, ID/21 rows 15, 16 and 20, ID/73 Paras 122-124, Parker IC

7.4.9 The first conclusion is that the Council's figure of £7,347m², giving a turnover for the proposal of £105m, is to be preferred. The second is that the Council's approach of adjusting the survey based turnover for large centres is a more appropriate one and gives a credible assessment which the Appellant's does not:

	Council	Appellant
Turnover existing Tollgate 2016:	£5,494m ²	£7,311m ²
Turnover existing Tollgate 2021:	£5,900m ²	£8,141m ²
Turnover of proposals:	£7,347m ²	£6,000m ² ¹²⁷

7.4.10 A key issue is trade draw or the percentage of the proposal's turnover that comes from the Town Centre. This is a matter of judgement bearing in mind that retail uses compete with their most comparable competitive facilities. The expectation therefore is that by far the biggest percentage will come from Colchester Town Centre which is the primary and closest competitor in the fashion and town centre goods sector.¹²⁸

7.4.11 The Appellant's starting point can be seen from Newton's original Proof. For a scheme that was not fashion led with a turnover of £5,000 per m² the judgment was that the proposal would take £40.6m, or 57%, from the Town Centre, and £9.1m, or 12%, in internal impact from the existing Tollgate floorspace. If, as the internal impact assumptions are not realistic, that money were reassigned it must come primarily from the Town Centre resulting in a trade draw from the Town Centre of somewhere at least in the mid 60's%.¹²⁹

7.4.12 One would also expect the percentage trade draw from the Town Centre to increase if the proposal being tested is a fashion based one, because such a development is more closely competitive with the Town Centre. NLP's judgment for example was that trade draw from the Town Centre would be 65% for a non-fashion development and 75% for a fashion based development. The conclusion is that if the Appellant's original judgment of 57% is adjusted for no internal impact and a fashion based proposal then the result would be at least in the mid 60%'s and that the Rule 6 Parties' judgement of 66% is to be preferred.¹³⁰

7.4.13 The judgment in the Appellant's Rebuttal is even less credible. The assumptions for the equivalent non-fashion development turning over at £5,000 per m². is that the trade draw from the Town Centre drops from 57% to 43% and the internal impact on existing Tollgate floorspace rises from 12% to 19%. Furthermore, the percentage trade draw remains the same at 43% from the Town Centre even for a fashion based assumption trading at £6,000 per m², which one would expect to take a higher

¹²⁷ ID/21 rows 15, 16 and 20, ID/73 Paras 125-126

¹²⁸ ID/25 p.7 of 9, ID/73 Para 127

¹²⁹ ID 40 / p.2, ID/73 Paras 128-129

¹³⁰ D.4 i. Non-fashion Table 11 [694 - 641 = 53 / 82.06 x 100 = 65%]

ii. Fashion based Table 12 [695 - 617 = 78 / 104 x 100 = 75%], ID/73 Para 130-131

percentage from the Town Centre. A judgment that a fashion led version of the proposal would have a trade draw of only 43% from its main and immediately proximate competitor is simply not believable. Even if all the internal impact of 19% were transferred to the Town Centre giving a draw of 62% it would still be low.¹³¹

- 7.4.14 One would expect most of the impact of a fashion led development at Tollgate to come from the nearest centre dealing with the same type of offer which is the nearby Colchester Town Centre. The Council's and NLP's judgments are consistent with that expectation. Anything lower than a mid 60% figure does not look reasonable. The Appellant's original judgment could be made broadly compatible if the assumptions as to internal impact and a non-fashion led development were corrected. However its current judgment of only 43% is simply not believable and the Rule 6 Parties' judgment is to be preferred.¹³²
- 7.4.15 If the Appellant's assessment is adjusted to use an internally consistent turnover of £121m and a reasonable trade draw of 66% with no internal impact on the existing Tollgate floorspace then the impact becomes 14%. The turnover of the Town Centre in 2021 prior to impact is assessed as £570m. With a turnover of £121m and a trade draw of 66% the proposal would draw about £80m from the Town Centre. That is an impact of about 14%, compared to the Rule 6 Parties' assessment of 12.9%.¹³³
- 7.4.16 The Appellant assesses the comparison turnover of the existing Tollgate at 2021 to be £248.2m. If the proposal turns over at £121m with no internal impact then the comparison turnover of Tollgate after the proposal is built would be £369m. The comparison turnover of the Town Centre after impact would be £490m. So Tollgate District Centre would have a comparison turnover of 75% of the Town Centre (up from 51% in 2016). The Rule 6 Parties equivalent figure is 60% (up from 42% in 2016).¹³⁴
- 7.4.17 In considering impact one relevant matter to consider is whether the trade draw of the proposal would leave enough growth in the Town Centre to provide for existing floorspace to grow at the normal expected rate and provide capacity for new floorspace. Increased floorspace 'efficiency' is the ability to sell more from given floorspace. Experian predictions of the growth in efficiency for existing floorspace are routinely used. The relevant rate for 2016 to 2021 averages out at about 2.5% giving a cumulative increase of just over 13%.¹³⁵
- 7.4.18 The Table on the last page of ID/40 entitled "Position of Existing Floorspace" does what it says. It uses the Appellant's starting point of unadjusted survey turnovers, but uses an internally consistent turnover of £121m and a reasonable trade draw of 66% with no internal impact on the existing Tollgate floorspace. It demonstrates that after the impact of the proposal there would not be enough growth for normal efficiency growth for existing floorspace – let alone new floorspace. The deficit would be

¹³¹ ID/40 p2, ID/73 Paras 132-133

¹³² ID/73 Para 134

¹³³ ID/73 Para 135

¹³⁴ ID/73 Para136

¹³⁵ ID/73 Paras 137-139

£46m. If allowance is made for the positive £5.9m net effect of Primark then the deficit drops to about £40m. The Rule 6 Parties' Table 102 shows a broadly similar result. It adds 2.5% per annum to the sales of existing floorspace in row 5, and arrives at a deficit of 45m.¹³⁶

- 7.4.19 Whether the proposal would have a significant adverse impact on the vitality and viability of, or planned investment in, Colchester Town Centre is a question of planning judgment in the circumstances of this case. Words used in other cases with different facts and issues may not be applicable in this case.¹³⁷
- 7.4.20 The Town Centre is healthy but vulnerable. There is a trend towards the concentration of higher order comparison retailing in the most powerful centres. It is agreed that Colchester Town Centre needs to grow to maintain its position in the regional hierarchy. Competition is strong and growing, particularly from Chelmsford where the Bond Street development anchored by John Lewis has recently opened. Top Zone A rents in Colchester are now below those in Chelmsford. If the proposal adversely impacts the growth necessary for Colchester to maintain its position then that would be significant. Survey material demonstrates that the changes that have already taken place over the last few years at Tollgate have increased its competition with, and trade draw from, the Town Centre. It suggests that one should be cautious about permitting an even greater scale of development and more fashion and high street type retailers at Tollgate.¹³⁸
- 7.4.21 The Appellant's assessment lacks credibility or is internally inconsistent and the Rule 6 Parties' assessment should carry weight in this case. The proposal would represent a very significant increase in the relative competitive power of Tollgate and the Town Centre. On the Rule 6 Parties' assessment the turnover of Tollgate would increase from 42% to 60% of that of the Town Centre. Tollgate would for the first time compete directly with the Town Centre for its core comparison business with a significant range and choice of uncontrolled fashion and higher order comparison shops. Those shops would be generally larger and more modern, with better layouts than most of their competitors in the Town Centre and they would be served by plentiful free adjacent surface level parking. That is a very different position from Scotch Corner which was a proposal for a very different form of retail development that would not compete directly with the Town Centre.¹³⁹
- 7.4.22 In addition, the proposals would increase the likelihood of existing floorspace within the centre getting rid of its bulky goods restrictions and leading to an increase in fashion and higher order comparison tenants in the existing floorspace, further increasing the competitive effect. That is what retailers and potential investors will consider to be likely. Moreover, the grant of permission makes it likely that the extent of the defined District Centre would be expanded by the Local Plan. That is what the

¹³⁶ ID/73 Paras 140-141

¹³⁷ ID/73 Para 142

¹³⁸ Parker IC

¹³⁹ I.7 Paras 5.1, 5.4; Conditions 2 and 5.

appellants would consider to be a strong likelihood. If that happens then there is significant potential for further intensification despite any conditions imposed on the grant of a permission. The grant of permission would very significantly increase the direct competition of the District Centre with the Town Centre and the justifiable perception would be that the level and extent of competition would continue to grow.¹⁴⁰

- 7.4.23 The figures indicate a significant trade draw from the Town Centre such that there would not be enough growth to allow existing floorspace its normal efficiency growth (with a deficit of around £40m) and certainly not spare growth for new floorspace. Less spending means less footfall and footfall has an effect on rents, rental growth, expectations of rental growth, and tenant demand. That has an adverse effect on yields and reduces the incentive to invest in existing and new floorspace. Confidence would reduce amongst retailers and potential investors. Lesser tenant demand means that rental terms are less attractive to landlords, that the quality of tenants coming forward to fill vacancies or new space will fall, and that vacancies are likely to take longer to fill. Tenant demand would be further reduced because there will be very attractive opportunities for tenants at Tollgate. This is so whether the potential tenant is an existing occupier in the Town Centre or not.¹⁴¹
- 7.4.24 Even where dual representation is imposed, the impact on the Town Centre would be significant. If an anchor such as M&S opened a bigger and better store at Tollgate there would, in the short term, be the prospect of the offer in the Town Centre reducing or becoming all food. In the longer term there would be the real prospect of the Town Centre store closing. Both would mean less choice in the Town Centre. In any event, customers would no longer need to go to the Town Centre to shop at M&S. They would have the choice of a larger, better store, and easy car parking at Tollgate. That means less expenditure and footfall in the Town Centre and linked trips transferred from the Town Centre to Tollgate. M&S would have less incentive to invest in the Town Centre. The prospect of a major anchor moving the main emphasis of its offer out of the Town Centre and potentially closing in the Town Centre in the longer term would be likely to have a significantly adverse effect on retailer and investor confidence.¹⁴²
- 7.4.25 Dual representation by Next and other retailers would have similar effects. Next have 847 m² in the Town Centre and 1,793 m² at Tollgate at the moment. If they were to take a 5,575 m² Next Lifestyle at Tollgate, and close their existing Tollgate unit as seems likely, only 13% of their overall offer would be in the Town Centre. Their incentive to improve their offer in the Town Centre will be very significantly reduced. The proposed condition requiring 5 years' dual representation does not deal with the underlying problem. As just described it will not prevent significant adverse effects. This is not a case where one vital anchor needs to be kept in place to cover a short term period of adjustment, nor simply giving reassurance where there would be no direct competition anyway (as in Scotch Corner). It is trying to control a large number of retailers against their market

¹⁴⁰ Newton XX Hicks, ID/73 Paras 148-150

¹⁴¹ ID/73 Paras 151-154

¹⁴² ID/73 Para 155

inclinations. Investors and retailers won't be persuaded that it will make the Town Centre a good long term prospect. It would have a limited and short term mitigating effect. It would not prevent significant harm or deal with the long term problem and the market's perception of that problem.¹⁴³

- 7.4.26 A striking feature is the width of the competition that is implied by the proposal. Once attracted to Tollgate customers would have a wide choice of fashion and higher order retailers in large modern accommodation with good parking, reducing the need and inclination to visit the Town Centre on another trip. It cannot be said that this development is complementary rather than directly competitive. The smaller Town Centre shops (of which there are many) would suffer too because they rely on the larger multiples to create the footfall which brings them their trade. The scale and location of the proposal in such close proximity to the Town Centre and the direct nature of the competition for the core comparison trade of the Town Centre that would result means that there would be a significant adverse effect on the vitality and viability of the Town Centre.¹⁴⁴
- 7.4.27 The demand for more A3–5 floorspace would be inadequate to fill the Curzon, Vineyard Gate, Queen Street Site and the Tollgate proposals¹⁴⁵. The proposals would make it more difficult to let units in Curzon and St. Botolph's. That would be likely to have an adverse impact on committed and planned development, particularly as it is a regeneration area. It would also make it more difficult or less profitable to let units in Vineyard Gate, which would contribute to the adverse impact on that planned investment.¹⁴⁶
- 7.4.28 NPPF paragraph 26 requires assessment of the impact of existing, committed and planned investment. Vineyard Gate may not be existing or committed development but it is certainly planned development. It is a Key Project within the Regeneration Area and Town Centre Core and in relation to the need for Colchester to grow to retain its position in the regional retail hierarchy.¹⁴⁷
- 7.4.29 What the NPPF says about the application of the impact test is guidance not policy. The investment has a high policy status in the development plan, it has made good progress since the Council ended its agreement with Caddick in August last year¹⁴⁸, and the investment will be undermined through the effects of the proposal on the factors listed in the third bullet:
- a) Forecast turnovers in the Town Centre would be reduced to a level which would not provide enough growth for existing floorspace let alone new. That would have an adverse effect on operator demand, yields and investor confidence.
 - b) Operator demand would be significantly adversely affected both in terms of the numbers and quality of tenants seeking space and the

¹⁴³ ID/51, ID/53 Paras 156-57

¹⁴⁴ ID/45, ID/73 Paras 158-160

¹⁴⁵ Parker in chief. That is so even with the condition limiting A3 – 5 to 2,100 gross.

¹⁴⁶ ID/73 Para 161

¹⁴⁷ Newton XX White, ID/73 Para162

¹⁴⁸ The reference to contracts is given only as an example and is really relevant to committed rather than planned investment.

terms that can be agreed. This would be relevant both to the difficulty in securing good quality tenants on satisfactory terms for the new floorspace and to the securing of tenants needed to fill vacancies left by tenants who might move. That would affect viability and investor confidence.

- c) Investor confidence would also be significantly adversely affected by the knowledge that there would be a significant shift in the emphasis of major retailers from the Town Centre to Tollgate, and the view that Tollgate would continue to increase its draw from the Town Centre in the future.

- 7.4.30 The Rule 6 Parties' evidence is clear that in the absence of Tollgate Village, Vineyard Gate is likely to be ready for occupation in 5 to 8 years' time. If Tollgate Village is permitted then it will not. That would have a significant adverse effect on important planned investment and the long term vitality and viability of the Town Centre.
- 7.4.31 The Appellants suggest that Vineyard Gate would go ahead, despite Tollgate Village, on the basis, not of commercial evidence, but of two short emails from Next and River Island. Both retailers clearly want a unit at Tollgate and want it to happen, and they are not going to say things that reduce the chances of it going ahead. What they say in those brief emails falls well short of anything that might form the basis for confidence that they would in fact pay a good rent for new premises in the Town Centre and at Tollgate. The Next email specifically refers to rent and River Island's email says nothing at all about taking new premises in the Town Centre. These e-mails were not something that could be relied upon by investors, and it was reported that negotiations with both had gone on hold.
- 7.4.32 How advanced an investment has to be is a matter of planning judgment depending on the circumstances of the case. In this case Vineyard Gate is an important planned investment within the core of an historic Town Centre. Development in an historic centre is more difficult to deliver and takes longer which is a relevant consideration.
- 7.4.33 There is absolutely no basis in this case for the contention that Vineyard Gate would have to be at "a very advanced stage" to be considered as planned development. The importation of a quote from another case where the development and circumstances were totally different is not a proper exercise of planning judgment and is just the sort of exercise that Aldergate Properties warned against.
- 7.4.34 Nor is there any merit in the argument that Vineyard Gate cannot be considered to be planned investment because a CPO may be needed. Such an approach is completely unjustified and would rule out a very high proportion of key Town Centre investments throughout the country.
- 7.4.35 Vineyard Gate is important in both retailing and regeneration terms, and indeed the future of retailing and its growth in the Town Centre is inextricably linked with the regeneration of the St. Botolph's area. Vineyard Gate is a key part of the puzzle which would link with the Curzon, the Building Partnerships' St Botolph's development, the reuse of the Co-op, and Priory Walk, linking the core through to the new and dramatic First

Site Art Gallery. There can be little doubt that if that evidence is correct then the proposal is likely to have a significant adverse effect on important planned investment and the vitality and viability of Colchester Town Centre and should be refused pursuant to NPPF paragraph 27, and UR1 and CE2a of the development plan.¹⁴⁹

7.5 Impact on the Highway Network

- 7.5.1 The key issue is the traffic generation rate of the proposed comparison retail floorspace. Where there are no details of the development, or tenants, it is appropriate to assess the reasonable worst case in traffic generation terms. The reasonable, and most likely, worst case is a fashion based retail park with tenants such as M&S, Next, and River Island, and no bulky goods conditions. In this location where the existing park is already trading well the new units are likely to trade even better. Appropriate trip rate material should be sought.¹⁵⁰
- 7.5.2 The best evidence available is a June 2014 survey of the Tollgate Centre. It provides the best replication of the location, captures the success of that location, is a park not individual units, and includes some fashion and high street retailers. Indeed, the proposal would be expected to have an even higher trip generation because there would be no bulky goods conditions, much more fashion, the largest format of many fashion and high street shops, and significant anchors such as M&S. The survey was used as a cross check in the Transport Assessment (TA) because it was thought to be a good indication of the proposal's likely trip generation. It was known before submission of the TA that the highway authorities considered the trip rate to be high, but after the cross check the Appellant's witness maintained his initial position in the TA. The submitted TA used a two way trip rate of 10.21 supported by the cross check from the 2014 survey of Tollgate Centre which showed 9.38.¹⁵¹
- 7.5.3 The post-submission assessment eventually used a two way trip rate of only 6.216 for which no supporting material was produced. The survey of the Tollgate Centre produced a 50% higher trip rate. No evidence has been produced at this Inquiry which comes near to justifying using a figure of just over 6. When the best evidence is used the result is a severe impact on the highway network in the vicinity of the site. Junctions 4, 5, 7, 8 and 9 all have RFC's over 1, and the queues generated would block back through junctions 4 and 7 which would cause severe disruption. There would be more than 120 vehicles queuing to get out of the Tollgate Centre car park. In practice that would cause further severe problems for vehicles seeking to get into, as well as out of, that car park leading to further problems on the highway. Those results do not include the extra growth which it is considered should be included, and they do not include any additional generation to allow for the increased attraction of the unrestricted fashion led proposals.¹⁵²

¹⁴⁹ ID/73 Para 170

¹⁵⁰ Newton Rebuttal Apx.3, A.8 p.17 Paras 5.26 and 5.30, ID/73 Paras 50-52

¹⁵¹ Bell Proof p.7 Para 3.24, F.8.1 p15 Table 5.2, ID/73 Paras 53-56

¹⁵² Bell Proof pp.19 – 22, ID/26, ID/73 Paras 57-60

- 7.5.4 It was suggested that the rate surveyed at Tollgate should be reduced because of cross visitation. That might be justified if the rate used was an amalgamation of surveys of individual units but it is a rate derived for a sizeable park containing a number of units and cross visitation will already have been taken into account. In any event, the surveyed rate is robust because it does not take into account the likely increased rate of attraction of the new proposal or the extra growth factor.¹⁵³
- 7.5.5 It was also suggested that peak spreading might alleviate some of the problems but the potential for peak spreading on a Sunday is limited. There are only 6 trading hours and most of those are almost as busy as the peak hour. Customers are much less likely to want to change the timing of their trip on a Sunday as many would want to coordinate with a cinema time or a family lunch. Saturdays are also busy throughout the main part of the day, and Friday evening is a completely different time slot, and has its own problems. Peak spreading is likely to have a very limited effect.¹⁵⁴
- 7.5.6 It was suggested that drivers would take alternative routes. However, all customers need to enter and exit the site between junctions 6 and 7 limiting the scope for variation. It would not take much for problems to occur at junctions 3 and 5, and account needs to be taken of the effect of the Tollgate Centre car park being blocked and entry restricted. Additional TRICS material, including some relating to a retail park in Chelmsford which shows a higher figure than was used, was introduced but does not alter the fact that the best evidence, which captures the characteristics and success of the appeal location, is the Tollgate Centre survey. If a robust assessment is to be done to take into account a reasonable worst case then the trip rate used must be at least as high as that revealed by that survey.¹⁵⁵
- 7.5.7 The proposals would have a severe adverse impact on the highway network in the vicinity and should be refused. Even if all other objections are overruled this ground should prevail. It may be that further highway improvements could be implemented to deal with the severe impact but there is no evidence about that before this Inquiry.¹⁵⁶

7.6 Prematurity

- 7.6.1 The Rule 6 Parties support, but do not repeat, the Council's submissions on prematurity. The appellants are seeking to establish the principle of a significant amount of new town centre development which in practice involves a significant expansion of the role and physical extent of the District Centre. That clearly is a matter for a Local Plan unless there are very strong arguments for not doing. In this case there are no such reasons.

¹⁵³ ID/73 Para 61

¹⁵⁴ ID/73 Para 62

¹⁵⁵ ID/73 Paras 63-64

¹⁵⁶ ID/73 Para 65

7.7 Conclusion

- 7.7.1 The proposal would have a significant adverse impact on important planned investment and the vitality and viability of Colchester Town Centre and should be refused whatever the conclusions in relation to other issues. There is no suggestion that there are benefits which might outweigh such an impact.
- 7.7.2 The proposal fails the sequential test and should be refused whatever the conclusions in relation to other issues. There is no suggestion that there are benefits which might outweigh a failure of the sequential test.
- 7.7.3 The proposal would have a severe residual impact on the highway network in the vicinity and should be refused whatever the conclusions in relation to other issues. A severe highways impact is within the second bullet point of NPPF paragraph 14 and Policy SD1. A specific policy in the NPPF, paragraph 32, indicates that development should be refused. Even if this was the only objection to be upheld it should result in refusal. The proposal should not be allowed to proceed until its highway implications are acceptable. It may be that further highway improvements would result in an acceptable residual impact. However, there is no information before this Inquiry in relation to further improvements, or the ownership of any land required for further improvements, and any such approach would have to be associated with a fresh application.
- 7.7.4 The proposal conflicts with provisions of the development plan which should carry substantial weight, is contrary to the development plan as a whole, and other material considerations do not indicate that permission should be granted.
- 7.7.5 The proposal is not sustainable development and the presumption in NPPF paragraph 14 and SD1 of the development plan should not be applied. Even if they were applied the adverse impacts of the proposals conflict with the development plan and would not be outweighed by any benefits.
- 7.7.6 This is a proposal that should be considered through the development plan process and there is no good reason why it should not be.
- 7.7.7 There is certainly no case for granting permission for a cinema. The evidence is clear that there is no tenant for such a cinema and the conclusion must be that it would not be developed in the foreseeable future. It cannot therefore be claimed that there are any benefits that outweigh the presumption of Section 38(6) or the adverse impact due to the conflicts with the development plan. The proper course is therefore refusal in any event. It would not be appropriate to cut down the proposal, if the cinema goes then matters such as, for example, the extent of the site need to be reconsidered.
- 7.7.8 More generally we suggest that the Secretary of State should be very wary of the long term dangers of granting permission for a large amount of speculative car related town centre development in the wrong place, however politically attractive that may seem in the short term.

8.0 The Case For Tollgate Partnership Limited

8.1 Introduction

8.1.1 The appeal scheme arises from the *Framework Vision for Tollgate* 2013 and discussions leading to the signing of two Planning Performance Agreements dated 27 August 2013 and 11 March 2014. That approach provides the opportunity to “consolidate the existing District Centre to create a focused integrated heart to the [Stanway] growth area”. The appeal scheme would bring together the existing parts of the defined district centre, a “town centre” in NPPF terms, and improve permeability.¹⁵⁷

8.1.2 The appeal site comprises three zones. Zone 1 is the site of the former Sainsbury’s store which used to, but no longer, falls within the defined District Centre. It is now edge-of-centre but is surrounded to north, south, east, and west by the defined District Centre. It is hard to imagine a better located ‘edge-of-centre’ site than Zone 1. Zone 2 is within the defined District Centre, whilst Zone 3 is to the south of Tollgate West and is edge-of-centre in NPPF terms¹⁵⁸

8.2 The Development Plan

8.2.1 The Council’s and Rule 6 Parties’ objections are characterised by a misunderstanding of the relevant policies in the development plan, including those that are inconsistent with the NPPF and so out of date, as well as by ‘false tests’ in respect of the main issues. Consequently, the Appellant parts company with the other parties very early on as to the basis on which to determine this appeal. This raises a matter of law as it concerns the interpretation of the relevant development plan policies for the purposes of applying section 38(6) of the 2004 Act.¹⁵⁹

8.2.2 The presumption in favour of sustainable development is set out in Policy SD1 of the development plan in the ‘Focused Review’. It is common ground that this replicates the terms of the presumption found in NPPF paragraph 14. What counts is where the presumption is set out. The legally correct approach is that Policy SD1, and the presumption set out within it, must be applied as part of deciding under the first limb of section 38(6) what “determination” would be in accordance with the development plan. The process of weighing the development plan on the one hand against the presumption on the other was labelled “the normal approach” by the Rule 6 Parties. That is fine if the presumption is set out only in NPPF paragraph 14. But it has nothing to do with the task which arises as a matter of law of objectively construing the wording of the development plan when the words of the presumption are part of that plan.¹⁶⁰

8.2.3 The fact that the Appellant’s planning witness articulated the legally correct approach for the first time in his oral evidence in chief, and that other QCs

¹⁵⁶ ID74 Paras 1-2, Newton IC, F.8, pp 13 & 14, G.1, G.2.

