



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 46

P621/23

OPINION OF LORD RICHARDSON

In the cause

TESCO STORES LIMITED

Petitioner

against

PERTH AND KINROSS COUNCIL

Respondent

**Petitioner: J Findlay KC, Garrity; Morton Fraser MacRoberts LLP**

**Respondent: Armstrong KC; Harper Macleod LLP**

26 April 2024

**Introduction**

[1] This case concerns the grant by the respondent, on 31 May 2023, of a planning application made by Aldi Stores Limited for the erection of a retail unit and associated works at land west of 4 Pickembere, Pitheavlis, Perth. The site is accessed from Necessity Brae.

[2] In the present proceedings, the petitioner seeks the reduction of the respondent's decision.

## Background

### *The Local Development Plan*

[3] The current Local Development Plan for the application site is the Perth and Kinross Local Development Plan 2 (2019). In terms of the Local Development Plan, the application site is within employment site E165 for employment uses, including hotel and non-residential institutions and is not allocated for retail uses. Accordingly, Policy 7 “Employment and Mixed-Use Areas” applies to the site.

[4] Policy 13 “Retail and Commercial Leisure Proposals” of the Local Development Plan provides as follows:

“The location for any use that generates a significant footfall (retail, commercial leisure, offices, community and cultural facilities and, where appropriate, other public buildings such as libraries, and education and healthcare facilities) should follow a sequential approach in which locations for such development are considered in the following order:

- (a) city or town centre;
- (b) edge of city or town centre;
- (c) other commercial centres identified in the Development Plan;
- (d) out of centre locations that are or can be made easily accessible by a choice of transport modes.

Proposals for any retail and leisure development of 1,500 square metres or more gross floor space outwith a defined town centre boundary, and not in accordance with the Development Plan, will require a transport, retail or leisure impact assessment. Any detrimental effects identified in such an assessment will require mitigation. For smaller developments, the requirement for any impact assessment will be at the discretion of the Council.

Proposals in edge of city or town centre, other commercial centre or out of centre locations will only be acceptable where:

- (1) it can be demonstrated that a proposal helps meet quantitative or qualitative deficiencies in existing provision;
- (2) it is supported by a favourable sequential assessment;

- (3) it is of an appropriate scale;
- (4) it provides improved distribution and accessibility of shopping provision;
- (5) it provides for accessibility to public transport and non-car modes of transport;
- (6) any detrimental effects identified in the transport assessment are mitigated;
- (7) it has been demonstrated that there will be no significant impact (individual or cumulative) on any of the centres within the network of centres."

### *Aldi's application*

[5] On 16 February 2021, Aldi made an application to the respondent for the erection of a retail unit, formation of access, car parking and associated works at the site in Perth.

Subsequent to its application, Aldi submitted a detailed Planning and Retail Statement dated March 2021. This described the proposed development as:

"Detailed planning application for erection of a Class 1 retail foodstore with associated car parking, access, engineering works, landscaping and associated works."

The application made clear that the proposed store was to be a direct replacement for Aldi's existing store at Glasgow Road which could not be extended as a result of physical and operational constraints. The application detailed that the gross floor area of the proposed store was to be 1,884 square metres, of which the sales area would comprise 1,315 square metres. This compared with the existing Aldi store on Glasgow Road which measures 1,173 square metres gross, 760 square metres net. The proposed development was to have 100 parking spaces.

[6] In its application, Aldi submitted that the proposed development would improve shopping provision for Perth and, in particular, would help to meet qualitative and

quantitative deficiencies in the catchment area. In respect of catchment, the application stated:

“2.16 As Aldi stores are of modest scale and fulfil a neighbourhood shopping role, it means more than one store can be accommodated in a Local Authority area or indeed, a town or city. The catchment for a new store is localised and often shoppers to a new Aldi store are existing Aldi customers who have been travelling to their nearest store, but with a new store opening close by, this can reduce the need to travel.”

The Retail Assessment Plan appended to the application showed a catchment area based on an adjusted 7 minute drive time. This extended to the entire southern half of the city of Perth, bounded by the M90 to the south, the A9 to the West, and the River Tay to the east.

[7] Aldi’s application expressly sought to address the terms of Policy 13 of the Local Development Plan. It contained a comprehensive sequential assessment of the proposed site and sought to address how the proposed development would help to meet perceived deficiencies in the pre-existing quantitative and qualitative retail provision within the southern area of Perth. The application also addressed the retail impact of the proposed development. In doing so, the application took account of the fact that Aldi was, as part of the proposed development, going to close its existing store on Glasgow Road. Accordingly, the application focussed on the uplift in turnover arising from the additional floor space created by the proposed development when compared with the Glasgow Road store.

The retail impact assessment concluded that the impact on the city centre would be, essentially, very small but also recognised that the proposed development would impact on pre-existing stores within the catchment area operated by the petitioner along with other major retailers.

[8] On 24 December 2021, the petitioner made representations objecting to the application.

*The respondent's initial report*

[9] On 19 May 2022, the respondent's Head of Planning and Development issued a Report of Handling in connection with the application. Paragraphs 43 and 44 of the report provided as follows:

"43. Aldi currently operate two stores in Perth, with the Glasgow Road store one of the smallest in their Scottish portfolio with a gross floorspace of 1,173sq metres. As such Aldi have been exploring opportunities to improve this stores [sic] offering to be more in line with its other stores, such as through an extension. ... The alternative instead being to relocate to a larger site within the city. As a result of the alternative location, the existing store on Glasgow Road would be closed and the ability of the building to operate as a Class 1 retail facility removed, through a formal revocation.

44. In seeking a new site within the city, Aldi considered a range of options including alternative locations within the city centre, although none were available, nor any sequentially preferable – in terms of retail policy considerations. Following this, efforts