¹⁵⁸ ID/14 Paras 5-9, ID/19, ID/74 Para 3, F.3.4 p68, F.8, page 13

¹⁵⁹ ID/74 Paras 5-6

¹⁶⁰ ID/74 Paras 7-9, XX Pearce and Anderson.

in the Stane Park, Colchester case didn't take the point now made, is irrelevant. The meaning of the development plan is a matter of law.¹⁶¹

- 8.2.4 In the context of this case the focus should fall on the development plan and five stages are identified. The first stage is Section 38(6) and the approach required by Policy SD1. Policy SD1, as amended by the Focused Review, brings the NPPF paragraph 14 presumption in favour of sustainable development into the development plan. A consequence of this is that the presumption applies when considering the first limb of section 38(6). There is therefore a presumption in favour of applying the presumption in favour of sustainable development. This 'double presumption' is the starting point of the section 38(6) analysis in this case.¹⁶²
- 8.2.5 Another point is that the adopted 'Focused Review' is the latest development plan document and if there is conflict between it and any other development plan document section 38(5) requires the conflict to be resolved in favour of the most up to date document.¹⁶³
- 8.2.6 There are four steps under Policy SD1. Firstly, determine whether relevant policies in the development plan are out of date. It is agreed that this requires judging whether the relevant policy is materially out of date. Secondly, if so the presumption in favour of sustainable development applies and permission should be granted, unless the presumption is to be dis-applied for any of the reasons in the presumption part of Policy SD1.¹⁶⁴
- 8.2.7 The first potential basis to dis-apply the presumption is if there are specific policies in the NPPF that indicate development should be restricted whilst the second is if the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole. This is not a typical case where conflict with a development plan under limb one of Section 38(6) falls to be weighed against the presumption in favour of sustainable development in NPPF paragraph 14 but only under limb two of Section 38(6) as an "other material consideration".¹⁶⁵
- 8.2.8 Case-law authorities and ministerial/inspectorate decisions which have weighed conflict with a development plan against the presumption in favour of sustainable development on a Section 38(6) limb one versus limb two approach do not apply as they consider a fundamentally different situation as a matter of law. What is clear from the Court of Appeal's decision in Hopkins Homes, is that in a typical case the presumption falls to be set against the statutory presumption in favour of the development plan. In this situation it is necessary to determine the weight to be given to the policies in the development plan that are out of date.¹⁶⁶

¹⁶¹ ID/874 Paras 10-11

¹⁶² ID/74 Paras 12-16

¹⁶³ ID/74 Para17

¹⁶⁴ ID/74 Para 18(1) & (2)

¹⁶⁵ ID/74 Paras 18-19

¹⁶⁶ ID/74 Paras 20-21, J.11 [20216] PTSR 1315

- 8.2.9 That is not the situation here. A judgment must be reached on compliance with the development plan as a whole under the first limb of s. 38(6) bearing in mind the requirement to resolve any conflict between SD1 (in its amended form) and older development plan policies in favour of policy SD1. It is well settled law that when policies in a development plan pull in different directions, “a judgment [must be made] bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach”: in R v Rochdale MBC ex parte Milne, unreported 31st July 2000, at paragraph 48.¹⁶⁷
- 8.2.10 Policy SD1 is important. The fundamental significance of the amended policy is that it tells the decision-maker what to do in cases where relevant policies in the plan are found to be out of date. That is, the development plan itself provides for the relative importance of the policies in issue, with the presumption in favour of sustainable development as set out in policy SD1 taking priority over out of date policies. If a proposal does not accord with policies in the development plan but these policies are out of date, then the development plan itself tells the decision-maker that rather than refusing planning permission by reference to the out of date policies, permission should be granted by reference to the up to date presumption in policy SD1.¹⁶⁸
- 8.2.11 This requires weighing compliance with policy SD1 (and its direction to grant permission) against conflict with other policies in the development plan. This does not mean that out of date policies are ignored. One looks to see whether they are complied with or not and whether they are up to date or out of date. This is doing what one is mandated to do by the development plan.¹⁶⁹
- 8.2.12 The Inspector in the recent Stane Park decision failed to follow the correct legal approach. That is not surprising given that the Stane Park decision letter does not refer to the inclusion within policy SD1 of the presumption in favour of sustainable development. It is not clear whether the Inspector was even aware of the amendment to the policy made by the Focused Review but even if he was aware of it, he was not addressed on the significance of the amendment. In any event, there is only one legally correct approach.¹⁷⁰
- 8.2.13 Since the meaning and effect of policy SD1 is a matter of law, it is irrelevant that the Council did not appreciate the legal consequences of the changes made to it. The task is to interpret policy SD1 objectively, having regard to its language and context: Tesco v Dundee.¹⁷¹
- 8.2.14 Paragraph 1.9 of the Focused Review indicates that none of the unchanged policies in the Core Strategy were endorsed as being in conformity with the NPPF. The intention in the Focused Review was to provide a mechanism by which “the golden thread” of the presumption in favour of sustainable development could be incorporated into the development plan pending a

¹⁶⁷ ID/74 PAras 22-23

¹⁶⁸ ID/74 Para 24, Newton IC and Rex after XX by Rule 6 Parties

¹⁶⁹ ID/74 Para 25

¹⁷⁰ H.5.7, ID/74 Para26

¹⁷¹ J.1 Para 18, ID/74 Para 27.

full review. This is its legal effect. The development plan itself provides a self-balancing approach where its un-amended policies are concluded to be out of date. By operation and application of law, Sections 38(5) and (6), the up to date policy, the presumption in the amended version of SD1, outweighs the out of date policies.¹⁷²

- 8.2.15 The second stage is whether any relevant policies in the development plan are out of date. The policies relating to the impact on the town centre and retail hierarchy, are Core Strategy policies CE1, CE2, and CE3, Development Policy DP5, and Site Allocation policy STA3. Both the Examining Inspector for the Focused Review, and the Inspector in the Stane Park appeal, determined that policies CE1, CE2 and CE3 were inconsistent with the NPPF. The Council accepted that these policies are inconsistent with the NPPF to a material degree. For the Rule 6 parties it was accepted that there was inconsistency between policies CE1, CE2 and the NPPF.¹⁷³
- 8.2.16 It would be perverse to approach policy SD1 on the basis that it was necessary for all material parts of a policy to be inconsistent with the NPPF for the policy SD1 presumption in favour of sustainable development to apply. The Examining Inspector for the Focused Review reached the same conclusion. The fact that it is a material part of the policy that is out of date demonstrates that this is sufficient to engage policy SD1. Splitting a policy into discrete parts gets nowhere. It is the fundamentals that count, not the peripherals. One judges whether a policy is materially out of date on the basis of which aspects of it are relevant to deciding the case in hand.¹⁷⁴
- 8.2.17 The position in respect of individual policies is generally agreed. The retail policies are inconsistent with the NPPF and are out of date for failing to provide for a sequential test and an impact test. Policy CE1 provides for a retail hierarchy but interposes urban gateways and Town Centre Fringe above District Centres, which in NPPF terms are town centres in their own right and so should stand above them.¹⁷⁵
- 8.2.18 Policy CE2(b) is the relevant part of the CE2 suite of policies relating to sites in/on the edge of a district centre. It restricts urban district centres from providing new in-centre retail uses, unless those uses meet identified local needs and do not compete with Colchester town centre, and from expanding. The NPPF provides no test of need, nor does it restrict retail development in district centres as to do so would be inconsistent with the NPPF's "town centres first" approach. The NPPF provides no anti-competition test, and the requirement to not compete with Colchester town centre does not reflect the NPPF's impact test, which has a threshold of significant adverse impact, rather than simply competition. In any event, it is nonsense for Tollgate district centre to be prevented from competing with Colchester town centre since both are town centres in NPPF terms.

¹⁷² ID/74 Para 28

¹⁷³ F.4.10, H.5.7, ID/74 Para 29.

¹⁷⁴ ID/74 Paras 31-32

¹⁷⁵ ID/74 Paras 33-34, H.5.7 Paras 12-13, F.4.10 Paras 13-29

These inconsistencies are sufficient to render Policy CE2 out of date and within the terms of the presumption in Policy SD1.¹⁷⁶

- 8.2.19 Policy STA3 states that no new town centre uses will be permitted in the Tollgate district centre, despite this being a town centre in NPPF terms. The policy is materially out of date by virtue of its inconsistency with the NPPF and so the presumption in policy SD1 is engaged. The Stane Park Inspector determined that this policy should be given full weight, but he was dealing with an out of centre site (not part in and part edge as the appeal scheme is) and so did not have to grapple with the NPPF tests relating to development. However, the policy is very obviously inconsistent with the NPPF. The Council agreed that policy STA3 is materially out of date and disagreed with the Stane Park Inspector's decision to accord this policy full weight.¹⁷⁷
- 8.2.20 Policies CE3 and DP5 were found to be inconsistent with the NPPF by both the Stane Park Inspector and the Examining Inspector for the Focused Review. It was further concluded in Stane Park that there is approximately 65 hectares of vacant employment land including SEZ and Local Employment Sites, which based on take up of 1 ha per year over the last 10 years' economic cycle, amounted to a 65-year supply. The Appellant concludes that developing the appeal site for employment uses would be unviable and unrealistic. The Council's withdrawal of the former reason for refusal one, relating to loss of employment land, reflects its acceptance of the conclusion of the Stane Park Inspector. Having regard to NPPF paragraph 22, which militates against the long-term unrealistic protection of sites allocated for employment uses, the advice to Members was that "the Council has been over-cautious in allocating far more employment land than will reasonably be needed... there is no prospect of all this coming forward." These policies are plainly out of date and engage the presumption in policy SD1.¹⁷⁸
- 8.2.21 Core Strategy policy UR1 and site allocations policy SA TC1 were not relied upon in the Council's reason for refusal nor in the Council's or the Rule 6 parties' written evidence and are not relevant to this appeal. In any event, these policies are inconsistent with the NPPF and out of date by reason of their failure to provide for a sequential or impact test in assessing the appropriateness of the proposed development. Consideration must next be given to whether any of the other matters set out in the presumption in policy SD1 indicate that this appeal should not be allowed. Policy SD1 is clear, however, in saying that the decision-maker should "*grant permission*" if relevant policies are out of date and there are no material considerations that indicate otherwise.¹⁷⁹
- 8.2.22 Stage 3 is whether there are any policies in the NPPF that restrict this development. The relevant restrictive policies here are the sequential test and the impact test in NPPF paragraphs 24, 26 and 27. Whilst the Appellant does not accept that the last bullet of NPPF paragraph 32 is a

¹⁷⁶ ID/74 Para 35(2)-(5), F.4 p5, F.4.10 Para22, F.3.4

¹⁷⁷ ID/74 Para36

¹⁷⁸ G.5.1 Para 15.29, H.5.7 Paras 12-13, F.4.10 Paras 13-29

¹⁷⁹ F.3.1 p53, F.33 p32, ID/74 Paras 38-39

restrictive policy, it is addressed here as well. If the sequential and retail impact tests are passed the next stage is to consider the “tilted balance” provided for under the first limb of the presumption in favour of sustainable development set out in policy SD1. That tilted balance will then be undertaken in light of the finding that there are no sequentially preferable sites and that the proposed development would not cause significant adverse impacts on Colchester town centre.¹⁸⁰

8.3 The Sequential Test

- 8.3.1 The application of the sequential test is a matter of planning judgment, but its meaning is not. The meaning of the test needs to be understood as a matter of law and only then does planning judgment come into play in applying the correctly understood test.¹⁸¹
- 8.3.2 The Appellant submits that “The sequential test seeks to see if the application can be accommodated on a sequentially preferable site. The test, which includes the requirement to demonstrate flexibility on issues such as format and scale, does not require the applicant to disaggregate the scheme; ‘suitable’ and ‘available’ means suitable and available for the broad type of development that is proposed in respect of the approximate (rather than the precise) size, type and range of goods that are proposed. In summary, whilst a sequentially preferable site need not be capable of accommodating exactly the same as what is proposed it must still be capable of accommodating development which is recognisably closely similar to what is proposed.” The witnesses for the Council and the Rule 6 Parties agreed that applying the test as set out above, the proposed development would pass the sequential test. This means that if the legal submissions are accepted, it is common ground that the sequential test is passed.¹⁸²
- 8.3.3 The basis for applying this meaning is by reference to relevant legal authorities, SoS decisions, the NPPF and the current Guidance. Tesco v Dundee established that policy must be interpreted objectively in accordance with the language used, read in its proper context. If there is a wrong starting point, the exercise of planning judgment would also be wrong. The meaning of the sequential test must be the same whenever and wherever it is applied. Its meaning is not a matter for a local authority to decide within the limits of rationality on a case by case basis and on the application of planning judgment in each case.¹⁸³
- 8.3.4 The principles first bite in respect of what is ‘suitable’ for the purposes of the NPPF sequential test. In the context of Scottish policy, Tesco v Dundee held that ‘suitable’ means “suitable for the development proposed”. In respect of suitability, and provided that the Appellant 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 so that it can be made to fit the

¹⁸⁰ ID/74 Paras 40-41

¹⁸¹ ID/74 Para 46

¹⁸² ID/74 Para 42-43

¹⁸³ ID/74 Paras 44-45, J.1 Paras 18, 21 and 23

alternative site. The wording in Tesco v Dundee has been held to be broadly the same as that within the NPPF¹⁸⁴.

- 8.3.5 The point that suitability is assessed by reference to the development proposed has been upheld most recently in Aldergate Properties, where it was held that: 'suitable' and 'available' generally mean 'suitable' and 'available' for the broad type of development which is proposed in the application by approximate size, type, and range of goods. This incorporates the requirement for flexibility in NPPF paragraph 24, and excludes, generally, the identity and personal or corporate attitudes of an individual retailer. The area and sites covered by the sequential test search should not vary from applicant to applicant according to their identity, but from application to application based on their content."¹⁸⁵
- 8.3.6 The point in Aldergate Properties is that what the sequential test seeks to determine is whether the application can be accommodated on a town centre site. There is no suggestion here that the sequential test means to refer to anything other than the application proposals. This is an important starting point. Pointing to 'commercial justification', to questions of scale and hierarchy, or the need to disaggregate or sub-divide a scheme, flounder when set against the proposition that what falls to be assessed is the application, subject to the need to demonstrate flexibility. The sequential test leaves no place for these matters.¹⁸⁶
- 8.3.7 Commercial justification is another way of saying 'need'. However, there is no requirement to demonstrate need and/or commercial justification under the NPPF's retail policies as affirmed in Warners Retail. If commercial justification means a developer's individual justification for a scheme then that too falls to be ignored. Aldergate Properties rejected an argument that commercial justification warranted excluding sites from a sequential assessment. Suitability does not fall "simply to be judged from the retailer's or developer's perspective", including a retailer's trading style or site preferences. Those matters fell to be ignored in Aldergate Properties when considering the application proposal, because otherwise the possible sites to be reviewed was artificially narrowed. As a matter of principle, a developer's individual commercial justification for a scheme is excluded from the sequential test as the law stands.¹⁸⁷
- 8.3.8 In the Rushden Lakes decision the Inspector concluded that "there is nothing in the sequential test as set out in NPPF paragraph 24 that states that the concept of "suitable" sites means suitable in terms of the scale of the nearest centre to the site in question and/or its place in the "hierarchy" of centres." The Secretary of State expressly agreed with this at paragraph 15.¹⁸⁸
- 8.3.9 The Exeter decision expressly concluded that this is the correct approach when the relevant retail policies in a development plan are out of date, as they were in Rushden Lakes. When a development plan is not out of date,

¹⁸⁴ J.8, Warners Retail (Moreton) Ltd v Cotswold District Council [2016] EWCA Civ 606, at Para 45, ID/74 Paras 47-48

¹⁸⁵ J.3 [2016] EWHC 1670 (Admin) Para 35, ID/74 Para 48

¹⁸⁶ ID/74 Paras 50-51, I.1 Para 8.46 Rushden Lakes

¹⁸⁷ ID/74 Paras 52(1) and (2), J.3 Paras 35-38, J.8 Para 29

¹⁸⁸ I.1 Para 8.48, ID/74 Paras 53(1)

then any development plan policies relating to scale and hierarchy should be considered, applying normal section 38(6) principles. It was agreed that the circumstances in this appeal are akin to Rushden Lakes.¹⁸⁹

- 8.3.10 There is no basis for some restraint on development if the effect of a scheme passing the sequential and impact tests is that there would be an impact upon the retail hierarchy. It is irrelevant to the application of the tests in national policy. This is not to say that matters relating to hierarchy should be ignored. However, the place to assess them is when considering whether the scheme accords with the development plan read as a whole, at which point the retail policies fall also to be judged in the context of the presumption in policy SD1. The Rule 6 Parties sought to rely on scale and hierarchy due to the passage in the PPG which states that “The application of the test should be proportionate and appropriate for the given proposal.” There are three obstacles to this approach. Firstly, the sentence relates to how the sequential test should be conducted not how one determines whether a site is suitable. Secondly, ‘proportionate’ does not imply anything about scale and hierarchy. Thirdly, the PPG provides a list of considerations that should be taken into account, which says nothing about scale and hierarchy. The above matters point to the conclusion that the words in NPPF paragraph 24 cannot be read so as to import any tests relating to scale or hierarchy, as the SoS has previously concluded.¹⁹⁰
- 8.3.11 Under disaggregation or sub-division what would be required is the splitting up of the proposal into smaller parts spread to a variety of sites in, and on the edge of, Colchester Town Centre. The sequential test looks to see if there are suitable sites which can accommodate the broad type of development that is proposed in respect of the approximate, rather than precise, size, type and range of goods that are proposed. It is common-sense that a development split into several disparate parts does not amount to approximately the same size or type of development. The task to assess sequentially preferable sites (plural) means in order to see whether any one (singular) of them can accommodate what is proposed.¹⁹¹
- 8.3.12 The sequential test within the NPPF falls to be interpreted on its own terms, and not by reference to previous policy and guidance which made express reference to disaggregation. Those references were not carried forward. Neither the NPPF nor the PPG make any reference to disaggregation or sub-division. This was a deliberate choice when formulating current policy. Warners Retail confirms that it is not appropriate to interpret the sequential test by reference to withdrawn guidance.¹⁹²
- 8.3.13 The suggestion that the PPG is ‘not inconsistent’ with sub-division is misplaced. It relies on what contribution more central ‘sites’ (plural) can make “individually to accommodate the proposal.” This is a question of whether any one of the sequentially preferable sites be able to accommodate what is proposed, having applied flexibility, not whether a

¹⁸⁹ I.3, Para 11.20 agreed by the SoS Para 14, ID/74 Para 53(2)

¹⁹⁰ ID/25 Para 10, ID/74 Paras 53(3)-(5).

¹⁹¹ ID/47, ID/55, ID/62, ID/74 Paras 54(1) & (2).

¹⁹² J.8, ID/74 Para 54(3)

number of them can cumulatively add up to the same or similar in total. Being 'not inconsistent' is a long way from positively requiring disaggregation.¹⁹³

- 8.3.14 Finally, the SoS's decisions in Rushden Lakes and Scotch Corner both conclude that disaggregation is not required to demonstrate flexibility. This interpretation is to be preferred to the decisions of individual inspectors who have, wrongly as a matter of law, determined that disaggregation must still be considered (the Inspector who decided the Great Yarmouth case did so without any legal submissions concerning the meaning of the sequential test).¹⁹⁴
- 8.3.15 In terms of availability, NPPF paragraph 24 asks whether town centre or edge of centre sites 'are ... available'. The present tense is used because what is being asked is whether there are any sequentially preferable sites available at the date of the assessment. This was the approach of the SoS in Rushden Lakes and accords with the language and context of the sequential test. It reflects the break from previous guidance which directed decision-makers to consider whether sites might become available over a reasonable period of time. This guidance is referred to in the 2013 Bath Press decision, and was relied upon to determine that availability should be assessed over a period of 10 to 15 years. That guidance has now been withdrawn, and cannot form any part of the context for seeking to construe the words in the NPPF. Warners Retail is not authority for the proposition that need can still be relevant. In that case need was simply a material consideration outside of the sequential test.¹⁹⁵
- 8.3.16 If the above submissions are accepted, they lead to the meaning of the sequential test as set out in both opening and closing. Whilst a sequentially preferable site need not be capable of accommodating exactly the same as what is proposed, it must be capable of accommodating development which is closely similar to what is proposed. On this approach, the Council and the Rule 6 parties agreed that there were no sequentially preferable sites. NLP, who advised the Council on the present application prior to its refusal, also concluded that the sequential test was passed by this scheme.¹⁹⁶
- 8.3.17 Only when the Council's present consultants were appointed was reliance placed on the sequential test. That reliance is surprising given that the Inspector in the Stane Park decision concluded that the sequential test was satisfied in relation to the much smaller scheme in issue in that appeal. That decision was made as recently as July last year and there have been no material changes to make any difference to the conclusion reached.¹⁹⁷
- 8.3.18 Only in a highly artificial scenario could it even begin to be argued that the sequential test was not met. That scenario would involve the proposed development scattered over several sites in and on the edge of the town

¹⁹³ ID/25 Para 10 second bullet, ID/74 Para 54(4)

¹⁹⁴ ID/1.5, ID/1.7 Para 8.47 and the SoS's decision at Para 16, ID/74 Para 54(5)

¹⁹⁵ I.8 Para 12.27 (ref APP/F0114/A/13/2191952), ID/1.7 Para 8.55 SoS Para 17, ID/74 Paras 55-57, J.8 Paras 5, 21 and 32,

¹⁹⁶ ID/74 Paras 58-59

¹⁹⁷ G.5.1, H.5.7, Newton's proof paras 2.6-2.10, ID/74 Para 59

centre. It would still be necessary for each of the sites in question to be available and viable for the parts of the proposed development that would be placed upon them. There is no evidence at all that any of the sites are available and viable for these purposes.¹⁹⁸

- 8.3.19 Turning to the sites relied upon by others, the Council's evidence made no mention at all of the new retail scheme for Vineyard Gate that was mentioned for the first time in the evidence of the Rule 6 parties, even though the redevelopment of the site has been an aspiration of the Council since at least 2002. The Council's development partner, Caddick Developments, withdrew from its agreement with the Council in 2016 and has now disposed of its interest in land at Vineyard Gate back to the Council.¹⁹⁹
- 8.3.20 Only through the Rule 6 Parties' evidence was information provided, including the indication that Vineyard Gate would provide 10,800m² of floorspace. A planning performance agreement was signed during the inquiry, and crucially given that the site is largely in Council ownership, there is no development agreement.²⁰⁰
- 8.3.21 Attempts to suggest that Vineyard Gate is suitable for the proposed development lacked any credibility. The Council's evidence was that flexibility requires the appeal scheme's proposed D2/cinema use be deleted and that only half of the gross floorspace proposed for DZ1 needed to be accommodated on Vineyard Gate. The Rule 6 Parties' evidence was that if the D2/ cinema use and the proposed convenience element at the proposed development and at Vineyard Gate were deleted, and if 1/3 of the remaining proposed floorspace at the appeal site was deducted, then that would amount to 10,817 m² of net floorspace required for Vineyard Gate. It was considered that the chopped down scheme from this approach would be approximately similar to the proposed development. Neither of the propositions put forward are anywhere near being approximately or closely similar to what is proposed for the appeal site.²⁰¹
- 8.3.22 In any event for Vineyard Gate to proceed there are some 27 different ownerships still to be acquired. It was agreed by the Rule 6 Parties that it was likely there would need to be a CPO to acquire all the land and cleanse the title for the site which would be a time-consuming process. Added to this is the fact that there is no viability evidence concerning retail-led redevelopment at Vineyard Gate. This must be a concern given that Caddick has recently pulled out. Finally, there are the likely difficulties associated with delivering development so close to the Roman Wall.²⁰²
- 8.3.23 The Council agreed that any date for delivery of a scheme on Vineyard Gate was speculative. That must be right, given the very early stage of the interest in the site by one of the Rule 6 parties, the continued inability to get any scheme off the ground at all since 2002, the various land ownerships, and the very real constraints provided by the Roman Wall if

¹⁹⁸ ID/74 Para 60

¹⁹⁹ ID/74 Para 62(1)

²⁰⁰ ID/74 Para 62(2)

²⁰¹ ID/74 Para 62(3) & (4), ID/23

²⁰² ID/74 Paras 62(5) & (6)

nothing else in planning terms. The Rule 6 Parties' estimate was 5 – 8 years, but this depends on overcoming all the above obstacles.²⁰³

8.3.24 Vineyard Gate is not capable of accommodating development which is recognisably closely similar to what is proposed. It is not therefore a suitable site, and even if it was (either due to some radical change to the proposed development or as part of a disputed disaggregated approach), it cannot be considered to be available nor shown to be viable.²⁰⁴

8.3.25 Despite being advanced as a sequentially preferable site, St Botolph's is an edge of centre site and so in policy terms is not sequentially preferable and does not need to be considered as part of the sequential test. It is in any event smaller than the proposed development and is being promoted for different uses (A3 and A1 at ground floor level and student accommodation and a hotel on the upper floors). St Botolph's must be seen in the context that Stane Park concluded that there were no sequentially preferable sites for the (Stane Park) restaurants as recently as July 2016.²⁰⁵

8.3.26 Priors Walk has been assessed as being able to provide up to 5,000m² net of (new) floorspace. This is significantly less than Vineyard Gate. For the reasons set out above in respect of the size of the Vineyard Gate site, it cannot be concluded that Priors Walk is capable of accommodating development which is recognisably closely similar to what is proposed. Both the Council and the Rule 6 Parties agreed that this site is not currently available, but also that there is in any event no evidence of anyone trying to actively assemble this site (which has several units, including the town centre Sainsbury's), and no evidence that it would be viable to seek to do so. This site is not suitable or available, nor has it been shown to be viable.²⁰⁶

8.3.27 The Appellant has assessed all the above sites which have been found to be neither suitable nor available, applying the approach to the sequential test set out above. In assessing these sites, a rigid minus 10% threshold has not been applied. Instead the sites have been assessed for suitability, applying the required flexibility, and availability. Consistent with the conclusion in the recent Stane Park appeal, which found that the sequential test was met with the much smaller scheme in issue in that appeal, the Appellant submits that the proposed development has passed the sequential test.²⁰⁷

8.4 The Impact Test

8.4.1 Alleged significant adverse impact on the vitality and viability of Colchester Town Centre was not raised by the Council when it initially refused this application, since it was not a concern of the Council's previous retail advisers, NLP. It was included within the Council's reasons for refusal on 24 November 2016, at the same time as the inclusion of the alleged failure

²⁰³ ID/74 Para 62(7)

²⁰⁴ ID/74 Para 62(8)

²⁰⁵ F.6.3 p62, Para 8.20. ID/47 and ID/55 (revision 1), ID/74 Paras 63(1)-(3)

²⁰⁶ Newton's rebuttal Para 3.43, A.7, ID/74 Paras 64(1)

²⁰⁷ ID/74 Paras 65 & 66

to meet the sequential test. The Rule 6 Parties rely on impact on vitality and viability.²⁰⁸

- 8.4.2 Considering some preliminary matters, the first is the composition of the appeal scheme when built. Since this is an outline scheme, the composition of the final development is not fixed. For that reason, all the parties have applied the impact test using the maximum amount of retail and other floorspace that is sought and assuming that the proposed development will be “fashion-led”. The assessments made by all the parties therefore have this level of robustness built-in.²⁰⁹
- 8.4.3 The second preliminary matter is that NPPF paragraphs 26 and 27 do not prescribe how significant adverse impact on “town centre vitality and viability, including local consumer choice and trade in the town centre and wider area” is to be judged. However, all the retail witnesses agree that the precise numbers are not by themselves important or determinative of the issue and a more rounded assessment must be undertaken. One approach, as taken in Scotch Corner, necessarily includes a judgment about the current health of the town centre. The percentage diversion figures on the Retail Witnesses Table do not represent any agreed position about how significant adverse impact is to be judged.²¹⁰
- 8.4.4 Thirdly, the two SoS decisions in Rushden Lakes and Scotch Corner bear out this submission. The approach taken in Rushden Lakes was to assess significance of impact by comparing town centre turnover in the base year of the assessment against predicted turnover with the proposed development in place as at the ‘design’ year of the assessment, whereas in Scotch Corner it was emphasised that it is necessary to look at the “evidence taken as a whole” The Inspector’s report explained that this required making a “largely subjective assessment of the underlying strength of the town centres that might be affected.”²¹¹
- 8.4.5 Fourthly, the assessment of impact must be made against the town centre as a whole. It is a flawed comparison to seek to understand the impact of the proposed development on Colchester Town Centre by comparing the amount of floorspace in the Tollgate District Centre, with the proposed development, as against the ground floor floorspace of the Town Centre. The crudeness of this comparison is highlighted by the fact that it ignores that the floorspace in the Town Centre is made up of 595 units, compared to far fewer units at Tollgate, and so a significantly less diverse retail offer, and one that performs a materially different function.²¹²
- 8.4.6 Finally by way of preliminary matters, it is necessary to apply some common sense. The Town Centre has remained healthy despite Tollgate District Centre increasing its competitiveness in recent times. The Town Centre has remained healthy without Vineyard Gate. It has also remained healthy during the lifetime of this application, and during this time has

²⁰⁸ G.5.1, ID/21, ID/74 Para 67

²⁰⁹ ID/74 Para 69

²¹⁰ ID/21 line 23, ID/74 Paras 70-71

²¹¹ I.1 Para 8.86 and decision letter Para 24, I.7, I.8 Para 11.34 and decision letter Para 19, ID/74 Paras 71-72

²¹² F.6.3, ID/74 Para 73

attracted investment in excess of £100m. All these facts undermine the unsubstantiated assertions of significant adverse impact.²¹³

- 8.4.7 Turning to impact using the Rushden Lakes approach, all the parties agreed that the proposed development would not amount to a significant adverse effect. On the Council's figures the turnover of the Town Centre at present is £395.8m and post development would be £451.4m, an increase of £55.6m. Both as an increase in itself of tens of millions of pounds, and as a percentage of existing turnover, this comparison demonstrates that the Town Centre would continue to grow and maintain its vitality and viability, even with the proposed development. On the Appellant's figures, the increase is between £99.1m and £105.2m starting from a higher present turnover of £434.7m.²¹⁴
- 8.4.8 It is wrong to discount the increase in turnover as being a function of floorspace efficiency. Even if it is, that would still point to an improvement in the health of the town centre as it would be trading more efficiently. Anyway, the opening of Primark this year, after the base year of the assessment and the household survey, will boost the health of the Town Centre. However the Town Centre turnover growth is characterised, significantly more money will be coming into the Town Centre even with the proposed development in place.²¹⁵
- 8.4.9 Turning to the Scotch Corner approach, there was again much common ground in respect of the Town Centre presently being a relatively healthy town centre. Notably, this was also the view of the Colchester Retail Business Association who spoke at the inquiry. Its view was that the Town Centre was "a thriving town with a superb shopping amenity".²¹⁶
- 8.4.10 The *Retail and Town Centre Study 2016 (Retail Study)*, which was prepared to inform the Council's emerging development plan, bears this out. It identifies several features of the Town Centre that demonstrate a healthy centre. These include a good diversity of uses, a declining vacancy rate, good retailer representation, good independent retailer offer, strong commercial rents and stable yields, good pedestrian flows, and a pleasant shopping environment.²¹⁷
- 8.4.11 The Rule 6 Parties described the Town Centre as a vital and vibrant town centre with quite good retail rankings, as well as being the cultural centre for the sub-region. Despite their view that the Town Centre is under pressure due to its location between Ipswich and Chelmsford (the latter recently securing a John Lewis), it was also accepted that it has done well in recently securing Primark to take over the former BHS unit. It is notable that in the Rule 6 Parties' view it is not the proposed retail but rather the potential for a cinema within the proposed development that represents the highest concern to the Town Centre.²¹⁸

²¹³ ID/74 Para 74

²¹⁴ ID/21, line 24 minus line 13, ID/74 Para75(1)-(2)

²¹⁵ ID/74 Para 76

²¹⁶ Day 3 evening session of the inquiry, ID/74 Para 77.

²¹⁷ F.6.3 paras 3.9, 3.13, 3.19, 3.23, 3.30-3.32, 3.38 and 3.47.

²¹⁸ Parker Proof Para 3.28, ID/74 Paras 79-80.

- 8.4.12 The Council takes no issue with the cinema element of the proposed development. It has supported the provision of a large Cineworld at Northern Gateway, which is an out of centre site. That support is based on external advice which includes an assessment of cinema capacity that concludes that a large cinema at Northern Gateway would be acceptable. As the Rule 6 Parties accept it is not sufficient to say that there may be an impact by the loss of the Odeon cinema in the Town Centre, it must be shown that this amounts to a significant adverse impact to the Town Centre as a whole. This has not been demonstrated.²¹⁹
- 8.4.13 The present good health of the Town Centre can be evidenced by investment that has taken place during the lifetime of this application, including Fenwicks' £30m investment in their "game-changing" store on High Street; Primark's entry into Colchester with its new store now open; the reduction in the number of vacant units, and the sale of Lion Walk for £76.5 m representing a £20m profit on a three-year investment. The investment has all taken place whilst the Tollgate District Centre in its present form attracts shoppers on a sub-regional basis and includes a very large Sainsbury's store. It was agreed that the Tollgate District Centre has itself grown in the last five years, and improved its retail offer.²²⁰
- 8.4.14 The Council's reliance on retail rankings is misplaced. A retail ranking is not about the health of a town centre per se, but about how a centre sits compared to others. To take the example of Venuescore, this shows that the score for Colchester Town Centre increased substantially between 2010 and 2015, whereas the ranking stayed constant, 74 in 2010 versus 73 in 2015. The PPG makes no reference to assessing the health of a town centre by reference to retail rankings, likely for the reasons stated above.²²¹
- 8.4.15 These matters, including the anticipated £55.6m increase in Colchester Town Centre turnover on even the Council's more pessimistic assessment, with the proposed development in place, belie the judgment that the Town Centre is presently at some form of tipping point, and that the proposed development will lead to significant decline. On the contrary, they demonstrate that the Town Centre won't be standing still even with the proposed development in place, and that there would not be a significant adverse impact on vitality and viability.²²²
- 8.4.16 This conclusion is further supported by the following matters, which relate both to the tangibles of the proposed development and an analysis of the parties' different positions as to the figures. First, no evidence was produced by the Council or the Rule 6 parties that demonstrated that retailers would no longer look at the Town Centre trade if the proposed development is approved. Indeed, the only evidence on this theme supported the submission that there will not be a significant adverse impact on Colchester Town Centre.²²³

²¹⁹ H.6.3, H.6.1, ID/74 Para 81

²²⁰ Parker proof para 2.25, ID/74 Paras 82-83.

²²¹ ID/74 Para 84

²²² ID/74 Para 85

²²³ ID/74 Paras 85-86

- 8.4.17 There are three scenarios to consider: a retailer choosing to leave Colchester Town Centre and go to the proposed development, a retailer coming to Colchester for the first time and choosing only to go to the proposed development, and a retailer in the Town Centre deciding to close.²²⁴
- 8.4.18 Considering these scenarios, Next confirmed that in its commercial view the Town Centre and Tollgate serve different retail purposes, and that it would have a requirement for the Town Centre, even if the proposed development proceeded, and that there was no reason why the proposed development would hold the Town Centre back. The email provides the view of an actual major retailer which has experience in trading in numerous different locations across the country. River Island also confirmed that any new store it may secure in the proposed development would not affect its representation in the Town Centre. Both the Council and Rule 6 Parties agree that the proposed condition requiring retailers to keep open a store in the Town Centre was relevant to assessing the degree of any impact. This condition is modelled on one imposed in Scotch Corner (condition 6) and held to be lawful in R. (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC [2016] EWCA Civ 1260. The Court concluded, at paragraph 24, that the condition was able to be applied so as to require the retailer to retain “the substance of their presence as a retailer at the level and at the time specified”. Weight should be given to this condition as a mechanism to provide further support for the Town Centre. This would further demonstrate that the first scenario is unlikely.²²⁵
- 8.4.19 The Rule 6 Parties’ evidence was that the promoters of Vineyard Gate have three anchors in mind. The first two are Next and River Island. The third, unnamed, retailer is not on the target retailer list for the proposed development. The fact that this third retailer is only interested in the Town Centre, combined with Next’s email which sets out its view of the different retail offers that Tollgate and the Town Centre provide, and the lack of any evidence of a retailer diverting its interest to the proposed development also undermine any argument that scenario (b) is likely.²²⁶
- 8.4.20 There is no evidence before the inquiry of any retailer that would close because of the proposed development going ahead. The email from the Co-op, which operates three businesses in the Town Centre, wishes the appellant good luck with its appeal. It bears out the Next email. In any event even if a shop, or a number of shops closed that would not demonstrate significant adverse impact to the town centre as a whole. One would need to consider the prospects of the vacated shops being reoccupied by other retailers or town centre uses, as has happened recently with Primark taking the unit vacated by BHS.²²⁷
- 8.4.21 In respect of the figures, the Council has updated its evidence base, leading to the revision of the Appellant’s assessment. It is common ground

²²⁴ ID/74 Para 86

²²⁵ Newton Appendix 3, Newton Rebuttal Appendix 2, ID/41, ID/74 Paras 86(1)-(3)

²²⁶ ID/74 Para 86(4)

²²⁷ ID/64, ID/74 Para 86(5)

that the biggest difference between the impact assessments undertaken by the Council and the Appellant came from the change in the amount of trade drawn from the study area, particularly Colchester's "home zone", to Colchester Town Centre with the appeal proposals in place. The Council confirmed that it had provided no justification for its judgment that the overall level of diversion would be £66.6m in scenario 5. Nor had it provided any tables setting out the basis for its judgments. Table 100 is all there is. This includes asserted percentage figures as to the different levels of market share for / trade drawn to the Town Centre from the catchment zones with the proposed development in place.²²⁸

- 8.4.22 This column of numbers is the Council's sole justification for trade diversion. The approach seems to be to shoe-horn the capacity assessment undertaken in the *Retail Study* into a form that could be applied to an impact assessment. This means that instead of assessing trade diversion from the Town Centre in the first instance, the Council made unexplained market share adjustments from zones across the catchment area so as to derive a level of diversion.²²⁹
- 8.4.23 This is important because if the judgment was made that the market shares were reduced by half what was judged by the Council, this would in turn halve the diversion from the town centre to the amount of £33.3 m. That reduced level of diversion would on the Council's figures lead to an overall impact on the Town Centre of 6.5% instead of the Council's 12.9% (scenario 5). In contrast, the Appellant explained that its judgments were based in the first instance on an assessment of the likely diversion of trade from the Town Centre. That assessment was based on a review of the household shopper survey and an analysis of shopper patterns. The resultant level of diversion from the Town Centre is judged to be £36.5m, which would be a diversion of 6.4% (scenario 2).²³⁰
- 8.4.24 Moreover, unlike the Council, the Appellant also made the assumption that putting new retail development in the midst of the existing retail facilities in the Tollgate Centre would draw trade from those existing facilities. The Council's position, in contrast, was that even though there would be a large diversion from shopping in the Town Centre four kilometres down the road, there would be no diversion from across the road. That is inconsistent with the Council's own approach of assuming intra-centre diversion in the Town Centre.²³¹
- 8.4.25 The difference between the Appellant and the Council on this judgment feeds into their respective overall positions on trade diversion from the town centre. Unlike the Council, the Appellant has provided a robust justification for his judgment and has made the further assumption that the proposed development will draw trade from the retail facilities right next door, as well as the facilities in the Town Centre. The Appellant's retail impact assessment is to be preferred.²³²

²²⁸ Watts Appendix 10 Table 100 p61 Table 108 p65

²²⁹ ID/74 Para 89

²³⁰ ID/74 Paras 90-91

²³¹ Watts' Appendix CW10, ID/74 Para 92

²³² ID/74 Paras 93-94

- 8.4.26 The *Retail Study* derived turnovers based on a survey which met industry standards. However, the Council then adjusted (reduced) the derived turnovers by 10% for the Town Centre and by 25% for Tollgate District Centre based entirely on the judgment that the changes “represent reality more accurately”. There was no explanation about the basis for this judgment. The answer that a “reality check” is needed does not amount to an explanation for departing from the survey. The Council pointed to the survey results showing an unrealistically high turnover for Tollgate District Centre but the Appellant explained, the *Retail Study* also threw up unrealistically low turnover figures for other district centres. If adjustment is needed to turnover, then the logical step is to reallocate that turnover to other district centres, on the basis that there should be a like for like adjustment, and not a bare “reality check” without this finer grained level of analysis.²³³
- 8.4.27 The Council applied a 2.5% floorspace efficiency to the new retail units, with the result that the assessed scheme turnover increased by £12 million (scenario 5). This approach is entirely inconsistent with the *Retail Planner Briefing Note*. This explains that density growth was anticipated to be driven by trends towards more modern space and the demolition of older inefficient space. Most of the proposed development is entirely new floorspace, involving no demolition at all. The *Briefing Note* only reflects common sense. New floorspace should be modern and efficient when built. It is older floorspace that is able to gain efficiencies by being replaced by new. Reliance upon a floorspace efficiency in this circumstance is entirely wrong but ultimately does not matter much in terms of the figures.²³⁴
- 8.4.28 The Council (scenario 5) and the Appellant (scenario 2) have a difference between them of £15m in scheme turnover. Much of this could be explained by the line-up of potential retailers. The Appellant’s evidence is to be preferred, being based upon the actual list of prospective tenants that were before the inquiry and not inflated by retailers with unusually high floorspace trading densities. The Council agreed, that its table included retailers that are not on the Morgan Williams list of target retailers provided by the appellant. Those retailers included, for example, Ted Baker, which provides an effective sales density of £32,000 psqm. As Mr Watts agreed, that is more than double any other retailer on the Morgan Williams list, and substantially more than average density of £4,728 psqm calculated by the Appellant based on target tenants and published sales densities.²³⁵
- 8.4.29 The Appellant’s approach, supported by the PPG, assesses predicted turnover against company benchmarks. There is no inconsistency between the current turnover of floorspace at Tollgate compared to that which was assessed by the Appellant. The current floorspace is overtrading, which is another reason to support the judgment that the proposed development would divert trade from these existing retailers. In either event, since the proposed development would take only a proportion of its trade from the Town Centre, any increase to the Appellant’s scheme turnover figure would

²³³ F.6.3, ID/74 Paras 95(1)-(2)

²³⁴ ID/22, ID/74 Para 96.

²³⁵ Newton’s rebuttal Appendix 3, ID/51, ID/74 Paras 97(1)-(2).

translate into only small differences in overall scheme percentage impact to the Town Centre in the order of 1 – 1.5%.²³⁶

- 8.4.30 The Council assumes a 1% level of visitor expenditure (“inflow”) against the 5% assumed by the Appellant. The justification for the much lower figure is catchment size, the Appellant’s judgment of 5% is supported by both the Council’s previous advisers, NLP, who also assumed a 5% inflow, and the 2009 North Essex retail study which at that time assumed inflow of 6%. The Council’s judgment of a lower inflow also exposed the inconsistency in its approach, asserting on the one hand that the proposed development will have sub-regional attraction, yet on the other hand assuming such a low level of inflow.²³⁷
- 8.4.31 Support for the Appellant’s judgment is also provided by the publication of the Council’s tourism figures, reported in the Essex County Standard, which reported a £255.4 m spend in 2015, based on some 6.2 million trips. That level of tourism has been supported by the opening of five new hotels, and is expected to grow further with the opening of what is now Fenwicks.²³⁸
- 8.4.32 New units cannot answer whether the proposed development would cause a significant adverse impact on vitality and viability. One must take into account the wider cultural and other attractions of the Town Centre compared to Tollgate. Nor is it appropriate to assess impact against matters that may or may not occur in the future in either the local plan or by other existing stores seeking relaxation of bulky goods restrictions. Questions about what the local plan may say about the extent of the Tollgate District Centre, for example, and whether bulky goods restrictions might be lifted, aside from being entirely speculative, are not questions that relate to the impact of “the proposal”. It is only “the proposal” that NPPF paragraph 26 requires to be judged.²³⁹
- 8.4.33 These matters all bear out that the Appellants’ judgment on retail matters is to be preferred, being based on clear reasoning and also having the support of the Council’s previous retail advisers, NLP, who also concluded that there would be no significant adverse impact on the Town Centre even though they relied on an impact figure more akin to the Council’s than the Appellant’s.²⁴⁰
- 8.4.34 The Appellant’s quantitative impact assessment for the Town Centre concludes that the proposed development would not cause a significant adverse impact. That conclusion washes down to individual existing and committed investments, which include investments that have been made during the lifetime of this planning application. Those investment decisions (Fenwick’s refurbishment, purchase of Lion Walk, Primark, Curzon development) all represent significant investment in the Town Centre,

²³⁶ ID/74 Paras 97(3)-(4)

²³⁷ F.6.2, Newton’s rebuttal Para 2.17(iv), ID/74 Para 98(1).

²³⁸ ID/66, ID/74 Para 98(2)

²³⁹ ID/74 Para (99)

²⁴⁰ ID/74 Para100

which has or will proceed irrespective of the proposed development being given planning permission.²⁴¹

- 8.4.35 In respect of 'planned investment' the focus of the Council and the Rule 6 parties' cases related to Vineyard Gate which is not planned investment as it is not at a very advanced stage. It is an aspiration of the development plan and so is not planned investment for the purposes of NPPF paragraph 26. The PPG refers to investments being 'in progress', further supporting the approach of an investment needing to be at a 'very advanced stage'.²⁴²
- 8.4.36 The SoS's decision in Scotch Corner makes clear that to meet this aspect of NPPF paragraph 26, a project must be 'at a very advanced stage. The necessity to demonstrate this level of progress was informed by the PPG, which affirms that a key consideration in assessing whether investment is sufficiently advanced is whether contracts are established for an investment. No such contracts are in place for Vineyard Gate.'²⁴³
- 8.4.37 Vineyard Gate meets another of the key considerations in the PPG, as it has policy support in the development plan, this cannot be a factor in the particular facts of this case that supports a conclusion that the redevelopment of Vineyard Gate is at a very advanced stage. The fact of such long-standing policy support and no development is in fact a counter indicator that there is any prospect of Vineyard Gate coming forward in the foreseeable future. If it is unlikely to come forward in any event, whether the proposed development at Tollgate goes ahead or not is immaterial²⁴⁴
- 8.4.38 On no view could Vineyard Gate be described as being at a very advanced stage: it has no confirmed scheme, no confirmed developer, no overall land control, no planning application, and no clear notion of when delivery would be. The planning performance agreement, which was signed only during the course of the inquiry, does not alter this evidence. No information is in the public domain against which the likelihood of one of the Rule 6 parties proceeding with redeveloping Vineyard Gate can be tested. No contracts are in place with the Council about redevelopment, and the track record with the Vineyard Gate site inspires no confidence that the site can be viably redeveloped. Any development at Vineyard Gate, even if it could overcome the obstacles discussed in the above section on the sequential test, is many years away.²⁴⁵
- 8.4.39 It is agreed that the investment decision to redevelop Vineyard Gate would be based on securing two or three anchor tenants which would then assist with attracting a style and mix of other tenants. It is here that the Rule 6 Parties' assertions that interest in investment in Vineyard Gate would fall away if the proposed development proceeds is exposed. As set out above, of the three anchors being targeted, two (Next and River Island) have made clear that the proposed development would not impact on their decision to retain a presence in the Town Centre. The third potential

²⁴¹ Newton's proof Paras 7.55-7.62, ID/74 Para 101.

²⁴² ID/25 Para 16, ID/74 Para 102.

²⁴³ ID/25, paragraph 16. 1.7, para 11.16, SofS para 13. ID/74 Para 103

²⁴⁴ ID/74 Para104

²⁴⁵ Newton Proof and XiC, ID/74 Para 105.

anchor tenant is not on the Morgan Williams' target list anyway. It is impossible to conclude that there would be a significant adverse impact on planned investment when the available evidence is flatly contrary to the proposed development influencing the key stage of Vineyard Gate securing its anchor tenants.²⁴⁶

8.4.40 In so far as St Botolph's is concerned, the impact on planned investment there is irrelevant to the application of the impact test given that this is an edge of centre site. NPPF paragraph 26 applies only to sites 'in a centre'. Nor can there be any suggestion of impact on planned investment at Priory Walk given that the site is not currently being marketed for redevelopment and there is no planned investment there at all.²⁴⁷

8.4.41 For these reasons, it cannot be concluded that there would be significant adverse impacts upon existing, committed and planned public and private investment.²⁴⁸

8.5 Effect on the Highway Network

8.5.1 The Appellant does not accept that NPPF paragraph 32 provides a restrictive policy for the purposes of Policy SD1 or NPPF paragraph 14. Only the Rule 6 Parties argue that the proposed development would cause highway congestion that falls to be addressed here. The highways witnesses part company at the start of the highways assessment on the issue of trip rates. Only the weekend peak hour trip rate is in issue but it is agreed that the judgment about which trip rate to apply makes a substantial difference to the consequential assessments of highways congestion. The trip rate used by the Appellant is that supplied by Essex County Council (ECC) as one of the two relevant highways authorities, the other being Highways England.²⁴⁹

8.5.2 The chronology for the determination of an appropriate trip rate for assessing highways impacts was agreed as follows:

- i) An original trip rate of 10.21 two way trips per 100 m² was provided in the original TA. This was based upon two TRICS surveys, one of which was a toy store in December;
- ii) On receipt of the TA both Highways England, by its independent consultants AECOM, and ECC responded to say that in their view, the trip rate was too high for the development proposed. In AECOM's view, the trip rate was double what it should be;
- iii) In response, the Appellant undertook further interrogation of TRICS and derived a trip rate of 5.486. This was based on a larger sample of six TRICS surveys, including the original two surveys, and so still the toy store in December;
- iv) ECC reviewed this trip rate and proposed a modestly higher trip rate of 6.216. This trip rate was derived from an interrogation of

²⁴⁶ ID/74 Para 106

²⁴⁷ ID/74 Para 107

²⁴⁸ ID/74 Para 108

²⁴⁹ ID/74 Paras 109-110

TRICS undertaken by a highways engineer employed by ECC, though the detail of that interrogation is not available;²⁵⁰

- v) It was the trip rate provided by ECC that the Appellant applied in its highways assessments and upon which ECC and Highways England concluded that the proposed development was acceptable in highways terms.²⁵¹

- 8.5.3 The Rule 6 Parties' criticism of the trip rate used is also a criticism of ECC and Highways England, who both considered that the original trip rate provided in the TA was too high, and who both accepted the lower trip rate which was provided by ECC.
- 8.5.4 The Rule 6 Parties' criticism is that the appropriate trip rate to apply is the one derived from the survey of the Tollgate Centre over one weekend in June 2014. The Appellant accepts that this survey is the best evidence on which to base judgments about an appropriate trip rate, but this does not mean that it is the only evidence. The purpose of using multiple surveys to derive a trip rate reduces the prospect of a trip rate being skewed by an abnormally high or low level of traffic on any particular day. The TRICS survey for the Chelmer Village Retail Park provided a trip rate of 6.286, based on a similar tenant mix as found at the Tollgate Centre, and acts to corroborate the trip rate provided by ECC.²⁵²
- 8.5.5 In any event, the Appellant would expect there to be cross-visitation between the existing Tollgate Centre and the proposed development which would suppress the trip rate since it would be wrong to count visits to the two locations separately. There would be peak spreading, caused by shoppers re-timing their trips if they encountered queues in the weekend peak hour. Whilst the Rule 6 Parties accept that shopping is a discretionary activity, which bears out the principle of peak spreading being a relevant consideration, they were not prepared to accept that peak spreading would impact upon trip rates in this case as "if that were right there would be no shopping locations with congestion." This misses the point that peak spreading in the context of this development would push the trip rate down as shoppers adjusted their visits to other times on the weekend or to weekdays in respect of which no evidence of congestion was advanced.²⁵³
- 8.5.6 On the trip rates provided by ECC, and applied by the Appellant, the Rule 6 Parties maintained that there would be a residual cumulative impact at junctions 5 and 9 that would be severe. In respect of junction 5, three sets of improvements are planned to this junction, including improvements which would be made based on the proposed highways contribution of £25,000 to be made in this matter. Junction 9 is within the Tollgate Centre car park. The impact on this junction would be wholly within the car park and so would not severely affect the public highway because users of this carpark could elect to use the other exit at junction 8.²⁵⁴

²⁵⁰ ID/34. The reason it is not available is that Essex have not renewed its TRICS licence, i.e. while the email says that a TRICS analysis was undertaken, the output cannot be accessed.

²⁵¹ A.8.1 table 5.2 page 15, Bass proof App JB9 p6 & JB4 item 1 p1, E.1.1 Paras 8.6 & 8.7.

²⁵² ID/49, ID/38, ID/74 Para112.

²⁵³ Bass IC & XX, Bell XX, ID/74 Para 113

²⁵⁴ Bell XX, Bass IC & App JB2 Junctions map, ID/75 Sect 5, ID/74 Para 114.

- 8.5.7 The Rule 6 Parties' basis for saying that there would be severe impact Focused on whether a junction would have an RFC in excess of 1. There are difficulties with this approach, even applying it as some form of starting point. The first is that as the Rule 6 Parties' accepted, such an approach has no basis in government policy. It also fails to account for peak spreading and cross-visitation, and throws up anomalous results since once the RFC is greater than 1, the modelling just shows cars joining the back of a queue and fails to reflect real life driving decisions.²⁵⁵
- 8.5.8 These points are also applicable to the situation in which the Rule 6 Parties' trip rate was applied to assess likely highways impacts. That is it is reasonable and appropriate to assume in this scenario that there would still be both cross-visitation and peak spreading that would ameliorate the traffic impacts as modelled by the Rule 6 Parties'. It is only the weekend peak hour in respect of which they have expressed concern. Shoppers taking discretionary trips can go at different times or even on different days, including week days.²⁵⁶
- 8.5.9 Given that the Rule 6 Parties' concern was focused on the weekend peak hour, that their unsupported starting point for assessing severity is whether the RFC for any junction exceeded 1, that reasonable assumptions can be made about cross-visitation and peak spreading, and that the fact that a test of severe impact imposes a particularly high hurdle, which is unique within the NPPF, the Appellant's judgment that there would not be a severe cumulative impact, even using a higher trip rate, is plainly to be preferred.²⁵⁷
- 8.5.10 Two other matters were addressed in oral evidence but neither affects the conclusion above. The first matter is the level of background traffic growth that should be considered when assessing likely highways impacts. In agreement with ECC the Appellant did not apply a TEMPRO growth factor but agreed the key developments that are likely to lead to an increase of traffic on the local highway network. Just two of these developments increased the base flow above what the TEMPRO growth factor would have been. The local highway network is compact, with traffic from developments further afield being able to bypass this area by using the A12. The Appellant's assessment is therefore robust.²⁵⁸
- 8.5.11 The second matter is egress from the multi-storey car park proposed within Zone 1. The Appellant has always proposed two exits, which is now suggested to be conditioned. The joint position statement on highways confirms the analysis of the multi-storey carpark contained within Mr Bass's rebuttal assuming this has two exits, which was that "even under the robust assumption that all spaces within the car park would turn over in one hour, significant levels of queuing would not occur." In fact, the Appellant's analysis shows a maximum queue in this robust scenario of 19 vehicles compared to the Rule 6 Parties' prediction of 449.²⁵⁹

²⁵⁵ ID/74 Para 115

²⁵⁶ Bass IC, ID/74 Para 116.

²⁵⁷ Bell XX, ID/74 Para117.

²⁵⁸ Bass Rebuttal, Bas XX, Bass Proof Table 1, at para 2.13, provided within an erratum as ID/32, ID/74 Para 118

²⁵⁹ Bass Rebuttal at Para 2.36, ID/26, ID/74 Para 119.

8.5.12 The above demonstrates that there would be no residual cumulative highways impacts that could be described as severe. This is a particularly high test, and gets nowhere near being met, which entirely accords with the conclusions of both ECC and Highways England as the relevant highways authorities in this matter. Returning to the staged approach required by SD1, it is the Appellant's submission that there are no restrictive policies in the NPPF that indicate that the proposed development should be refused permission because the sequential and retail impact tests are passed and, if relevant, the residual highways impact would not be "severe".²⁶⁰

8.6 Tilted Planning Balance

8.6.1 As explained in Cheshire East BC v Secretary of State for Communities and Local Government [2016] EWHC 571 (Admin) [CD/J.5], "the effect of paragraph 14 is that proposals which would otherwise have been refused because their planning merits were finely balanced should be approved – subject to the first indent of the second bullet point being made out. Another way of putting the matter is that the scales, or the balance, is weighted, loaded or tilted in favour of the proposal. This is what the presumption in favour of sustainable development means: it is a rebuttable presumption, although will only yield in the face of significant and demonstrable adverse impacts."²⁶¹

8.6.2 Only the Appellant's evidence approached the tilted balance in SD1 on the basis that both the sequential and impact tests had been passed. This is important, given that what falls to be assessed at this stage of the decision-making process are retail impacts that would not be significant and so do not fall foul of the impact test and, if this assessment has already been made and not reserved for this stage, highways impacts that are not judged to be severe.²⁶²

8.6.3 The Appellant's primary submission is that highways impacts only fall to be assessed at this fourth stage on the basis that NPPF paragraph 32 last bullet, does not amount to a restrictive policy in NPPF terms. If this submission is accepted, then the above submissions explain why the highways impacts are not severe. The Appellant otherwise accepts that there will be adverse impacts upon the local highways network in the form of some increased congestion but falling below the threshold of severity that require to be assessed in the tilted balance.²⁶³

8.7 Accessibility/Sustainability

8.7.1 The Council's third reason for refusal asserts that the proposed development would be unsustainable by reason of it being car dominated and providing a poor pedestrian environment. The proper context within which to analyse this reason for refusal includes three key agreements by the Council.²⁶⁴

²⁶⁰ ID/74 Paras 120-121

²⁶¹ ID/74 Footnote 171

²⁶² ID/74 Para 122

²⁶³ ID/74 Para 123

²⁶⁴ Pearce XX, IFD/74 Para 124

- 8.7.2 Firstly, Policy TA1 does not provide a test to the effect that all proposals that are car dominated must be refused. If it did, it would be inconsistent with the NPPF, since it would require refusal of proposals that passed the impact and sequential tests and so located development in appropriate locations in retail terms, and yet would still be accessed predominantly by car.²⁶⁵
- 8.7.3 Secondly, a development can promote sustainable transport but still be accessed predominantly by car, so long as all reasonable or practicable opportunities to promote sustainable transport have been taken up. This is the requirement under both policy TA1 and NPPF paragraphs 32 and 34.²⁶⁶
- 8.7.4 Thirdly, locations within the Stanway growth area, including the appeal site, are viewed under policy SD1 as being at the top of the hierarchy for sustainable locations to locate housing and employment development.²⁶⁷
- 8.7.5 In relation to car domination, the Council's evidence was that all practicable opportunities to promote sustainable transportation had been taken save for two matters. These were that the car parking within the development should be charged and that double the amount of Public Transport Contribution should have been sought under the Section 106 Agreement that is agreed between the Appellant and the Council. If the Appellant's arguments about the sequential and impact tests are accepted, and subject to these two further matters, it follows that the appeal proposals comply with policy TA1 and NPPF paragraphs 32 and 34.²⁶⁸
- 8.7.6 In respect of the two matters, no evidence was provided by the Council at all that these were justified. Detailed measures would be put in place to encourage access to the appeal site by non-car means, including the provision of footways and cycleways, pedestrian crossings, and the opportunities to create pedestrian and cycle routes through the appeal site to link the separate parts of the district centre and provide much improved access. These proposed measures, and the linkages that these measures will provide with existing cycle/footways are shown on Drawing IT698/SK/15. This is in addition to the public transport contribution in the Section 106 Agreement. These measures will also ensure that the proposed development is attractive to pedestrians and will facilitate permeability between the different parts of the existing district centre. These are significant benefits of the proposal.²⁶⁹
- 8.7.7 Requiring parking charges would be an unjustified control on the development. It is not a measure that should reasonably be imposed on a new shopping facility which otherwise provides extensive opportunities for access by non-car modes. It is not necessary and would fail the tests for conditions and Section 106 planning obligations. The suggestion that the public transport contribution should be doubled is inconsistent with the Council's agreement to the contribution set out in the Section 106 Agreement. The judgment that must necessarily have been made by the

²⁶⁵ ID/74 Para 124(1)

²⁶⁶ I.1 at para 8.90, ID/74 Para 124(2).

²⁶⁷ ID/74 Para 124(3)

²⁶⁸ ID/75 schedule 1, Pearce XX, ID/74 Para 125.

²⁶⁹ Bass Appendix JB7.

Council is that the requested contribution, which amounts to subsidising the bus service for a period of 5 years, compared to 10 years, meets the tests set out in regulation 122 of the Community Infrastructure Levy (CIL) Regulations.²⁷⁰

8.7.8 It follows that there is no basis for the Council's third reason for refusal if it is concluded that the proposed development meets the sequential and impact tests. The policy decision reflected in policy SD1 that the appeal site is in a highly sustainable location for housing and employment uses must carry across to the appeal site being used for retail uses. This is all the more so when it is remembered that the Tollgate District Centre, which is part of and which surrounds all of Zone 1, is wholly within the Stanway growth area identified as being highly sustainable in this policy.²⁷¹

8.8 Prematurity

8.8.1 The guidance as to when prematurity can be the basis for refusal of a planning application was agreed to be that in the PPG.²⁷² Both the Council and the Rule 6 Parties agreed that as far as the PPG is concerned both that:

i) In this case it is at the point of applying the tilted balance in NPPF paragraph 14 that one is required to weigh any prematurity objection in the balance. This is because of the first part of the guidance which refers to prematurity being unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits; and

ii) That the prematurity objection sought to be made in this matter does not meet the instance provided by the guidance of a case in which a prematurity objection may be able to be sustained which has two parts (part (a) and part (b)). The prematurity objection made here does not meet part (b) because there is no plan that is at an advanced stage. For the prematurity objection to succeed, it must be shown both that part (a) is met, which is disputed, and in any event, that this is an exceptional case given that part (b) is not met.²⁷³

8.8.2 No good reason is given for departing from the guidance, even though the evidence does not show that the proposed development gets anywhere near to satisfying part (a) of the guidance, including because the proposed development cannot be described as being central to the emerging plan.²⁷⁴

8.8.3 The logic of considering the restrictive policies (the sequential and impact tests) before prematurity is that when the issue of prematurity is considered, this is done on the basis that the proposed development passes those tests. There is an insuperable difficulty in the Council submitting that the proposed development is central to the emerging plan

²⁷⁰ID/74 Para127

²⁷¹ ID/74 Para 128

²⁷² Copied in Newton's proof Para 5.98, paragraph 014, Reference ID: 21b-014-20140306.

²⁷³ ID/74 Para129(1)-(2)

²⁷⁴ ID/74 Para 130

when it has been found to cause no significant adverse impact to the Town Centre, which is the basis of the Council's prematurity concern.²⁷⁵

- 8.8.4 A further insuperable difficulty is that in the absence of a published, draft plan, it is impossible to test the contention that the proposed development would pre-determine decisions that are central to it. That point is further underscored as the emerging plan will proceed in two stages, with the first stage being a joint plan for North Essex also embracing Braintree and Tendring. The Council's evidence was that there may be a joint retail hierarchy covering not just these three areas but also Chelmsford. It is impossible to say that the proposed development would undermine a retail hierarchy that is central to a plan covering three or possibly four administrative areas, when the details of that plan are not even known.²⁷⁶
- 8.8.5 Both the Council and the Rule 6 Parties indicated that the proposed development would undermine the prospect of a district centre being provided in a potential new garden community identified in the Preferred Options Consultation. No one is promoting this garden community and it is ridiculous to suggest that the omission of a district centre from this garden community, even were this to happen, amounts to predetermining a decision that is central to the emerging plan.²⁷⁷
- 8.8.6 The matters set out above are underscored by the North Essex Garden Communities Peer Review undertaken by Lord Kerslake. Amongst other things, this concluded that the West Colchester / Marks Tey town was "large and complex ... to deliver on its own. It is absolutely dependent on upgrading the A120 and has complex land ownership. As a result, it may take longer for the councils to deliver this development than the other two sites". Other matters of note are that: (a) the garden communities would have a peak debt of £481 m, with no positive return until 2053 highlighting how ambitious their delivery would be, and (b) the report's view that the current local plan timetable is ambitious.²⁷⁸
- 8.8.7 Several matters outside the guidance on prematurity were raised by the Council. There is no test in the guidance that looks at the delay that would occur if a decision was made to wait for a new plan to be adopted. Such a test would be in contrast to NPPF paragraph 14, which directs decision makers to approve developments that accord with the development plan without delay. There is also no test which requires that consideration be given to harm that would be caused to a developer by delay. Again, applying such a test would not be supported by the guidance and would be inconsistent with NPPF paragraph 14.²⁷⁹
- 8.8.8 The Council suggested that the proposed development would consume all the retail capacity for the Borough and so pre-determine retail decision-making. This point is answered by the submissions already made in respect of prematurity but there are two further reasons why this is wrong. First, the Council's capacity assessment is not agreed. Addressing only one of

²⁷⁵ ID/74 Para 130(1)

²⁷⁶ Pearce XX, ID/74 Para130(2).

²⁷⁷ F.5.3, Pearce XX, Anderson XX, ID/74 Para 130(3).

²⁷⁸ ID/58, ID/74 Para 130(4).

²⁷⁹ G.1, ID/74 Para 131

eight criticisms will lead to additional capacity being created, and addressing all eight criticisms would demonstrate that there is significant additional capacity.²⁸⁰

8.8.9 Even if the Council is right about capacity, there would remain all but part of one of the ten items set out in NPPF paragraph 23 that the Council will have to address in its emerging plan. The underlying flaw in the Council's approach was to ignore that a town centre is much more than just its comparison goods shopping, and there is much more that the Council can and should do in its emerging plan to recognise the Town Centre as the heart of a community and to ensure its ongoing vitality and viability. It is relevant that the Rule 6 Parties' evidence was that the Town Centre has remained healthy and also retained its retail rankings despite not having grown in comparison floor space terms for some 25 years.²⁸¹

8.8.10 The prematurity reason does not meet the guidance and there is simply no evidence to show that this is some form of exceptional case that justifies refusal on prematurity grounds. This is all the more so if, as the Kerlake Report in effect predicts, there will be yet further slippage in the timetable for the new local plan.

8.9 Benefits

8.9.1 The proposed development would provide several significant economic, social, and environmental benefits. These are set out in section 10 of Mr Newton's proof, and are supported by a Regeneris Report that quantified the economic benefits of the proposed development. The benefits include:

- i) the provision of employment (construction, operational and induced and indirect jobs);
- ii) £16.9 m p.a. gross value added to the local economy;
- iii) promotion of the Town Centre through the contributions provided for in the Section 106 Agreement;
- iv) local employment opportunities for nearby residents (including a local recruitment scheme committed through the Section 106 Agreement);
- v) enhancing retail choice and competition for local residents;
- vi) the creation of a sense of place and heart for the Stanway growth area;
- vii) substantial public realm improvements;
- viii) increased pedestrian, cycle and public transport links; and,
- ix) the linkage of the disparate parts of the district centre by creating a permeable and pedestrian friendly development.²⁸²

²⁸⁰ Newton XX by the Council, Newton rebuttal paras 2.17-2.19.

²⁸¹ NPPF para 23 bullet 1, ID/74 Para133.

²⁸² A.10, ID/74 Para 135.

- 8.9.2 The Council confirmed that it accepted the economic and social benefits of the scheme, but questioned the environmental benefits on the basis of domination by cars. Given its later acceptance that all reasonable steps had been taken to provide for sustainable transportation measures, aside from the two measures discussed above, there was some modification in this approach. The Appellant's evidence explains the extensive steps that would be taken to provide for pedestrians, cyclists and public transport users, which support the assessment of the environmental benefits as shown on plan IT698/SK/15.²⁸³
- 8.9.3 It is notable that the proposed development enjoys the support of a large cross-section of the community that would most directly enjoy the benefits of the appeal scheme. The strength of feeling was illustrated by the number of people that turned out for the Thursday evening Inquiry session (on what was a very cold and snowy night). The suggestion that this support was any less genuine because information was provided to supporters about the planning matters in issue is entirely mis-placed.²⁸⁴
- 8.9.4 It was also notable that the proposal enjoys the support of the Essex Chamber of Commerce. Its letter of support sets out the view that the proposed development "will strengthen Colchester's retail offering and maintain its competitiveness against other areas within and outside Essex. Indeed the town centre has already seen significant investment from a major retailer whilst discussions about the Tollgate Partnership's proposals have been in the public domain."²⁸⁵
- 8.9.5 Adverse impacts arise from the proposed development both in retail terms and in respect of impacts upon the local highway network. However, they fall below the levels of impact and severity required to engage the retail impact test in NPPF paragraphs 26 and 27 and the severe highways impacts in NPPF paragraph 32. Notwithstanding this, the benefits of the proposals significantly and demonstrably outweigh the adverse impacts. The Council's assessment of the planning balance was based on significant adverse retail impacts. It had not conducted a balance on the correct basis, the impact test having been passed. In refusing permission the Council also weighed in the balance the loss of employment land. This objection has fallen away, yet it was of substantial import in the Council's original decision making.²⁸⁶
- 8.9.6 From the above, there are no matters arising from policy SD1 that indicate that permission should not be granted. It is the most up-to-date policy and any conflict between SD1 and other policies in the development plan should be resolved in favour of SD1 which is plainly a policy that is overarching or fundamental.²⁸⁷
- 8.9.7 It was put to the Appellant that approval of the proposed development would breach policy UR1. This policy is aspirational setting out that the Council is "committed to regeneration in rundown areas, deprived

²⁸³ Pearce IC & XX, Bass Appendix JB7.

²⁸⁴ ID/74 Para 137

²⁸⁵ ID/74 Para 138

²⁸⁶ Newton XX by the Council, Pearce XX, ID/74 Paras 139-141.

²⁸⁷ ID/74 Paras 142-144

communities and key centres” and that it will “pursue a broader urban renaissance agenda to revitalise communities”. It is not relevant to this appeal and forms no part of the Council’s full reasons for refusal. Nor is it mentioned in the SOCG. In any event, given that the relevant retail and employment policies are out of date, the presumption part of policy SD1 should be applied.²⁸⁸

8.9.8 As the Appellant explained, having balanced the positives and negatives of the scheme, and having applied the tests as set out in the development plan in policy SD1, the proposed development accords with the development plan when looked at as a whole. That being the case, the appeal proposals benefit from the statutory presumption in favour of the development plan in Section 38(6). In this event, NPPF paragraph 14 affirms that the proposed development benefits from the presumption in favour of sustainable development found within the NPPF, which for decision taking means (under the first bullet point) “approving development proposals that accord with the development plan without delay”²⁸⁹

8.9.9 Even if the appeal proposals do not accord with the development plan, the application of NPPF paragraph 14 outside of the development plan means that the presumption in favour of sustainable development applies. In the circumstances of this case any conflict with the development plan would be outweighed by the other material considerations provided by the NPPF and the significant benefits that this development would bring. This was the judgment reached by the Appellant prior to consideration of policy SD1 as amended in the Focused Review. This judgment holds good for all the reasons set out above. The Appellant wishes to stress that as the proposed development is consistent with the presumption in favour of sustainable development set out in policy SD1, and in NPPF paragraph 14, it is on the current state of case law, by definition sustainable development.

8.10 Conclusion

8.10.1 On this basis the Appellant asks that this appeal be allowed. There are compelling reasons to grant permission for these proposals whereas the opposition to them amounts to an anti-competitive stance which is overly protective of established interests at the expense of pursuing the greater public good.

9.0 Written Representations

9.1 The Officer’s report to the Planning Committee on 17 December 2015 records that there were 149 representations of support, 38 of objection and 9 neutral comments. At a later Committee meeting on 5 February 2016 an updated report records an additional 6 representations all in support. In addition to members of the public, there were also additional representations from the business community. 31 of these objected to the proposal and 3 supported it.²⁹⁰

²⁸⁸ ID/74 Para 145

²⁸⁹ Newton XX, ID/74 Para 146

²⁹⁰ E.1.1, E.2.1. ID/76

- 9.2 The main matters raised in support of the proposal include an increase in jobs boosting the local economy, keeping retail in Colchester rather than losing it to competing centres, redevelopment of the old Sainsbury site eyesore, an enhanced shopping experience and better choice on the west of Colchester, to support rapid housing growth and provide a welcome cinema and leisure facilities. Colchester is growing and needs a convenient out of town centre that will not harm the Town Centre. The town centre is run down inconvenient and unattractive. Town Centre traders should improve their offer and the Council should reduce Town Centre parking charges and improve disabled parking/access. It is suggested that there is room for both the Town Centre and Tollgate to flourish and that the Town Centre has other attractions which mean it will not be harmed. Tollgate is a sustainable location and people would not need to leave Stanway for facilities.²⁹¹
- 9.3 The main reasons for objection are that the proposal would cause unacceptable harm to the Town Centre, and exacerbate traffic problems in the area. A cinema is not needed and the proposal would be contrary to national planning policy and generate unsustainable traffic patterns. The proposed multi-storey car park would be ugly and there would be smells from eateries. Additional shops are not needed and there would be a loss of community.²⁹²
- 9.4 At appeal stage there were again well in excess of 100 representations and again the majority were in support of the proposal. The matters raised were generally the same as those raised at application stage and are not repeated.²⁹³

10.0 The Case For Interested Persons

- 10.1 Three members of the public spoke on the first day of the Inquiry whilst a further 28 spoke on 12 January 2017 at an evening session of the Inquiry. As with the written representations the majority were in support of the proposals and similar points were raised. Many of those who spoke provided written statements. A statement of support from the Rt Hon Priti Patel the local MP was also read out.²⁹⁴

11.0 Conditions and Section 106 Obligation

- 11.1.1 The Council in particular considers that a number of conditions would be necessary to make the proposal acceptable. A suggested list of conditions has been produced and has been the subject of discussions between the two main parties. Whilst agreement has been reached on a number of conditions there are still some points of difference. The Council has set out its position in respect of the latest iteration of the suggested conditions and makes points in relation to suggested conditions 4, 5, 7, 9, 13, 36, 37, 38, and 39.²⁹⁵

²⁹¹ E.1.1 Para 10.2.2, ID/76

²⁹² E.1.1 Para 10.2.3 ID/76

²⁹³ ID/77

²⁹⁴ ID/15, ID/16, ID/78

²⁹⁵ ID/2C, ID/71

- 11.1.2 The Rule 6 Parties were not originally involved in discussions about suggested conditions. However, the list of conditions was provided to them prior to discussion of conditions and comments, generally in relation to those that would affect impact, were made.
- 11.1.3 A Section 106 Agreement was signed between the Council and the Appellant. The Rule 6 Parties saw the final document and spoke to it at the Inquiry.²⁹⁶
- 11.1.4 The matters that would be covered are; the payment of a Public Transport Contribution (Schedule 1); payment of a Town Centre Contribution(Schedule 2); provision of Environmental Services (Schedule 3); provision of highway works at Junction 26 of the A12(Schedule 4); payment of a Waiting Restriction Contribution and a contribution towards highway works to improve capacity at the Stanway Western Bypass/London Road Roundabout to relieve queueing on the London Road western arm (Schedule 5); to work with the Local Employment Partnership to deliver a training package (Schedule 6); payment of a Travel Plan Fee (Schedule 7); and, payment of a CCTV Connection Contribution (Schedule 8).²⁹⁷

²⁹⁶ ID/75

²⁹⁷ ID/75

12.0 Inspector's Conclusions

[The references in square brackets are to earlier paragraph numbers in this report]

12.1 Introduction

12.1.1 The appeal proposal would provide 16,304m² of new comparison A1 retail floorspace, 1,858m² of new convenience A1 retail floorspace, 5,010m² flexible Class A1-A5 floorspace, 950m² flexible A3-A5 F&B floorspace and 6,690m² D2 leisure floorspace, including a 1,300 seat cinema. There would also be substantial new car parking. The proposed comparison floorspace, added to the existing, would be approximately 57,000m² gross, there would be substantial convenience floorspace at Sainsbury's nearby and the total floorspace of the new centre would be just under 80,000m².

[3.0, 6.1.1]

12.1.2 In NPPF terms the site is part in centre and part edge-of-centre with DZ1 an island within the defined district centre. [8.1.2]

12.1.3 The main matters raised at the Inquiry were the effect on the vitality and viability of Colchester Town Centre in terms of policy, starting with the development plan and including the sequential and impact tests, prematurity, accessibility/sustainability, and the effect on the highway network.

12.2 The Development Plan

12.2.1 Section 38(6) of the *Planning and Compulsory Purchase Act 2004* provides that "determination must be made in accordance with the plan unless material considerations indicate otherwise". NPPF paragraph 215 states that due weight should be given according to the degree of consistency with the NPPF and that "the closer the policies in the plan to the policies in the NPPF, the greater the weight that may be given". Weight is ultimately a matter for the decision maker. [6.2.1, 7.2.1, 8.2.1]

12.2.2 The development plan for the area comprises the CS, adopted December 2008, including selected policies revised in July 2014 under a Focused Review; the DP, adopted October 2010, including selected policies revised in July 2014 under the Focused Review; the SA, adopted October 2010 and; *Proposals Maps*, adopted in October 2010. The map for the Stanway UDC and Stanway Employment Zone was formally adjusted to reflect the nearby Sainsbury's planning permission being implemented. The most relevant policies referred to by the Parties are CS Policies SD1, CE1, CE2b, CE3, TA1 and UR1, DP Policy DP5 and SA Policies STA1 and STA3. [5.1]

12.2.3 Policy SD1 in particular was amended as part of a Focused Review whose intention was partly to provide a way by which the presumption in favour of sustainable development could be addressed in the development plan pending a full review. This added the wording from the decision making section of NPPF paragraph 14 to the end of the policy. The Appellant has a different interpretation of the effect of this than the Council and the Rule 6 Parties'. It is irrelevant that this difference in interpretation was only introduced during the Appellant's evidence in chief. [6.2.2, 6.2.3, 8.2.2, 8.2.3, 8.2.14]

- 12.2.4 The Appellant now maintains that a consequence of the alteration to Policy SD1 is that the presumption applies when considering the first limb of Section 38(6) and, in effect, there would be a double presumption in favour of sustainable development. In addition, the focused review takes precedence in any conflict with other policies as it is the most recently adopted development plan document.^[8.2.4, 8.2.5]
- 12.2.5 The significance of the amended Policy SD1, as interpreted by the Appellant, is that it would dictate what happens when relevant policies are out-of-date. If the proposal does not accord with plan policies but these are out-of-date the development plan tells the decision maker that rather than refuse permission by reference to the out of date policies, permission should be granted by reference to the up-to-date presumption in Policy SD1. This is the opposite to what would happen under the NPPF. Nothing in the amended policy requires policies which have a material part which is inconsistent with the NPPF to be ignored. Indeed, it would be contrary to common sense to prevent a provision of a policy that is not out of date from being taken into account because another provision of that policy is out of date.^[7.2.5, 8.2.10, 8.2.11, 8.2.14]
- 12.2.6 Such an approach would also be contrary to that in Aldergate Properties which states “The development control policy in NPPF paragraph 24 deals with applications for town centre uses out of centre where there is no up to date development plan embodying the policies of NPPF paragraph 23. But the development control policy aims to achieve as much of what an up to date plan would achieve as possible. It is not intended that the absence of an up to date plan creates a rather different world in which retailers could enjoy a much greater degree of temporary freedom based on their individual commercial interests.” That would apply equally in this case.^[7.2.6]
- 12.2.7 Where a policy contains both consistent and inconsistent provisions both should be considered and given appropriate weight. Aldergate Properties states: “Policy interpretations arising from litigation may be context and argument specific, and not intended as substitutes for the text at issue for all cases and contexts. The good sense of the planning consequences of any given interpretation may be a guide to its correctness.” I agree with the Rule 6 Parties that the proper interpretation of the additional wording in SD1 is that it brings the paragraph 14 presumption within the development plan, effectively combining the two parts of the decision making process, but it does not alter the substance of the weighing exercise. It simply makes it clear that the normal NPPF approach will be adopted. The policy is up-to-date and should attract full weight.^[7.2.7]
- 12.2.8 Turning to whether other relevant policies in the development plan are out of date, paragraph 1.9 of the Focused Review indicates that none of the unchanged policies in the CS were endorsed as being in conformity with the NPPF. Impacts on the retail hierarchy and on the town centre are addressed in CS Policies CE1, CE2, CE3, DP Policy DP5, and SA Policy STA3. The Inspectors for both the Focused Review and the Stane Park appeal determined that policies CE1, CE2 and CE3 are inconsistent with the NPPF. The Council also accepts that these policies are inconsistent with the NPPF to a material degree albeit that it claims that the majority of

policies are consistent with the NPPF and can be given full weight whilst the Rule 6 Parties accept that there is inconsistency between CE1 and CE2 and the NPPF. There is little evidence to justify an alternative conclusion to that of the previous Inspectors.^[6.2.2,6.2.7, 8.2.14, 8.2.15]

- 12.2.9 A retail hierarchy is provided for in Policy CE1 but it inserts urban gateways and town centre fringe above district centres. As these are town centres in NPPF terms they should stand above the gateways and fringe. The policy is, therefore, out of date.^[8.2.17]
- 12.2.10 Policy CE2(b) restricts urban district centres from providing new in-centre retail uses, unless those uses meet identified local needs and do not compete with Colchester town centre, and from expanding. The NPPF does not restrict retail development in district centres as to do so would be inconsistent with its own “town centres first” approach. The requirement to not compete with Colchester town centre does not reflect the NPPF’s impact test, which has a threshold of significant adverse impact, rather than simply competition. In any event, Tollgate district centre and Colchester town centre are both town centres in NPPF terms and so one should not be prevented from competing with the other. These inconsistencies are sufficient to render Policy CE2 out of date.^[8.2.18]
- 12.2.11 Policy STA3 is also out of date as it states that no new town centre uses will be permitted in the Tollgate district centre, despite this being a town centre in NPPF terms. The Stane Park Inspector determined that this policy should have full weight, but he was dealing with different circumstances. The Council agrees that policy STA3 is materially out of date and disagrees with the Stane Park Inspector’s decision to accord this policy full weight. I agree with the Council.^[8.2.19]
- 12.2.12 Policies CE3 and DP5 were found to be inconsistent with the NPPF by both the Stane Park Inspector and the Examining Inspector for the Focused Review. In Stane Park it states that there are approximately 65 hectares of vacant employment land amounting to a 65 year supply. Members were informed that “the Council has been over-cautious in allocating far more employment land than will reasonably be needed... there is no prospect of all this coming forward.” These policies are out of date.^[8.2.20]
- 12.2.13 Core Strategy policy UR1 and site allocations policy SA TC1 were not relied on in the Council’s reason for refusal nor in the Council’s or the Rule 6 Parties’ written evidence and are not directly relevant to this appeal. In any event, these policies are inconsistent with the NPPF and out of date by reason of their failure to provide for a sequential or impact test in assessing the appropriateness of the proposed development.^[6.2.3, 8.2.21]
- 12.2.14 All the policies that are out of date due to inconsistency with the NPPF should be given little weight.
- 12.2.15 Policy TA1 is accepted by the Appellant to be consistent with the NPPF and should carry full statutory weight. It states that “developments that are car dependent...will not be supported”. The proposal is car dependant and would conflict with policy. I note that the Stane Park Inspector reached the same conclusion in that case, which had far less parking. However in this case the local area is recognised as being sustainable.^[7.2.21]

12.2.16 Overall, some aspects of the proposal are not consistent with the development plan, in particular the retail policies and on balance the proposals are contrary to the development plan. I note that this was the stance of the Appellant's planning witness in his proof of evidence albeit that a different position is now taken.

12.3 The Sequential Test

12.3.1 Paragraph 24 of the NPPF requires the application of a sequential test for main town centre uses that are not in an existing centre and are not in accordance with an up-to-date Local Plan. It states "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".

12.3.2 The test needs to be understood and then planning judgment applied. A failure to comply with the sequential test would justify refusal on its own.^[6.3.1, 8.3.1]

12.3.3 The parties disagree as to whether the sequential test should require disaggregation of the scheme. Despite the Appellant's view that the test must be the same wherever and whenever it is applied, and that splitting development over several sites would not amount to approximately the same size and type of development, Warners v Cotswolds DC states "What bounds can reasonably be set on an applicant's preference and intentions as to 'format and scale' in any individual case will always, and necessarily, depend on the facts and circumstances of that particular case. The policy in paragraph 24 of the NPPF should not be seen as prescriptive in this respect. It plainly is not".^[6.3.1, 6.3.2, 8.3.3]

12.3.4 The sequential test within the NPPF should be interpreted without reference to old policy and guidance which mentioned disaggregation. Those references were not carried forward and neither the NPPF nor the PPG make any reference to disaggregation, or sub-division.^[8.3.12]

12.3.5 The point that suitability is assessed by reference to the development proposed has been upheld most recently in Aldergate Properties, where it was held that: 'suitable' and 'available' generally mean 'suitable' and 'available' for the broad type of development which is proposed in the application by approximate size, type, and range of goods. This incorporates the requirement for flexibility in NPPF paragraph 24". The area and sites covered by the sequential test search should not vary from applicant to applicant according to their identity.^[7.3.3, 8.3.5]

12.3.6 Aldergate Properties explained the position following the Dundee decision as: "The true focus of interpretative debate is still the wording of the policy in context, and here of the English policies. Policy interpretations arising from litigation may be context and argument specific, and not intended as substitutes for the text at issue for all cases and contexts. The good sense of the planning consequences of any given interpretation may be a guide

to its correctness.” Whilst a sequentially preferable site need not be capable of accommodating exactly the same as what is proposed, it must still be capable of accommodating development which is recognisably closely similar to what is proposed.^[7.3.1]

- 12.3.7 In the Rushden Lakes decision the Inspector concluded that “there is nothing in the sequential test as set out in NPPF paragraph 24 that states that the concept of “suitable” sites means suitable in terms of the scale of the nearest centre to the site in question and/or its place in the ‘hierarchy’ of centres.” The Secretary of State expressly agreed with this at paragraph 15. The Exeter decision concludes that this is the correct approach when the relevant retail policies in a development plan are out of date, as they were in Rushden Lakes.^[8.3.8, 8.3.9]
- 12.3.8 Matters relating to hierarchy should not be ignored. However, they should be assessed when considering whether the scheme accords with the development plan read as a whole.^[8.3.10]
- 12.3.9 Under disaggregation, or sub-division, the proposal would be split into smaller parts spread over a number of sites in, and on the edge of, Colchester Town Centre. The Appellant maintains that a development split into several disparate parts does not amount to approximately the same size or type of development but that depends on the circumstances of the case.^[8.3.11]
- 12.3.10 The extent of flexibility should not be constrained by policy or guidance, and there is nothing in the PPG that suggests that sub division is not to be considered. Indeed, sub division was considered in the Dundee case itself. There will be cases where sub division is not appropriate, both Rushden Lakes and Scotch Corner conclude that disaggregation is not required to demonstrate flexibility. In Scotch Corner the proposal was a Designer Outlet Centre whose business model requires units of a certain scale, and which is tightly controlled by conditions to be different from ordinary Town Centre development. In Rushden Lakes there was a strong development plan justification for a critical mass of units. ^[7.3.6, 8.3.13]
- 12.3.11 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.^[6.3.4, 7.3.7]
- 12.3.12 In respect of the cinema, the Appellants would accept conditions to ensure that no more than 1,300 seats would be built. However, the expert evidence is that such a cinema will not be built in the foreseeable future. It would be anomalous if this affected the outcome of the sequential test. As the scheme is one of the most fluid schemes promoted, the sequential test should also be flexible. The Appellant’s flexibility is limited to considering 10% less size and floorspace.^[7.3.8]

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- 12.3.13 In reality, there are a number of sites in the Town Centre, where new floorspace could be provided. Such sites are complex and take time to assemble but there is no reason why it cannot be done. The core includes: Vineyard Gate approximately 9,000m² net has development plan support; Priory Walk approximately 5,000m² net; and Co-op site approximately 2,500m² net assuming that all but the bottom 2 floors will be for residential.^[6.3.6, 7.3.9]
- 12.3.14 Those sites are within a similar distance of each other, or closer than the separate parts of the appeal proposal. They are connected by active Town Centre streets and cater for blocks of development of a similar size to those that might arise if the proposal went ahead. In Colchester, the Town Centre is significantly wider than the core, and covers mixed use zones coloured blue on the proposals map. The Rule 6 Parties claim they are to be preferred to the appeal site but they are at the same level in the hierarchy.^[7.3.9, 7.4.11, 7.4.13]
- 12.3.15 In Lionbrook it was stated that “suitability and availability are matters of planning judgment and the appropriate timescale for the sequential approach was for the Council to judge”. It is accepted that Colchester needs to grow to retain its position in the regional hierarchy, and that it is always more difficult to develop in an historic town centre. These sites need to be developed to secure growth and regeneration. Nonetheless, they also need to be available now.^[6.3.7, 7.3.14]
- 12.3.16 There is no urgent development plan requirement for the proposal (as in Rushden Lakes), and no urgent capacity or claw back need (as in Warner). There is no defined timescale for the proposal and no details or limits. Given the lack of demand for the cinema it is not likely to be completed for a considerable time. That could be as long as 10 to 15 years (see Bath Press).^[7.3.13]
- 12.3.17 The Co-op, Curzon and St. Botolph’s will be available in the short term, and it is claimed that Vineyard Gate is likely to be available for occupation in 5 to 8 years, and Priory Walk is likely to follow that. Each development would provide additional incentive for the next and together they would achieve regeneration of the St. Botolph’s Regeneration Area. Even given the requirement to be flexible they would not provide sufficient floorspace to be sequentially preferable to the proposal.^[6.3.5, 7.3.13]
- 12.3.18 Moreover, in terms of availability NPPF paragraph 24 asks whether town centre or edge of centre sites ‘are ... available’. That is at the date of the assessment. This was the approach of the SoS in Rushden Lakes and accords with the language and context of the sequential test.^[8.3.14]
- 12.3.19 It reflects the break from previous guidance which directed decision-makers to consider whether sites might become available over a reasonable period of time. This guidance is referred to in the 2013 Bath Press decision, and was relied upon to determine that availability should be assessed over a period of 10 to 15 years, but it has now been withdrawn.^[8.3.15]
- 12.3.20 The sequential test therefore means that whilst a sequentially preferable site need not be capable of accommodating exactly the same as what is

proposed, it must be capable of accommodating development which is closely similar to what is proposed. On this approach, the Council and the Rule 6 parties agreed that there were no sequentially preferable sites. NLP, who advised the Council on the application prior to its refusal, also concluded that the sequential test was passed by this scheme.^[8.3.16]

- 12.3.21 Only when the Council's present consultants were appointed was reliance placed on the sequential test notwithstanding that the Inspector in the Stane Park decision concluded that the sequential test was satisfied in relation to the much smaller scheme in issue in that appeal. That decision was made as recently as July last year and there have been no material changes since.^[8.3.17]
- 12.3.22 If the proposed development was scattered over several sites in and on the edge of the town centre it would still be necessary for each of the sites in question to be available and viable for the parts of the proposed development that would be placed upon them. There is no evidence at all that any of the sites are available and viable for these purposes.^[8.3.18]
- 12.3.23 Turning to the sites relied upon by others, the Council's evidence made no mention of a new retail scheme for Vineyard Gate, which was raised for the first time in the evidence of the Rule 6 parties, even though it has sought the redevelopment of the site since at least 2002. The Council's development partner, Caddick Developments, withdrew from its agreement with the Council in 2016 and has now sold its interest in land at Vineyard Gate back to the Council.^[8.3.19]
- 12.3.24 Only through the Rule 6 Parties' evidence was information provided, including a scheme for Vineyard Gate. A planning performance agreement was signed during the inquiry, and there is no development agreement.^[8.3.20]
- 12.3.25 The Council sought the deletion of the proposed D2/cinema use and indicated that only half of the gross floorspace proposed for DZ1 needed to be accommodated on Vineyard Gate. The Rule 6 Parties' evidence was that if the D2/ cinema use and the proposed convenience element at the proposed development and at Vineyard Gate were deleted, and if 1/3 of the remaining proposed floorspace at the appeal site was deducted, then that would amount to 10,817 m² of net floorspace required for Vineyard Gate. Neither of the propositions put forward would be closely similar to the appeal scheme.^[8.3.21]
- 12.3.26 The Vineyard Gate scheme requires the acquisition of 27 different ownerships. Moreover, it was agreed by the Rule 6 Parties that it was likely there would need to be a CPO to acquire all the land and cleanse the title for the site which would be a time-consuming process. Added to this is the fact that there is no viability evidence concerning retail-led redevelopment at Vineyard Gate and Caddick has recently pulled out. Finally, there are the likely difficulties associated with delivering development so close to the Roman Wall. Tellingly the Council agreed that any date for delivery of a scheme on Vineyard Gate was speculative. The site cannot, therefore, be considered available.^[8.3.22, 8.3.23]

- 12.3.27 St Botolph's is an edge of centre site and so in policy terms is not sequentially preferable and does not need to be considered. In any event, it is smaller and is being promoted for different uses. St Botolph's must be seen in the context that Stane Park concluded that there were no sequentially preferable sites for a much smaller development as recently as July 2016.^[7.3.15, 8.3.24, 8.3.25]
- 12.3.28 An assessment of Priory Walk indicates it could accommodate up to 5,000m² net of floorspace. This is less than Vineyard Gate. In addition, both the Council and the Rule 6 Parties agreed that this site is not currently available, but also that there is no evidence of anyone trying to assemble this site (which has several units, including the town centre Sainsbury's), and no evidence that it would be viable to do so.^[8.3.26]
- 12.3.29 All the above sites have been found to be not suitable, not available, or not viable applying the approach to the sequential test set out above. I consider that the sequential test has been passed.^[8.3.27]
- 12.3.30 Reference has been made to the Stane Park Inspector's decision but that differs from this appeal. Every occupier had signed either a contract or heads of terms and the occupiers had a specific requirement for that location and format. In addition, the SoCG required the application to be treated as one and not disaggregated. The Stane Park decision would not justify a different decision being reached in this case.^[6.3.8]

12.4 The Impact Test

- 12.4.1 An adverse impact on the vitality and viability of Colchester Town Centre was not a concern of the Council's previous retail advisor, NLP, and was not one of the original reasons for refusal. It was included in the Council's reasons for refusal on 24 November 2016, at the same time as the inclusion of the alleged failure to meet the sequential test.^[8.4.1]
- 12.4.2 The Town Centre contains many heritage assets whose wellbeing is supported by visitors and a thriving Town Centre. It is accepted that out of centre floorspace has a competitive advantage in terms of location and price. It is claimed that retail impact in this case could arise from two sources, what is proposed, and from relaxing restrictions on existing floorspace.^[6.4.1, 6.4.2]
- 12.4.3 The proposal is in outline and intended to be as flexible as possible. Consequently, the only restrictions are that D2 uses cannot be on DZ2 and that the quantum of floorspace would be capped by a condition. No commercial argument is made in relation to the components of the scheme and no evidence that the quantum of floorspace is required by retailers, their trading requirements, or why the proposal is as it is. No occupier has signed up, or agreed heads of terms and there is no limit in terms of phasing.^[6.4.3, 6.4.4]
- 12.4.4 The new floorspace would have larger floorplates and would roughly double the existing floorspace at the Tollgate Centre and Tollgate West. For those reasons it is agreed that the proposal should be assessed on the basis of a fashion led/high street tenant mix which is the most likely result if planning permission is granted and is the "reasonable worst case". It is also agreed

that it is important to have a reasonable level of consistency within an assessment.^[6.4.3, 6.4.5, 7.4.1]

- 12.4.5 The three main parties agree that if there is a significant adverse impact on the vitality and viability of the Town Centre there would be a breach of NPPF paragraph 27 and the proposal should be rejected. NPPF paragraphs 26 and 27 do not prescribe how significant adverse impact is to be judged. However, all the retail witnesses agree that the precise numbers are not important and a more rounded assessment must be undertaken. The assessment of impact must be made against the town centre as a whole.^[6.6.4, 8.4.3]
- 12.4.6 Two approaches have been raised. In Rushden Lakes the significance of impact is assessed by comparing town centre turnover in the base year with predicted turnover with the proposed scheme in place at the design year. This was rejected by objectors as it ignores the growth in expected expenditure. However, on the Council's figures the turnover of the Town Centre at present is £395.8m and post development would be £451.4m, an increase of £55.6m. Both as an increase of millions of pounds, and as a percentage of existing turnover, this comparison demonstrates that even with the proposed development the Town Centre would continue to grow and maintain its vitality and viability. On the Appellant's figures, the increase is between £99.1m and £105.2m. All the parties agreed that applying this method the proposed development would not amount to a significant adverse effect.^[8.4.4, 8.4.7]
- 12.4.7 The second approach, as taken in Scotch Corner, requires a judgment about the current health of the town centre, the likely level and type of diversion, and whether that level of diversion would pass the paragraph 27 test."^[8.4.3, 8.4.4]
- 12.4.8 Turning to the current health of the Town Centre, the Council argues that it could be declining as in two out of three ranking sources, or in all three depending on the year considered, its overall place has fallen. However, a retail ranking is about how a centre compares with others rather than how healthy a centre might be and in my view is a simplified approach. Indeed, the PPG makes no reference to assessing the health of a town centre by reference to retail rankings. The Council states that the Town Centre can be characterised as being at a crossroads partly as Peartree District Centre has 4 units which have been on the market for some time.^[6.4.9, 6.4.10]
- 12.4.9 The Rule 6 Parties consider that the Town Centre is healthy but vulnerable with a trend towards the concentration of higher order comparison retailing in the most powerful centres such as Chelmsford where the Bond Street development anchored by John Lewis has recently opened. Top Zone A rents in Colchester are now below those in Chelmsford. It is agreed that Colchester Town Centre needs to grow to maintain its position in the regional retail hierarchy albeit it is also the cultural centre for the sub-region.^[7.4.20, 8.4.9, 8.4.11]
- 12.4.10 In contrast, the view of the Colchester Retail Business Association was that the Town Centre was "a thriving town with a superb shopping amenity". Moreover, the 2016 *Retail Study*, which was prepared to inform the Council's emerging development plan, identifies several features of the

Town Centre that demonstrate a healthy centre. These include a good diversity of uses, a declining vacancy rate, good retailer representation, good independent retailer offer, strong commercial rents and stable yields, good pedestrian flows, and a pleasant shopping environment. In my view, this is not an ailing centre at a crossroads.^[8.4.10]

- 12.4.11 The *Retail Study* derived turnovers are based on a survey which met industry standards. However, the Council then reduced the derived turnovers by 10% for the Town Centre and by 25% for Tollgate District Centre based entirely on a judgment that the changes “represent reality more accurately”. The Appellant maintains that if adjustment is needed to turnover, then it should be reallocated to other district centres, on the basis of a like for like adjustment.^[6.4.10, 8.4.26]
- 12.4.12 The 2012 and 2016 Survey evidence shows that the survey based Town Centre turnover has gone down by over £100m whilst the Tollgate survey based turnover has gone up by over £100m. Within the home Zone 1 the Town Centre’s attraction has gone down by 14% and that of Tollgate has gone up by 11%.^[7.4.2, 7.4.20]
- 12.4.13 Surveys are not precise but the size and direction of change demonstrate the increasing competition from Tollgate and in trade draw from the Town Centre. The market share of the Town Centre might reduce further once the development at Chelmsford, with John Lewis as the anchor, takes effect. These factors need to be weighed in the planning balance.^[7.4.3]
- 12.4.14 It was stated that the promoters of Vineyard Gate have three anchors in mind. Despite some scepticism from the Council, Next and River Island both intimate that they see the Town Centre and Tollgate as providing different offers leading to dual trading whilst the third unnamed retailer is only interested in the Town Centre. A dual representation condition is proposed to provide some support for the Town Centre in the early days.^[8.4.39]
- 12.4.15 The proposed dual representation condition is modelled on one imposed in Scotch Corner (condition 6) and held to be lawful in R. (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC [2016] EWCA Civ 1260. The proposed condition requiring 5 years’ dual representation might not fully address the underlying problem but would provide some support for the town centre.^[6.4.18, 7.4.24, 7.4.25, 8.4.18]
- 12.4.16 The Council takes no issue with the cinema element of the proposed development based on external advice on cinema capacity, although the potential for a cinema within the proposed development is the greatest concern of the Rule 6 Parties’. However, it is not sufficient to say that there may be an impact due to the loss of the Odeon cinema in the Town Centre, it must be shown that this amounts to a significant adverse impact to the Town Centre as a whole. I do not consider that this has been demonstrated.^[8.4.12]
- 12.4.17 Indeed, the present good health of the Town Centre is demonstrated by investment of over £100m during the lifetime of this application, including Fenwick’s £30m investment in their store on High Street; Primark’s entry into Colchester with its new store, the former BHS, now open; the

reduction in the number of vacant units, and the sale of Lion Walk for £76.5 m representing a £20m profit on a three-year investment. The investment has all taken place whilst the Tollgate District Centre has improved its own retail offer and includes a very large Sainsbury's store.^[8.4.5, 8.4.6, 8.4.13]

- 12.4.18 In respect of trade diversion, the three main parties have made differing assumptions and also used different figures. Little evidence has been provided by either the Council or the Rule 6 Parties to support the view that retailers would close or not look at the Town Centre if the proposal went ahead. In any event, closure in itself would not indicate an adverse impact as the unit may be reoccupied, like Primark recently taking over the vacated BHS unit.^[8.4.16]
- 12.4.19 Turning to the figures, the Council's evidence base was updated leading to a revision of the Appellant's assessment. Notwithstanding this, it is agreed that the biggest difference between the Council's and the Appellants' assessments is the change in the amount of trade drawn from the study area, particularly Colchester's 'home zone'. The Council made unexplained adjustments to market share from zones across the catchment area with the proposal in place to derive a level of diversion of £66.6m in scenario 5 rather than assessing trade diversion from the Town Centre in the first instance.^[8.4.21, 8.4.30]
- 12.4.20 If the Council's judgment of market share were reduced by a half the diversion would be £33.3m. That reduced level would, on the Council's figures, lead to an overall impact on the town centre of 6.5% instead of the Council's 12.9% in scenario 5. In contrast the Appellant's assessment in the first instance was based on an assessment of the likely diversion of trade from the Town Centre based in its turn on a review of the household shopper survey and an analysis of shopper patterns. This produced a level of diversion of £36.5m, a diversion of 6.4% as compared with scenario 2.^[8.4.23]
- 12.4.21 There are a number of assumptions on which the parties cannot agree including, amongst others, turnover, whether the proposal would also draw trade from the surrounding existing retail facilities, whether a floorspace efficiency adjustment should be applied with a consequent increase in turnover, and whether the trade draw of the proposals would leave enough growth in the Town Centre's existing floorspace to provide for the normal expected rate and the provision of new floorspace.^[8.4.26, 8.4.27]
- 12.4.22 The line-up of possible retailers could explain much of the difference in turnover between the Appellant, scenario 2, and the Council, scenario 5, of £15m. The Appellant's list is the actual list of prospective tenants whereas the Council's includes retailers such as Ted Baker which provides a sales density of more than double any on the prospective tenant list and more than the average density of £4,728m². The Appellant's approach supported by the PPG assesses predicted turnover against company benchmarks.^[8.4.28]
- 12.4.23 Another inconsistency by the Council is its judgment of 1% visitor inflow justified by catchment size. This does not sit well with the assertion that the proposal would have a sub-regional attraction. The Appellant has

assumed 5%, a figure supported by NLP the Council's previous retail adviser. At that time the 2009 North Essex retail study assumed an inflow of 6%. The Appellant's judgment is supported by the Council's tourism figures that reported a spend of £255.4m in 2015 based on 6.2million trips.^[8.4.30, 8.4.31]

- 12.4.24 Whether there would be an impact on the vitality and viability of the Town Centre depends on more than retail. The wider cultural and other attractions of the Town Centre must be taken into account. Moreover NPPF paragraph 26 indicates that it is the proposal that falls to be assessed not what might happen to the district centre in respect of the emerging local plan or whether other units might seek relaxation of bulky goods restrictions.
- 12.4.25 Even if the 'worst case' of an anticipated 14.0% impact is accepted, given the current health of the Town Centre I consider that the proposal would not cause a significant adverse impact.^[7.4.15]
- 12.4.26 Turning to the impact on existing, committed and planned investment, the Council maintains that many companies are considering investing in the Town Centre and that it takes a proactive approach. It is seeking to assist in St Botolph's and at Vineyard Gate and has historically brought forward a number of schemes. However, the appeal scheme was cited by Caddick as a reason why it struggled to progress a scheme for Vineyard Gate.^[6.4.22, 7.4.28]
- 12.4.27 St Botolph's is irrelevant to the application of the impact test given that this is an edge of centre site and NPPF paragraph 26 applies only to sites 'in a centre'. Nor can there be any suggestion of impact on planned investment at Priory Walk given that no investment is planned and the site is not currently being marketed for redevelopment.^[8.4.40]
- 12.4.28 Much of the comparison floorspace at Tollgate is subject to restrictive bulky goods conditions, the removal of which the Council might find difficult to resist. This has already begun with Next and Argos having had restrictions removed. However, Next has expressed an intention to maintain both outlets and there has not been a tide of easing restrictions.^[6.4.17, 6.4.24, 7.4.22]
- 12.4.29 Planning permission might lead to an attempt to have the whole location identified as a District Centre in the development plan, albeit that the consequence might be over 30,000m² of new floorspace, added to which there would be some 27,000m² of existing A1 floorspace that could be unrestricted. Effectively there would be 57,000m² of A1 floorspace 3 miles from the Town Centre.^[6.4.25]
- 12.4.30 The planning system should be plan led with local plans setting out a positive vision for the future. Local planning authorities should define a network and hierarchy of centres. Although it is contended that some parts of the retail hierarchy are not fully compliant with the NPPF all three retail witnesses accept that the Town Centre should be at the top of the hierarchy with Tollgate at District Centre level. A decision to grant planning permission would to some extent undermine the hierarchy as Tollgate would be more modern with larger modern footplates. It would be

more accessible to the private car and it would be easier to park there. [6.4.28, 6.4.29, 6.4.30]

- 12.4.31 There is also the Sainsbury's and Stane Park floorspace. The Tollgate Village area would have close to 80,000m² of A and D2 floorspace and would be in the top 20 out of town retail clusters in the UK. Forecast turnovers in the Town Centre could be reduced which might have an adverse effect on operator demand, yields, investor confidence and viability. Investor confidence could be adversely affected by the view that Tollgate would continue to increase its draw from the Town Centre in the future. [6.4.21, 6.4.26, 7.4.29]
- 12.4.32 These matters are pure speculation. As a matter of fact a number of investments have been made during the lifetime of the appeal proposal: Fenwicks has been refurbished, Lion Walk sold for a large profit, Primark has opened and there is the Curzon development. [8.4.34]
- 12.4.33 The focus of the Council and the Rule 6 parties' evidence in this case was Vineyard Gate. The Appellant maintains that this is not planned investment for the purposes of NPPF paragraph 26 despite having policy support in the development plan as it is not at a 'very advanced stage'. The long-standing policy support without any development is a counter indicator. If it is unlikely to come forward it is immaterial whether the proposed development at Tollgate goes ahead or not. [8.4.34, 8.4.35, 8.4.37]
- 12.4.34 Vineyard Gate is important in retailing and regeneration terms. To some extent the future of retailing and its growth in the Town Centre is linked with the regeneration of the St. Botolph's area. Vineyard Gate is a key part of the area which would link with the Curzon, the Building Partnerships' St Botolph's development, the reuse of the Co-op, and Priory Walk, linking the core through to the new First Site Art Gallery. [7.4.35]
- 12.4.35 Objectors argue that Vineyard Gate has made progress since the Council ended its agreement with Caddick last year and maintain that it can be considered planned investment despite a CPO possibly being required. They state there is little basis for the contention that Vineyard Gate would have to be at "a very advanced stage" to be considered as planned development. [7.4.29, 7.4.33, 7.4.34]
- 12.4.36 Notwithstanding this the SoS's decision in Scotch Corner indicates that a project must be 'at a very advanced stage'. The PPG states that a key consideration in assessing whether investment is sufficiently advanced is whether contracts are established. There are no contracts in place in respect of Vineyard Gate. There is no overall land ownership and there is no developer, confirmed scheme, or planning permission. Moreover there is no timetable for delivery. A planning performance agreement was only signed during the course of the inquiry. Any development at Vineyard Gate, even if it could overcome the obstacles, is many years away. [8.4.36, 8.4.38]
- 12.4.37 The only commercial evidence is that with the appeal proposal, Vineyard Gate would not go ahead. Notwithstanding that, it is agreed that the investment decision to redevelop Vineyard Gate would be based on securing two or three anchor tenants. Of three anchors being targeted,

two, Next and River Island, have made clear that the proposed development would not impact on their decision to retain a presence in the Town Centre. A third potential anchor tenant is not on the Tollgate target list. The evidence therefore suggests that the proposal would not unduly influence the key stage of Vineyard Gate securing its anchor tenants.^[8.4.39]

12.4.38 For these reasons, although the proposal would have some impact, it cannot be concluded that there would be significant adverse impacts upon existing, committed and planned public and private investment. This was also the conclusion reached by the Council's previous retail advisors NLP, although they relied on an impact figure more akin to the Council's. The impact test is passed.^[8.4.33, 8.4.41]

12.5 Prematurity

12.5.1 The PPG states that "Arguments that an application is premature are unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, taking the policies of the Framework and any other material considerations into account. Such circumstances are likely, but not exclusively, to be limited to situations where both:

- a) The development proposed is so substantial or its cumulative effect would be so significant that to grant permission would undermine the plan making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan or neighbourhood planning; and
- b) The emerging plan is at an advanced stage but is not yet formally part of the development plan for the area".^[8.8.1]

12.5.2 The PPG goes on to state that where planning permission is refused on grounds of prematurity, the local planning authority will need to indicate clearly how the grant of permission for the development concerned would prejudice the outcome of the plan-making process. This requires a planning judgement and accepts that there could be exceptions to the guidance.^[6.5.1, 7.6.1, 8.8.1, 8.8.2]

12.5.3 If the sequential and impact tests are failed then the appeal should be refused. If they are passed, as in this case, then the Council has a difficulty arguing that the proposed development is central to the emerging plan when it has been found to cause no significant adverse impact to the Town Centre.^[8.8.3]

12.5.4 Much work has been done towards the emerging development plan, including a retail study by C&W. Although the study's conclusions are not agreed, there is no challenge to its scope, which seeks to address issues identified in the NPPF. The direction of travel of the Local Plan is set out in ID/59 and addresses all the NPPF paragraph 23 issues. The Council maintains that granting permission in this case would reduce such questions to an irrelevance in considering the emerging plan.^[6.5.2, 6.5.3]

12.5.5 However, in the absence of a published, draft plan, it is impossible to test whether the proposed development would pre-determine decisions that are

central to it. That is particularly relevant in this case as the emerging development plan adopts a collaborative approach with neighbouring authorities in bringing forward new settlements. These might require their own facilities. The emerging plan will proceed in two stages, with the first being a joint plan for North Essex also embracing Braintree and Tendring. The Council states that there may be a joint retail hierarchy covering not just these three areas but also Chelmsford. In these circumstances where the details of the emerging plan are unknown it is impossible to say that the proposed development would undermine a retail hierarchy that is central to it.^[6.5.4, 8.8.4]

- 12.5.6 Both the Council and the Rule 6 Parties indicated that the proposed development could undermine the prospect of a district centre being provided in a potential new garden community identified in the Preferred Options Consultation. However, this scheme is not being actively promoted. In any event, the North Essex Garden Communities Peer Review includes the conclusion that the West Colchester/Marks Tey garden community would be “large and complex ... to deliver on its own. It is absolutely dependent on upgrading the A120 and has complex land ownership. As a result, it may take longer for the Councils to deliver this development than the other two sites”. In addition, the garden communities would have a peak debt of £481m, with no positive return until 2053 highlighting how ambitious their delivery would be. Finally the report’s view is that the current local plan timetable is ambitious.^[8.8.5, 8.8.6, 8.8.10]
- 12.5.7 There is no test in the guidance about the delay that would occur if a decision was made to wait for a new plan to be adopted. It would though conflict with NPPF paragraph 14, which directs decision makers to approve developments that accord with the development plan without delay.^[8.8.7]
- 12.5.8 The Council suggested that the proposed development would consume all the retail capacity for the Borough and so pre-determine retail decision-making. However, the Council’s capacity assessment is not agreed. Addressing only one of eight criticisms would lead to additional capacity being created, and addressing all eight criticisms might demonstrate that there is significant additional capacity.^[8.8.8]
- 12.5.9 Even if the Council is right about capacity, there would remain all but part of one of the ten items set out in NPPF paragraph 23 that would have to be addressed in the emerging plan. A town centre is much more than comparison goods shopping, and there is more that could be done in the emerging plan to recognise the Town Centre as the heart of the community and to ensure its ongoing vitality and viability.^[8.8.9]
- 12.5.10 I conclude that the prematurity argument does not meet the guidance and that in this case there is no good reason that would justify making an exception to the guidance. The proposal would not be premature.^[8.8.10]

12.6 Accessibility/Sustainability

- 12.6.1 The Council asserts that the proposed development would be unsustainable by reason of it being car dominated and providing a poor pedestrian environment. The Appellant’s TA accepts that the proposal would lead to

an additional 95,000 vehicle trips a week to the development. The Council's untested evidence shows non car modal share would be 1-3%. Access would, therefore, predominantly be by private car. [6.6.2, 6.6.3, 8.7.1]

- 12.6.2 Notwithstanding that, the location enjoys a reasonable level of accessibility albeit poor in comparison to the Town Centre. The extent of population within walking distance of the Town Centre is greater than Tollgate. The site would provide access to a 20 min service to perhaps 20% of the population whereas the Town Centre provides access to virtually the entire population of urban Colchester. The Town Centre benefits from a rail link which the appeal site doesn't have. In addition, car journeys to the Town Centre would be shorter minimising travel by all modes and reducing carbon dioxide levels generated. Pedestrian journeys are 4 times more likely in a Town Centre and bus use 4-15 times more likely. [6.6.3, 6.6.5]
- 12.6.3 The Council criticises the existing pedestrian and cycle routes through the wider Tollgate area which it considers unfriendly. However, measures are proposed to encourage access to the appeal site by non-car means, including the provision of footways and cycleways, pedestrian crossings, and the opportunities to create pedestrian and cycle routes through the appeal site to link the separate parts of the district centre and provide much improved access. The proposed measures are shown on Drawing IT698/SK/15. This is in addition to the public transport contributions in the Section 106 Agreement. These would be significant benefits. [6.7.1, 6.7.2, 8.7.6]
- 12.6.4 The Council agrees three points. Firstly, there is no policy test requiring car dominated proposals to be refused. Indeed, such a test would be inconsistent with the NPPF. [8.7.1, 8.7.2]
- 12.6.5 Secondly, NPPF paragraph 32 indicates that for all developments that generate significant amounts of movement, account should be taken of whether the opportunities for sustainable transport modes have been taken up. Paragraph 34 states that decisions should ensure developments that generate significant movement are located where the need to travel will be minimised and the use of sustainable transport modes can be maximised. [8.7.3]
- 12.6.6 Thirdly, locations within the Stanway growth area, including the appeal site, are viewed under Policy SD1 as being at the top of the hierarchy for sustainable locations for housing and employment development. This must also apply to the appeal site being used for retail uses. This is all the more so when it is remembered that the Tollgate District Centre, which is part of and which surrounds all of DZ1, is wholly within the Stanway growth area identified as being highly sustainable. [8.7.4, 8.7.8]
- 12.6.7 In addition, the Council accepts that all but two practicable opportunities to promote sustainable transportation had been taken. These were that the car parking within the development should be charged and that double the amount of Public Transport Contribution should have been sought under the Section 106 Agreement between the Appellant and the Council. However, no justification for the two measures has been provided. [8.7.5]
- 12.6.8 Requiring parking charges would be an unjustified control on the development. It is not necessary and would fail the tests for conditions and

Section 106 planning obligations. The suggestion that the public transport contribution should be doubled is inconsistent with the Council's agreement to the contribution set out in the Section 106 Agreement. The judgment that must necessarily have been made by the Council is that the requested contribution, which amounts to subsidising the bus service for a period of 5 years, compared to 10 years, meets the tests set out in regulation 122 of the Community Infrastructure Levy (CIL) Regulations.^[8.7.7]

- 12.6.9 In relation to dependence on the private car, the Council relies on the Stane Park decision. Policy TA1 was not mentioned in the reason for refusal on sustainability grounds in this case. Although Policy TA1 was deemed in accordance with the NPPF in Stane Park, and it involved less parking spaces than now proposed, each case should be considered on its own merits. In this case the site is identified as being in a sustainable location and measures are proposed that would benefit the pedestrian and cycling environment and encourage travel by modes other than the car.^[6.6.4]
- 12.6.10 In my view, the third reason for refusal relates to accessibility, particularly as Tollgate District Centre is within the Stanway growth area that is identified as being highly sustainable. The Council seems to equate unsustainability with inaccessibility which in the light of NPPF paragraphs 7 and 14 is wrong. I conclude that the Council's third reason for refusal is not justified.

12.7 Impact on the Highway Network

- 12.7.1 NPPF paragraph 32 states that "Development should only be prevented or refused on transport grounds where the residual cumulative impacts of development are severe." This is a very high bar to clear. Only the Rule 6 Party and not the Council, ECC, or Highways England consider that the residual impact would be severe.^[8.5.1]
- 12.7.2 The point at issue is the traffic generation rate, albeit only the weekend peak hour trip rate. However, it is agreed that the trip rate makes a substantial difference to the consequential assessment of congestion. Where there is little detail, as here, it is reasonable to assume the worst case, which is a fashion based retail park with tenants such as M&S, Next and River Island and no bulky goods restrictions.^[7.5.1, 8.5.1]
- 12.7.3 Both the Rule 6 Parties, and the Appellant, consider the best available evidence to be a survey of the Tollgate Centre in July 2014, which showed a two way trip rate of 9.38. This is on the opposite side of the road to the appeal site, is a park not individual units, and includes some fashion and high street outlets. However, the Appellant used a trip rate figure of 6.216, provided by ECC, albeit that this trip rate interrogation has not been provided due to ECC not renewing its TRICS licence. Whilst the survey might be the best, it is not the only, information. A TRICS survey of the Chelmer Village Retail Park provided a trip rate of 6.286 based on a similar tenant mix and corroborates the ECC trip rate.^[7.5.2, 7.5.3, 8.5.2, 8.5.3, 8.5.4]
- 12.7.4 The Appellant suggests that peak spreading and cross visitation might help mitigate any problems and that drivers might use a different route. There is little scope for the former in a busy 6 hour weekend trading day, cross

visitation would already be addressed to some extent by the survey covering the whole park not individual units and there is little scope in the immediate locality for diverting routes.^[7.5.4, 7.5.5, 7.5.6, 8.5.5, 8.5.8]

- 12.7.5 Using the ECC trip rate, the Rule 6 Parties maintain there would be a residual impact at junctions 5 and 9. However, three sets of improvements are planned for junction 5 including improvements funded by the highways contribution payable by this scheme. Junction 9 is within the Tollgate Centre car park. Any impact would be within the car park and users could use the other exit at junction 8 preventing any severe impact.^[7.5.3, 8.5.6]
- 12.7.6 The unsupported starting point of the Rule 6 Parties is assessing whether the RFC at any junction exceeds 1. Once the RFC exceeds 1 it produces anomalous results as modelling just shows cars joining the queue rather than reflecting real life behaviour. In any event, that approach has no policy basis. The joint position statement on highways confirms that “even under the robust assumption that all spaces within the car park would turn over in one hour, significant levels of queuing would not occur.” In fact, the Appellant’s analysis shows a maximum queue in this robust scenario of 19 vehicles compared to the Rule 6 Parties’ prediction of 449.^[7.5.3, 7.5.7, 8.5.7, 8.5.9, 8.5.11]
- 12.7.7 In agreement with ECC the TEMPRO growth factor has not been applied but the key developments that are likely to lead to an increase in traffic were agreed. Just two of these developments increased the base flow above the TEMPRO growth factor but the local highway network is compact with traffic able to by-pass the area by using the A12.^[8.5.10]
- 12.7.8 It is accepted that there would be some impact but, like the Council, ECC and Highways England, I consider that this residual impact would fall short of the severe impact required by NPPF paragraph 32.^[7.5.7, 8.5.12]

12.8 Benefits^[8.9]

- 12.8.1 The benefits of the scheme would include the provision of construction and operational employment in both induced and indirect jobs; £16.9 m p.a. gross value added to the local economy; promotion of the Town Centre through the contributions provided for in the Section 106 Agreement; and, local employment opportunities for nearby residents (including a local recruitment scheme committed through the Section 106 Agreement).
- 12.8.2 In addition, the scheme would enhance retail choice and competition for local residents; create a sense of place and heart for the Stanway growth area; provide substantial public realm improvements; increase pedestrian, cycle and public transport links; and, provide for the linkage of the disparate parts of the district centre by creating a permeable and pedestrian friendly development.
- 12.8.3 The Council accepts the economic and social benefits but doubts the environmental benefits on the basis of its view on dominance by the car. The scheme is in outline and whilst there is little information at this stage I see no reason why, despite the predominance of the car, the proposals

would not provide significantly improved provision for pedestrians and cyclists.

12.9 Conditions and Section 106 Obligation

- 12.9.1 Should the SoS be minded to allow the appeal I consider that a number of conditions would be necessary, not least to ensure that the development remains within the parameters examined at the Inquiry.^[11.1.1, 11.1.2]
- 12.9.2 Suggested conditions 1, 2, and 3 relate to time limits and to the reserved matters and their approval and implementation. These should be attached. Suggested condition 4 relating to approved plans is not agreed between the parties. The appellant has no objection to the Design and Access Statement (DAS) being mentioned but does not consider that reference to the Masterplan is necessary. The drawing in DAS Section 4 has a level of detail for DZ3 that is similar to that found for DZ1 and DZ2 on the documents referred to in the suggested condition. The parameter plans for DZ3 only refer to plots rather than building footprints as they do for DZ1 and DZ2. I consider it necessary from an urban design/townscape view that the same level of detail is required for DZ3. The appellant maintains that the floorspace dispersal table in paragraph 4.7 of the Design Principles controls where floorspace will go and it should also be referenced.
- 12.9.3 There is also some disagreement about suggested condition 5 relating to phasing. In my view it would be sufficient to require the submission, and approval of, a phasing plan prior to any development commencing.
- 12.9.4 Construction, opening and delivery hours are addressed by suggested conditions 6, 7 and 8 respectively. There is general agreement on demolition and construction, and delivery, hours. In the interests of the amenity of local residents I see no reason to reach a contrary view and these should be attached. In respect of opening hours, the Council states that it was minded to allow the later time of 23:00 hours and that there was no objection from its Environmental Control Team. There is little evidence that reducing the opening hours to 18:00 hours would have any significant impact on the vitality and viability of the Town Centre. The reduced hours would, therefore, be unnecessary and the condition should be attached with the later opening hours.
- 12.9.5 I do not agree with the Council that suggested condition 9 is confusing as the totals exceed the sum of the maxima. The reason is to allow flexibility in size but with an overall cap which is what the condition would achieve. It should be attached.
- 12.9.6 Suggested conditions 10 to 14 relate to control of floorspace and uses to ensure that any impact of the proposal would be as that considered at the inquiry. There is little disagreement about the need for conditions 10, 11, and 14 and I see no reason to come to an alternative view. However, I disagree with the appellant that there is no need for condition 12. The appellant undertook in the DAS to provide small units. These would be required to provide townscape interest and to encourage pedestrian movement through the site. Setting a maximum unit size in condition 13

would effectively preclude the necessary anchor stores. Reference has been made to the Scotch Corner appeal but that differs from this case as there are no anchors in the type of retail development proposed there. Reference to 1800m² should therefore be removed.

- 12.9.7 To protect the amenity of local residents during construction, suggested condition 15, requiring a Construction Method Statement, should be attached. Suggested Conditions 16, 17, 18, and 34 relate to contamination measures and should also be attached to safeguard future users of the site. There are some variations in levels across the site so to ensure no greater impact than would otherwise exist site and floor levels should be approved as required by suggested condition 19.
- 12.9.8 To protect the character and appearance of the area, materials and landscaping details should be required as suggested conditions 20 and 21, together with a landscape management plan as suggested condition 33. Similarly, suggested conditions 22 and 23 relating to cycle parking and loading unloading and manoeuvring details should be required. A Travel Plan, as suggested condition 26 should also be required in the interests of highway safety and to encourage access by more sustainable modes of transport. Also in the interests of highway safety, condition 27, vehicle parking provision should be attached.
- 12.9.9 In the interest of community safety suggested conditions 28, 29, 30, 31 and 32 would be necessary. These relate to a Site Management and Security Plan, a scheme to deter the removal of trolleys, details of refuse and recycling storage facilities, details of equipment, facilities and arrangements for disposal and collection of litter and a scheme for the control of fumes smells and odours.
- 12.9.10 It is accepted that there would be an impact on the highway network and so to provide mitigation conditions 24 and 25 requiring some highways works before commencement and other works before occupation would be necessary.
- 12.9.11 Suggested condition 35 seeks to prevent retailers or cinema operators with outlets in Colchester Town Centre from closing the Town Centre outlet to take up a new outlet in the proposed development at Stanway. I acknowledge that there are examples of where such conditions have been imposed and have been found legal. It is generally agreed that any protection should be in the period immediately prior to occupation of any new unit. I consider that initial protection would mitigate the impact and that 12 months would be an appropriate period for triggering such a requirement. Both 5 and 10 years have been suggested as reasonable periods for protection and it is also suggested that the retained presence should be in the same premises as currently occupied and selling the same range of goods or operating the same number of cinema screens. However, I consider such restrictions would be unreasonable. There might be many reasons, unrelated to Stanway, why it might become necessary to close such a Town Centre premises particularly over a period of 10 years. I consider that 5 years would be reasonable.
- 12.9.12 The Council supports additional conditions 36, 37 and 38 suggested by the Rule 6 Parties. Suggested conditions 36 and 37 would require necessary

traffic related works. These would be necessary to mitigate acknowledged traffic impacts and so should be attached. Whilst condition 37 refers to access points, it is egress points that need to be retained in order to aid reduced queuing. The amended condition should also be attached.

- 12.9.13 Suggested condition 38 seeks to preclude free standing market stalls externally. Such a measure would have little impact on other existing centres and is therefore unnecessary. Whilst the Council is concerned about excessive visual clutter I do not consider that suggested condition 39 to control advertising would be necessary. In any event advertising is covered by other legislation which ought not to be duplicated in planning conditions.
- 12.9.14 At the end of the Inquiry a signed Agreement between the Appellant and the Council was submitted. During the Inquiry the Council produced a note to justify the provisions of the S106 agreement against the requirements of Community Infrastructure Regulation 122.
- 12.9.15 The agreement makes provision for Public Transport Schedule 1 by requiring a public transport contribution. Real costs have been ascertained for providing the existing community bus service and the contribution would fund an extra daily round trip. I note that the Council hoped to secure two round trips a day but consider that one would adequately meet the CIL Regulation tests.
- 12.9.16 Town Centre Schedule 2 acknowledges that there would, in the early days, be some impact on the Town Centre and requires a contribution towards marketing the Town Centre to mitigate that impact. Although the Council again sought double the agreed contribution the contribution is based on an assessment of mounting an effective campaign. The CIL tests would be met.
- 12.9.17 Litter picking beyond the site area for a period of 5 years is required by Schedule 3 Environmental Measures. Given the number of likely A3-A5 outlets and the expected footfall the requirement would satisfy the CIL Regulation tests.
- 12.9.18 Schedule 4 Highways works (trunk road) and Schedule 5 Highway works (local network) would require the funding of mitigation measures for the increase in traffic in the surrounding area. The former would require specified works to junction 26 whilst the latter would address waiting restrictions and works to improve capacity on the western by-pass where additional congestion is expected.
- 12.9.19 As employment land would be lost Schedule 6 Recruitment scheme would provide for the provision of skills training to local school leavers or the unemployed. I note that such schemes have been used previously in the area and consider the CIL Regulation tests would be met in this case.
- 12.9.20 A Travel Plan would be required by Schedule 7 to encourage modal shift away from the private car. This would comply with NPPF paragraph 36 and CS Policy TA1. The proposal would attract additional footfall late into the evening and it would be reasonable to extend the Towns CCTV cover, schedule 8, to the area around the development. The cost is based on a

similar development in East Colchester roughly the same distance away. I consider that all the provisions would meet the tests in the CIL Regulation 122.

13.0 Overall Conclusion and Recommendation

13.1 Overall Conclusion

- 13.1.1 Some aspects of the proposal are not consistent with the development plan, in particular the retail policies, albeit that these should be given little weight. On balance, I consider that the proposals are contrary to the development plan taken as a whole. It is necessary to consider whether there might be other material considerations, including the NPPF, that would indicate a decision other than in accordance with the development plan as a whole.
- 13.1.2 In this case both the sequential and impact tests set out in the NPPF, but not required by the development plan, have been passed. The proposal would not be premature and the location is accessible. The retail scheme would have a slight impact on the vitality and viability of the Town Centre but not the severe adverse impact required by NPPF paragraph 27. Whilst there would be some impact on the highway network it would also fall short of the severe impact required by the third bullet point in NPPF paragraph 32 to prevent development. In addition the proposal would provide a number of benefits many of which are accepted by the Council.
- 13.1.3 I consider that the social, economic and environmental benefits identified in section 12.8 above would reflect NPPF paragraph 7. These benefits, together with the considerations set out in paragraph 13.1.2 above amount to material considerations that would justify a decision other than in accordance with the development plan in this case.

13.2 Recommendation

- 13.2.1 I recommend that the appeal be allowed and planning permission be granted, subject to the conditions in Appendix C and the Section 106 Agreement ID/75.

Ken Barton

INSPECTOR

Appendix A

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Sasha White QC	Instructed by the Corporate Governance Manager, Colchester Borough Council
He called	
Vincent Pearce MRTPI	Planning Projects Specialist, Colchester Borough Council
Chris Watts MTCP MRTPI	Associate, Cushman and Wakefield
Simon Parfitt BA MSc MIT MILT MIHT	Director, David Tucker Associates Did not appear but Proof taken as read

FOR THE RULE 6 PARTIES (GBRE Global Investors, Fenwick Limited, and M&G Real Estate):

William Hicks QC	Instructed by Town Legal LLP, 1 London Wall Buildings, London EC2M 5PG
He called	
Ian Anderson BSc(Hons) DipTP MA MRTPI	Senior Director, Cushman & Wakefield
Alistair Parker BA BPL MRICS MRTPI	Partner, Cushman & Wakefield
Philip Bell BEng(Hons) MCIT MILT MIHT	Director, Motion Consultants Limited

FOR TOLLGATE PARTNERSHIP LIMITED:

Christopher Katkowski QC assisted by Andrew Byass of Counsel	Instructed by Barton Willmore LLP, 7, Soho Square, London W1D 3QB
He called	
Justin Bass MSc MCILT MCIHT	Technical Director, Intermodal Transportation Limited
Paul Newton BA(Hons) DipTP MRTPI	Partner, Barton Willmore

Peter Barefoot FRICS

Partner, Alder King

Did not appear but submitted a written statement concerning Employment Land

INTERESTED PERSONS:

Sir Bob Russell

Janus van Helfteren

Irene Samson

Simon Crow

Cllr Gerard Oxford

Andrew Guest

Tim Dow

Nicholas Chilvers

Marcus Harrington

Kim Adcock

Jonathan Palmer

Leanne Windridge

Jeremy Hagon

Brigitte Fraser

Angel Kalyan

Ron Levy

Scott Everest

Roger Steel

Mark Payne

Shaun Boughton

Cllr Sue Lissimore

Cllr Kevin Bentley

Trevor Manning

Chris Manning Press

Cllr Fiona Maclean

Cllr Young

Cllr Dominic Graham

Alan Woolcroft

Cllr Jackie Maclean

Pam Schomberg

Statement read out on behalf of
Rt Hon Priti Patel MP

Cllr Paul Smith

Appendix B**DOCUMENTS SUBMITTED BEFORE THE INQUIRY OPENED**

CD No.	(A) Planning Application Documents	Date
A.1	Application Covering Letter, including list of Application Documents	4 th February 2015
A.2	Application Form & Certificate	4 th February 2015 (amended 12 th February 2015)
A.3	Parameter Plans, including Site Location Plan	January 2015
A.4	Design Principles	January 2015
A.5	Design & Access Statement	January 2015
A.6	Planning Statement	February 2015
A.7	Retail & Leisure Assessment	February 2015
A.8	Transport Assessment (4 Volumes) & Highway Capacity Plan	January 2015
A.8.1	Transport Assessment Volume I	
A.8.2	Transport Assessment Volume II	
A.8.3	Transport Assessment Volume III	
A.8.4	Transport Assessment Volume IV	
A.8.5	Highway Capacity Improvement Plan: IT698/TA/03	
A.9	Travel Plan Framework	January 2015
A.10	Employment Land Study	January 2015
A.11	Landscape & Visual Appraisal	January 2015
A.11.1	Landscape & Visual Appraisal – Main Report	
A.11.2	Landscape & Visual Appraisal – Appendix A	
A.11.3	Landscape & Visual Appraisal – Appendices B, C & D	
A.12	Indicative Landscape Masterplan	November 2014
A.13	Ecological Appraisal	January 2015
A.13.1	Ecological Appraisal – Main Report	
A.13.2	Ecological Appraisal – Appendices A & B	
A.14	Arboricultural Impact Assessment	January 2015
A.15	Flood Risk Assessment	February 2015
A.16	Health Impact Assessment	January 2015
A.17	Statement of Community Involvement	January 2015

CD No.	(B) Planning Application Documents & Correspondence from Applicant submitted after the Initial Submission	Date
B.1	Tank Validation Report	January 2011
B.2.1	Response to LPA's Preliminary Comments	March 2015
B.2.2	Parameter Plans (revised)	March 2015
B.3	Letter to CBC regarding ECC comments	9 th April 2015
B.4	Reptile Survey	May 2015
B.5	Retail & Leisure Assessment Supplementary Information	June 2015
B.6	Letter to CBC enclosing letter of support from British Land	9 th July 2015
B.7.1	Letter to CBC regarding additional documents	12 th August 2015
B.7.2	Geo-Environmental Desk Study Report	August 2015
B.7.3	Revised Landscape & Visual Appraisal – Main Report Rev A	July 2015
B.7.4	Indicative Landscape Masterplan ref: 1607 01 (revised)	November 2014 – Revised July 2015
B.8	Response to CBC Spatial Policy Officer Comments, incorporating response to NLP Retail & Employment Critique	3 rd December 2015
B.9	Highway Drawings submitted to CBC	3 rd December 2015
B.9.1	IT698/SK/09	

B.9.2	IT698/SK/10	
B.9.3	IT698/SK/11	
B.9.4	IT698/SK/12	
B.9.5	IT698/SK/13 Rev A	
B.9.6	IT698/TA/03 Rev A	
B.10	BW comments on CBC's Draft Conditions & S106 Heads of Terms	4 th February 2016
B.11	Letter to CBC regarding Planning Committee Meeting	15 th February 2016

CD No.	(C) LPA Correspondence	Date
C.1	Application Registration Letter	12 th February 2015
C.2	Preliminary Comments on Application by Vincent Pearce – Part 1	23 rd February 2015
C.3	Preliminary Comments on Application by Vincent Pearce – Part 2	24 th February 2015
C.4	EIA Screening Opinion	4 th March 2015
C.5	Email from Vincent Pearce – retail comments	24 th April 2015
C.6	Draft Conditions & S106 Heads of Terms	22 nd January 2016

CD No.	(D) Key Consultation Responses & Other Application Comments	Date
D.1	CBC Contaminated Land Officer	16 February 2015
D.2	CBC Environmental Control Officer	17 February 2015
D.3	CBC Contaminated Land Officer	26 August 2015
D.4	CBC - NLP Retail & Employment Land Critique for CBC	29 October 2015
D.5	CBC Spatial Policy	November 2015
D.6	ECC Flood & Water Management and 2 x enclosures	25 February 2015
D.7	ECC Economic Growth & Development	6 March 2015
D.8	ECC Highway Authority	26 November 2015
D.9	Highways Agency	19 February 2015
D.10	Highways England	31 July 2015
D.11	Highways England	13 August 2015
D.12	Stanway Parish Council	4 March 2015
D.13	Natural England	5 March 2015
D.14	Anglian Water	5 March 2015
D.15	Chelmsford City Council	1 April 2015
D.16	Colchester Retail Business Association	16 April 2015
D.17	Vineyard Gate Developments Ltd	13 May 2015
D.18	GL Hearn on behalf of M&G Real Estate	14 May 2015
D.19	CBRE on behalf of Fenwick Ltd and Sovereign Land Ltd	15 May 2015
D.20	Motion on behalf of Sovereign Land	22 May 2015
D.21	Redwood Consulting on behalf of M&G Real Estate, Sovereign Land (Management) Ltd & Fenwick	18 June 2015
D.22	Colchester Cycling Campaign	27 June 2015
D.23	The Right Hon. Priti Patel MP	24 August 2015
D.24	Eight Ash Green Parish Council	10 September 2015
D.25	Curzon	Undated. Published 16 February 2016

CD No.	(E) Officers Reports to Committee & Decision Notice	Date
E.1.1	Officers Report to Planning Committee Meeting on 17 th December 2015	-
E.1.2	Appendix to Officers Report 17 th December 2015	-
E.1.3	Amendment Sheet to Officers Report 17 th December 2015	-
E.2.1	Officers Report to Planning Committee Meeting on 18 th February	-

CD No.	(E) Officers Reports to Committee & Decision Notice	Date
	2016	
E.2.2	Appendix 1 to Officers Report 18 th February 2016	-
E.2.3	Appendix 2 to Officers Report 18 th February 2016	-
E.2.4	Amendment Sheet to Officers Report 18 th February 2016	-
E.3	Decision Notice	19 th February 2016

CD No.	(F) Planning Policy Documents	
F.1	The National Planning Policy Framework	
F.2	Planning Policy Guidance (online version)	
F.3	Colchester Borough Council LDF / Local Plan Documents	
F.3.1	Core Strategy (Adopted December 2008)	
F.3.2	Development Policies (Adopted October 2010)	
F.3.3	Site Allocations (Adopted October 2010)	
F.3.4	Focused Review of Core Strategy and Development Policies (Adopted July 2014)	
F.3.5	Proposals Map – Colchester Inset (October 2010)	
F.3.6	Proposals Map – Colchester Central Area Inset (October 2010)	
F.3.7	Proposals Map Key	
F.4	Focused Review of Core Strategy & Development Policies	
F.4.1	Issues and Options Consultation (March 2013)	
F.4.2	Report to Local Plan Committee Meeting on 29 th July 2013	
F.4.3	Minutes Local Plan Committee Meeting on 29 th July 2013	
F.4.4	Draft Submission Document (August 2013)	
F.4.5	Barton Willmore EiP Hearing Statement including Representations to Issues and Options, Draft Submission and Modification consultation stages.	
F.4.6	Inspector's Preliminary Comments (November 2013)	
F.4.7	Inspector's Post Hearing Note 1 (January 2014)	
F.4.8	Consultation on Post Hearings Modification – Tracked Changes Document February 2014	
F.4.9	Barton Willmore / TPL Representations to Post Hearing Modifications Consultation (February 2014) dated 28 th March 2014	
F.4.10	Inspectors Report (8 th May 2014)	
F.5	Emerging Colchester Local Plan	
F.5.1	Issues and Options Consultation (January 2015)	
F.5.2	Barton Willmore / TPL Representations to Issues and Options Consultation dated 27 th February 2015	
F.5.3	Colchester Borough Council Emerging Local Plan 2017-2033 - Preferred Options Consultation (July 2016) – Main Document	
F.5.4	Colchester Borough Council Emerging Local Plan 2017-2033 - Preferred Options Consultation (July 2016) – Proposals Maps & Key	
F.5.5	Barton Willmore / TPL Representations to Preferred Options Consultation dated 13 th September 2016	
F.5.6	Consultation Responses – Report to Local Plan Committee on 9 November 2016 and Appendices	
F.5.7	Local Development Scheme August 2016	
F.6	Colchester Borough Council – Local Plan Evidence Base Documents	
F.6.1	Colchester Employment Land Needs Assessment, Final Report - prepared by NLP (January 2015)	
F.6.2	Colchester Borough Council – Retail Update 2013 – Retail and Town Centre Uses Study – prepared by NLP (March 2013)	
F.6.3	Colchester Borough Council – Retail and Town Centre Study 2016 – prepared by Cushman & Wakefield (December 2016)	
F.7	Stanway Parish Plan & Design Statement (March 2011)	
F.8	Tollgate – A Framework Vision (July 2013)	
F.9	St Botolphs Quarter – Masterplan Planning Guidance (July 2005)	
F.10	Colchester Cycling Delivery Strategy SPD (January 2012)	
F.11	Colchester Strategic Plan 2015-18	

F.12	Parking Standards – Design and Good Practice SPD (September 2009)
F.13	Guidance on Transport Assessment, CLG / DfT (March 2007)
F.14	CBC Revolving Investment Fund Committee Report 10 August 2016

CD No.	(G) Planning History Core Documents	
G.1	Tollgate Planning Performance Agreement	27 August 2013
G.2	Tollgate Planning Performance Agreement	11 March 2014
G.3	Tollgate Retail Park Decisions	
G.3.1	Appeal Decision T/APP/A1530/A/94/240436/P4	12 January 1995
G.3.2	Decision Notice – ref: 121573	23 October 2012
G.4	Land South of Tollgate West	
G.4.1	Decision Notice – ref: 070391	1 December 2008
G.4.2	Decision Notice – ref: 080640	1 December 2008
G.4.3	Decision Notice – ref: 071932	1 December 2008
G.5	Application: 160868 - Tollgate Village Duplicate Application	
G.5.1	Report to Planning Committee 24 November 2016 – Main Report	
G.5.2	Report to Planning Committee 24 November 2016 – Appendix 1	
G.5.3	Report to Planning Committee 24 November 2016 – Appendix 2	
G.5.4	Planning Committee Amendment Sheet 24 November 2016	
G.5.5	Decision Notice	28 November 2016

CD No.	(H) Relevant Planning Applications in Colchester	
H.1	New Sainsbury's store, north of London Road, Stanway – Revised Application (Ref: 101173)	
H.1.1	Scheme Drawings	-
H.1.2	Decision Notice	7 September 2010
H.1.3	Officers Delegated Report	-
H.2	Floral Acres	
H.2.1	Decision Notice – ref: 130789	17 July 2013
H.2.2	Report to Planning Committee ref: 130879	-
H.2.3	Decision Notice – ref: 144615	24 June 2014
H.2.4	Report to Planning Committee ref: 144615	-
H.3	Horkesley Park – Secretary of State Decision and Inspector's Report	16 April 2014 12 February 2014
H.4	Tollgate West Business Park – Appeal Ref: App/A1530/A/14/2212689	
H.4.1	Appellant Appeal Statement	January 2014
H.4.2	LPA Appeal Statement	Undated
H.4.3	Correspondence	28 March 2014
H.4.4	Appeal Decision	9 May 2014
H.5	Land West of Stanway Western Bypass and north of London Road, Stanway, Colchester (Stane Park) – Appeal Refs APP/A1530/W/15/3139492 & APP/A1530/W/15/3139491	
H.5.1	Proof of Evidence of Chris Watts	May 2016
H.5.2	Proof of Evidence of Jim Leask	May 2016
H.5.3	Proof of Evidence of Karen Syrett	May 2016
H.5.4	Proof of Evidence of Simon Parfitt	May 2016
H.5.5	Proof of Evidence of Martin Robeson	May 2016
H.5.6	Proof of Evidence of John Stephenson	May 2016
H.5.7	Appeal Decision	Amended Decision - 6 September 2016
H.6	Northern Gateway – Ref: 160825	

CD No.	(H) Relevant Planning Applications in Colchester	
H.6.1	NLP Leisure and Town Centre Critique	3 October 2016
H.6.2	CBC Spatial Policy comments	14 October 2016
H.6.3	Report to Planning Committee 1 December 2016	-
H.7	Cherry Tree Grange Appeal Decision	20 July 2009

CD No.	(I) Appeal Decision Core Documents	
I.1	APP/G2815/V/12/2190175 – Land Adjacent Skew Bridge Ski Slope, Northampton Road, Rushden (Rushden Lakes)	11th June 2014
I.2	APP/N2345/W/15/3130141 – Land north of Eastway, Fulwood, Preston	15 th January 2016
I.3	APP/Y1110/W/15/3005333 – Land north of Honiton Road and West of Fitzroy Road, Exeter	30th June 2016
I.4	APP/Z1510/A/14/2219101 – Broomhills Industrial Estate, Pods Brook Road, Braintree	25 th June 2015
I.5	APP/U2615/W/15/3136604 – Land Adjoining to the East Jones (GC) Way, Pasteur Road, Great Yarmouth	22 nd September 2016
I.6	APP/L1765/C/16/3141998 – Molly's Den, Wessex Gate, Moorside Road, Winchester	21 st September 2016
I.7	APP/V2723/V/15/3132873 & APP/V2723/V/16/3143678 – Barracks Bank, Scotch Corner	1 st December 2016
I.8	APP/FO114/A/13/2191952 - Former Bath Press, Lower Bristol Road, Bath	18 th December 2013
I.9	APP/DO840/W/15/3137929 - Land between the A390, the Park & Ride and Willow Green Farm, Threemilestone, Truro	27 th October 2016
I.10	APP/X1165/A/14/2215950 - Land at Edginswell Business Park, off Orchard Way, Torquay	3 rd February 2015

CD No.	(J) Other Core Documents	
J.1	Tesco v Dundee, UK Supreme Court Judgment March 2012	
J.2	Zurich Assurance v North Lincolnshire, High Court Judgment December 2012	
J.3	Aldergate Properties v Mansfield, High Court Judgment July 2016	
J.4	East Staffordshire v SSCLG and Barwood Strategic Land II LLP, High Court Judgment November 2016	
J.5	Cheshire East BC v SSCLG and Renew Land Developments Ltd, High Court Judgment March 2016	
J.6	Vineyard Gate Land Registry Titles	
J.7	DCLG Planning Update Newsletter January 2015	
J.8	Warners Retail (Moreton) Ltd v Cotswold DC [2016] EWCA Civ 606	
J.9	R. (on the application of CBRE Lionbrook (General Partners) Ltd) v Rugby BC [2014] EWHC 646 (Admin)	
J.10	Gladman Developments Ltd v Daventry District Council [2016] EWCA Civ 1146	
J.11	Suffolk Coastal DC v Hopkins Homes Ltd [2016] EWCA Civ 168	

Appeal Documents

CD No.	(K) Appellant	
K.1	Appeal Form	

CD No.	(K) Appellant
K.2	Statement of Case
K.3	Draft Statement of Common Ground – submitted with Appeal

CD No.	(L) Colchester Borough Council
L.1	Appeal Questionnaire
L.2	Statement of Case
L.3	Emails between CBC, PINS, BW confirming CBC's revised case at appeal.

CD No.	(M) Rule 6 Party
M.1	Statement of Case
M.2	Letter from King & Wood Mallesons dated 30 November 2016

CD No.	(N) Other Appeal Documents
N.1	Agreed Statement of Common Ground between Appellant and LPA dated 5 th January 2017
N.2	Agreed Conditions [NOTE: NOT SUBMITTED. SEE ID2 FOR DRAFT CONDITIONS]
N.3	Draft S106 Agreement – 2 December 2016

DOCUMENTS SUBMITTED AT THE INQUIRY

Inquiry doc. no.	Document description
<u>Day 1</u>	
1.	Draft s. 106
2.	(a) Draft conditions (b) amended draft conditions (handed up day 7) (c) amended draft conditions (handed up day 9)
3.	Javelin email of 28.11.2016
4.	Extract – planning and retail statement March 2013 for Stanway Unit 1 – 2B Tollgate Centre
5.	Experian email of 24.11.16
6.	Email from Hughes Electrical of 6.1.17
7.	Statement from the Rt Hon Priti Patel MP (undated)
8.	Letter Essex Chamber of Commerce of 5.1.17
9.	Mr Bell – Proof of Evidence Errata
10.	Opening Submissions of the Local Planning Authority
11.	Opening Submissions of the Rule 6 Parties

Inquiry doc. no.	Document description
12.	Local Plan Colchester town centre designations
13.	Consolidated Core Strategy (2014)
14.	Opening Submissions of the Appellant
15.	Written Statement of Sir Bob Russell
16.	Written Statement of Mr Janus Van Helfreten
<u>Day 2</u>	
17.	Council's Growth Exercise
18.	CACI Retail Footprint 2015 Rankings
19.	JS Sainsbury S. 106 agreement of 24 March 2010
20.	Simon Cairns email dated 6.1.17
<u>Day 3</u>	
21.	Retail witnesses tables
22.	Retail Planner Briefing Note 14 November 2016 extracts
23.	Vineyard Gate land ownerships as at 6.1.17
<u>Day 4</u>	
24.	Local Plan Newsletter – December 2016
25.	PPG, Ensuring the vitality of town centres, accessed 13.1.2017
26.	Fig PAB-11, reported queues length analysis corrected analysis – Sunday peak
27.	Fig PAB-A, committed and allocated documents, Tollgate
28.	Access to multi storey carpark note dated 13.1.17
29.	Picady 9 Junctions 9 print out
30.	Bell, exam-in-chief notes
31.	Bell / Bass Agreed Statement dated 13.1.17
<u>Day 5</u>	
32.	Bass Rebuttal substitute page 18
33.	Appx 4, item 4, page 293 addition
34.	Essex County Council email to Rule 6 party dated 20 December 2016
35.	Essex County Council email to Council dated 17.1.17
36.	PPA for St Botolph site dated 6.1.17
37.	PPA for Vineyard Gate site dated 13.1.17
38.	TRICS trip rate retail park excluding food for Chelmer Village Retail Park, and map of Chelmer Village
39.	Bass TRICS data extract from item 4 of JB9, pp 53 and 54
40.	Mr Anderson tables
<u>Day 6</u>	
41.	River Island email dated 17 January 2017
42.	Mr Watts table on revised estimated sales
43.	CIL Justification Note from the Council

Inquiry doc. no.	Document description
44.	Morgan Williams Schedule
45.	Mr Parker town centre plan (large and small scale)
46.	Stane Park list of operators
<u>Day 7</u>	
47.	Mr Anderson table of net floor space figures, version 1
48.	LPA documents for Mr Newton's cross-examination
49.	Joint highways statement
50.	Newton position of existing floorspace – corrected
51.	Newton potential scheme turnover analysis
52.	Planning committee report dated 29 July 2013
<u>Day 8</u>	
53.	Mr Watts Market Share Tables
54.	Sales Density analysis
55.	Mr Anderson table of net floor space figures, version 2
56.	Vineyard Gate retail areas floor space – Mr Parker
<u>Day 9</u>	
57.	Building Partnerships letter re St Botolphs
58.	Lord Kerslake North Essex Garden Communities Peer Review
59.	Local Plan Committee Report
60.	Council's update on Colchester Town Centre
61.	Mr Watts ID48 Update from the appellant
62.	Mr Anderson ID55 Update from the appellant
63.	VOA sheet on Co-Op site
64.	Co-op email dated 23 January 2017
65.	Mr Parker's ID56 update from the appellant
66.	Essex County Standard article dated February 3 2017
67.	Tiviot Way Ltd judgment
68.	Ex parte Milne judgment
<u>Day 10</u>	
69.	Westlaw Summary & Abstract on R (oao Vue Entertainment Ltd) v City of York Council judgment
70.	Cushman & Wakefield Letter to PINS on cinema condition dated 16 February 2017
71.	LPA comments on draft conditions as at 9 February 2017
72.	LPA Closing Submissions
73.	Rule 6 Parties Closing Submissions
74.	Appellant's Closing Submissions
75.	Signed Section 106 Agreement
76.	Bundle of representations made at application stage

Inquiry doc. no.	Document description
77.	Bundle of representations made at appeal stage
78.	Bundle of statements read at evening session of the Inquiry

Appendix C

SCHEDULE OF CONDITIONS

- 1) Reserved Matters – Details Required
Details of the appearance, landscaping, layout, and scale, (hereinafter called "the reserved matters") shall be submitted to and approved in writing by the local planning authority before any development takes place and the development shall be carried out as approved.
- 2) Time Limit – Reserved Matters
Application for approval of the reserved matters shall be made to the local planning authority before the expiration of three years from the date of this permission
- 3) Time Limit - Outline
The development hereby permitted shall be begun before the expiration of two years from the date of approval of the last of the reserved matters to be approved.
- 4) Approved Plans
Details of Reserved Matters shall generally accord with the Tollgate Master Plan (January 2015) as shown on page 24 of the Design & Access Statement (Section 4.0; 4.1.11) as supported by the Parameter Plans (amended March 2015), Design Principles (January 2015) and section 4 of the Planning Statement (February 2015) hereby approved insofar as these are in conformity with all of the restrictions contained in conditions 9, 10, 11, 12, 13 and 14 below. In the event that the Parameter Plans, the Design Principles or section 4 of the Planning Statement are not in conformity with any of condition 9, 10, 11, 12, 13 or 14 then the condition will take precedence. Without prejudice to the generality of the foregoing, the gross area, use classes, maximum developable commercial floorspace and building heights in each Development Zone shall be in accordance with the table in paragraph 4.7 of the Design Principles.
- 5) Phasing
The development shall be carried out in accordance with a phasing plan and no development shall commence until a phasing plan has been submitted to, and approved in writing by, the local planning authority.
- 6) Demolition and Construction Hours
No demolition or construction work shall take outside of the following times;
Weekdays: 08.00 to 18.00hrs
Saturdays: 09.00 to 13.00hrs
Sundays and Bank Holidays: none
- 7) Opening Hours
The use hereby permitted shall not be open to customers outside of the following times:
Weekdays: 07.00-23.00

Saturdays: 07.00-23.00

Sundays and Public Holidays: 09.00-23.00

With the exception of the Class A3, A4, A5 and D2 uses which can open until 01:00 7 days a week.

8) Delivery Hours

No deliveries shall be received at, or despatched from, the site outside of the following times:

Weekdays: 07.00 to 22.00

Saturdays: 07.00 to 22.00

Sundays and Public Holidays: 09.00 to 22.00

9) Use Classes and Floor Space

The Class A1, A2, A3, A4 and A5 floorspace hereby permitted shall not exceed 24,122 sq.m. gross. Notwithstanding this, the maximum floorspace within individual use classes shall not exceed:-

- Class A1 comparison goods: 21,314 sq.m. gross, of which no more than 14,920sq.m net shall be sales area.
- Class A1 convenience goods: 1,858sq.m. gross, of which no more than 1,394sq.m. net shall be sales area
- Class A3, A4 and A5 floorspace shall not exceed 2,100 sq.m gross

The Class D2 floorspace hereby permitted shall not exceed 6,690sq.m and any floorspace within Class D2 used for the purposes of a cinema shall in aggregate be of no more than 3,450 sq.m. gross, and have no more than 1,300 cinema seats and no more than 8 screens.

10) Net Retail Sales Area

The net retail sales area defined as the area within the walls of the shop or store to which the public has access or from which sales are made, including display areas, fitting rooms, checkouts, the area in front of checkouts, serving counters and the area behind used by serving staff, areas occupied by retail concessionaires, customer service areas, and internal lobbies in which goods are displayed; but not including cafes and customer toilets, in the development hereby permitted shall not exceed the net floorspace levels permitted and identified in Condition 9.

11) Use Class

Notwithstanding the provisions of the Town & Country Planning (General Permitted Development) Order 1995 (as amended), or in any amending Order, the floorspace hereby approved shall be limited in accordance with the following schedule;

- a) The A1 convenience goods floorspace hereby approved shall not be used for any other purpose whatsoever, including for the sale of comparison goods
- b) The Class A3, A4 and A5 floorspace hereby approved shall not be used for any other purpose whatsoever
- c) The Class D2 floorspace hereby approved shall not be used for any other purpose whatsoever

12) Small Local Shops

Development of Development Zone 1 and Development Zone 2 shall include the completion to core and shell of the three small freestanding buildings shown in the East Plaza prior to any other part of development on Development Zone 1 or Development Zone 2 coming into beneficial use.

13) Maximum and Minimum Unit Sizes

All Class A1 retail units hereby permitted shall have a minimum unit size of 500 sq m gross, with the exception of a maximum of 10 units which shall have no minimum unit size and a maximum unit size of 500 sq m gross.

14) Restriction on Mezzanine Floor Space

Notwithstanding the definition of development the creation of any mezzanine level or intermediate floorspace within any building or part of a building within this development is not permitted without the further grant of planning permission for an expansion of floorspace from the local planning authority.

15) Construction Method Statement

No works shall take place, including any demolition, until a Construction Method Statement has been submitted to and approved, in writing, by the local planning authority. The approved Statement shall be adhered to throughout the construction period and shall provide details for:

- the construction programme;
- the parking of vehicles of site operatives and visitors;
- storage of plant and materials used in constructing the development;
- the erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate;
- wheel washing facilities;
- measures to control the emission of dust and dirt during construction; and
- a scheme for recycling/disposing of waste resulting from demolition and construction works.
- routing for vehicles delivering construction materials
- location of compounds
- health & safety measures to protect public during construction
- methodology for breaking up concrete slab and crushing
- noise suppression measures
- arrangements for exceptional events
- arrangements for the display of contact details on site in prominent locations for the public to report issues to the site manager

16) Contamination – Investigation and Risk Assessment

No works shall take place in any Development Zone until an investigation and risk assessment, in addition to any assessment provided with the planning application, has been completed for that Zone in accordance with a scheme to assess the nature and extent of any contamination on the site, whether or not it originates on the site. The contents of the scheme are subject to the approval, in writing, of the local planning authority. The investigation and risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing of the local planning authority. The report of the findings must include:

- (i) a survey of the extent, scale and nature of contamination, including contamination by soil gas and asbestos;
- (ii) an assessment of the potential risks to:
 - human health,
 - property (existing or proposed) including buildings, service lines and pipes,
 - adjoining land,
 - groundwaters and surface waters,
 - ecological systems,
 - archaeological sites and ancient monuments;
- (iii) an appraisal of remedial options, and proposal of the preferred option(s). This must be conducted in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11' and the Essex Contaminated Land Consortium's 'Land Affected by Contamination: Technical Guidance for Applicants and Developers'.

17) Contamination – Remediation Scheme

No works shall take place in any Development Zone until a detailed remediation scheme to bring that Zone to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment has been prepared and then submitted to and agreed, in writing, by the local planning authority. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, timetable of works and site management procedures. The scheme must ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

18) Contamination – Remediation Scheme Notification of Works and Verification/Validation report

The local planning authority must be given two weeks written notification of commencement of the remediation scheme works and the approved remediation scheme must be carried out in accordance with the details approved before the development is first occupied/brought into use. Following completion of measures identified in the approved remediation scheme, a verification/validation report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the local planning authority before the development is occupied/brought into use.

19) Site and Floor Levels

No works shall take place in any Development Zone until detailed scale drawings by cross section and elevation that show the development of that zone in relation to adjacent property, and illustrating the existing and proposed levels of the site, finished floor levels and identifying all areas of cut or fill, have been submitted to and agreed, in writing, by the local planning authority. The development shall thereafter be completed in accordance with the agreed scheme before each of the relevant Development Zones is first occupied.

20) Details of Materials

Notwithstanding any details shown on the illustrative elevations, no works shall take place in any Development Zone until precise details of the manufacturer and types and colours of the external facing and roofing materials to be used in construction for that Zone have submitted to, and approved in writing by, the local planning authority.

21) Landscape Works

No works shall take place within any Development Zone until full details of all landscape works in that Zone have been submitted to and agreed, in writing, by the local planning authority and the works shall be carried out prior to the occupation of any part of the development unless an alternative implementation programme is subsequently agreed, in writing, by the local planning authority. The submitted landscape details shall include:

- Proposed finished levels or contours;
- Means of enclosure;
- Car parking layouts;
- Other vehicle and pedestrian access and circulation areas;
- Hard surfacing materials;
- Minor artefacts and structures (e.g. furniture, play equipment, refuse or other storage units, signs, lighting etc);
- Planting plans;
- Written specifications (including cultivations and other operations associated with plant and grass establishment);
- Schedules of plants, noting species, plant sizes and proposed numbers/densities where appropriate; and
- Implementation timetables.

Any planting plan submitted and agreed to must include provision that any tree, shrub or hedge plant (including replacement plants) removed, uprooted, destroyed, or caused to die, or which become seriously damaged or defective, within five years of planting, shall be replaced by the developer or their successors in title, with species of the same type, size and in the same location as those removed, in the first available planting season following removal.

22) Details of Cycle Parking Facilities

Prior to the commencement of the development within any Development Zone, details of the number, location and design of cycle parking facilities for that Zone shall be submitted to and approved, in writing, by the local planning authority. The approved facility shall be secure, convenient and covered and shall be provided prior to occupation within that Zone (including those located within other zones but serving the Zone in question) and retained for that purpose at all times thereafter.

23) Details of Loading, Unloading and Manoeuvring Areas

Prior to the commencement of development within any Development Zone the areas within that Zone for the purpose of loading, unloading and manoeuvring of all vehicles including construction traffic, as well as a timetable for their implementation, (including those located within other zones but serving the Zone in question) shall have been submitted to and approved, in writing, by the local planning authority. The areas for loading,

unloading and manoeuvring shall then be provided in accordance with the agreed details for that Zone and shall be retained at all times for that sole purpose .

24) Highway Improvements

No work shall commence until the following design details relating to improvements to the A12 Eight Ash Green (Junction 26) have been submitted to, and approved in writing by, the local planning authority. The scheme shall generally conform to the arrangements shown in outline (including the signals to be provided by others) on drawing IT698/SK/09 Improvements at A12 Eight Ash Green Interchange, dated June 2015. Scheme details shall include drawings and documents showing:

- How the improvement interfaces with the existing highway alignment and carriageway markings including lane destinations;
- Full construction details relating to the highway improvement. This should include any modification to existing structures or proposed structures, with supporting analysis;
- Full signing and lighting details where applicable; and
- Confirmation of full compliance with Departmental Standards (DMRB) and policies (or approved relaxations/departures from standards from the local planning authority).

The scheme shall be implemented and completed as approved. No beneficial occupation shall take place unless and until the junction improvements (including the signalisation of both the Ipswich bound and London bound off slips of the A12) have been delivered and are fully operational.

25) Highway Works

No occupation of the development shall take place until the following have been fully completed and made available for use:

- a) Signalisation of the A12 Trunk Road Junction 26 as shown in principle on planning application drawing number IT698/SK/09
- b) The road markings amended at the Stanway Western Bypass/Sainsbury's access roundabout as shown in principle on planning application drawing number IT698/SK/10. Works to include 'Get in lane' road signs
- c) The road markings amended at the Stanway Western Bypass/London Road roundabout as shown in principle on planning application drawing number IT698/SK/11. Works to include 'Get in lane' road signs
- d) Widening of and the road markings amended at the Tollgate West (East) arm at the Stanway Western Bypass/Tollgate West roundabout as shown in principle on planning application drawing number IT698/SK/12
- e) The repositioning and enlargement of the Tollgate Road/Tollgate West roundabout, widening of Tollgate Road north arm, enlargement of the Tollgate West/Tollgate Retail Park access/site access roundabout and widening of Tollgate West between the two roundabouts to provide two full width running lanes in both directions as shown in principle on planning application drawing number IT698/TA/03A

- f) An egress from the proposal site car park onto Tollgate Road, widening of Tollgate Road and a central island in Tollgate Road as shown in principle on planning application drawing number IT698/SK/13A
- g) A minimum 3 metre wide shared footway/cycleway from the toucan crossing in Essex Yeomanry Way to Cherry Tree Farm in London Road with a minimum 2 metre wide uncontrolled crossing point within the existing London Road splitter island
- h) A minimum 3 metre wide shared footway/cycleway along the proposal site's London Road and Tollgate Road frontage
- i) Upgrade the zebra crossing in Tollgate Road south of its junction with Tollgate East to a toucan crossing unless otherwise agreed in writing by the local planning authority.
- j) A toucan crossing in Tollgate West
- k) A minimum 3 metre wide shared footway/cycleway along the proposal site's eastern frontage adjacent the Tollgate Retail Park. Footway/cycleway shall be open to the proposal on its western side
- l) A minimum 3 metre wide shared footway/cycleway along the proposal site's northern frontage onto Tollgate West
- m) An uncontrolled pedestrian crossing (with central refuge) in Tollgate West in the vicinity of the footpath which runs behind Chiquito and Frankie & Benny's
- n) Upgrade the two bus stops in Tollgate West to current Essex County Council specification
- o) Real Time Passenger Information in two prominent locations within the proposal site, one in that part of the site to the north of Tollgate West and one in that part of the site to the south.

26) Travel Plan

No part of the development hereby approved shall be brought into use until a Travel Plan has been submitted to and approved, in writing, by the local planning authority. The Travel Plan shall include, as a minimum a five year commitment to:

- The identification of targets for trip reduction and modal shift and the methods to be employed to meet these targets;
- The mechanisms for monitoring and review;
- The mechanisms for reporting;
- The mechanisms for mitigation;
- Implementation of the travel plan to an agreed timescale or timetable and its operation thereafter;
- Mechanisms to secure variations to the travel plan following monitoring and reviews.

27) Vehicle Parking Provision

Prior to the first occupation of the development within any Development Zone, the vehicle parking area indicated on the approved plans for that Zone (including those located within other zones but serving the Zone in question) including any parking spaces for the mobility impaired, shall have

been hard surfaced, sealed, marked out in parking bays and made available for use. The vehicle parking area shall be retained in this form at all times and shall not be used for any purpose other than the parking of vehicles that are related to the use of the development.

28) Site Management and Security Plan

No part of the development hereby permitted shall be brought into beneficial use until an entire application site wide Management and Security Plan has been agreed in writing with the local planning authority. This plan shall include a description of:-

- CCTV coverage and monitoring arrangements
- On-site security presence
- Methods for securing the site (particularly the car parking areas) outside of business hours
- Litter control and site cleaning
- Public realm maintenance
- Full hoarding details

29) Scheme to Deter the Removal of Trolleys

No works shall commence within any Development Zone until a scheme to deter the removal of trolleys from the site has been submitted to and approved, in writing, by the local planning authority. The scheme shall then be implemented as approved prior to the commencement of the first use of the development hereby permitted within that Zone (including those located within other zones but serving the Zone in question) and retained as such thereafter.

30) Details of Refuse and Recycling Storage Facilities

Prior to the first occupation of the development hereby permitted in any Development Zone, refuse and recycling storage facilities for that Zone (including those located within other zones but serving the Zone in question) shall be provided in accordance with a scheme which shall have been previously submitted to and agreed, in writing, by the local planning authority. Such facilities shall thereafter be retained at all times.

31) Details of Equipment, Facilities, and Arrangements for Disposal and Collection of Litter

Prior to the first occupation of the development hereby permitted in any Development Zone, equipment, facilities and other appropriate arrangements for the disposal and collection of litter for that Zone (including those located within other zones but serving the Zone in question) shall be provided in accordance with details that shall have previously been submitted to, and agreed in writing by, the local planning authority for that Zone.

Any such equipment, facilities and arrangements as shall have been agreed shall thereafter be retained and maintained in good order.

32) Scheme for the Control of Fumes, Smells, and Odours

Prior to the first use of the development hereby permitted in any Development Zone, control measures shall be installed in accordance with a scheme for the control of fumes, smells and odours and noise attenuation to external plant shall have been previously submitted to, and agreed in

writing by, the local planning authority for that Zone. Where appropriate this scheme shall be in accordance with Colchester Borough Council's Guidance Note for Odour Extraction and Control Systems. Such control measures as shall have been agreed shall thereafter be retained and maintained to the agreed specification and working order

33) Landscape and Management Plan

Prior to the first occupation of the development within any Development Zone, a landscape management plan including long term design objectives, management responsibilities and maintenance schedules for all landscape areas for that Zone shall be submitted to and agreed, in writing, by the local planning authority. The landscape management plan shall thereafter be carried out as approved at all times.

34) Unexpected Contamination

In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the local planning authority. An investigation and risk assessment must be undertaken in accordance with the requirements of condition 13, and where remediation is necessary a remediation scheme must be prepared in accordance with the requirements of condition 14, which is subject to the approval in writing of the local planning authority. Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the local planning authority in accordance with condition 17.

35) Dual Representation

None of the approved retail or cinema floorspace should be occupied by any retailer or cinema operator (as relevant) who at the date of such occupation, or within a period of 12 months immediately prior to occupation, occupies retail or cinema floorspace within the Inner or Outer Core of Colchester Town Centre (as defined on the Colchester Central Area Inset Proposals Map, October 2010); unless a scheme which commits the retailer or cinema operator to retaining their presence as a retailer or cinema operator within that Town Centre, for a minimum period of 5 years following the date of their occupation of retail or cinema floorspace within the development, or until such time as they cease to occupy retail or cinema floorspace within the development, whichever is sooner, has been submitted to and approved in writing by the local planning authority.

36) Access

Prior to commencement of development, details of the service access road for Development Zone 1 and Development Zone 2 must be submitted to and agreed in writing by the local planning authority. Such access road shall be constructed prior to occupation of Development Zone 1.

37) Multi-Storey Car Park

The multi-storey car park hereby approved shall have two vehicle egress points which shall be retained at all times following occupation of any part of the development. Such egress points may not be located on the same side of the multi-storey car park.

Appendix D

GLOSSARY

CS	Core Strategy DPD
C&W	Cushman and Wakefield
DP	Development Policies DPD
DZ	Development Zone
ECC	Essex County Council
F&B	Food and Beverage
NLP	Nathaniel Lichfield and Partners
NPPF	National Planning Policy Framework
RFC	Residual Flow Capacity
SA	Site Allocation DPD
SoCG	Statement of Common Ground
SoS	Secretary of State
TA	Transport Assessment
PPG	Planning Policy Guidance
UDC	Urban District Centre



RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act

Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.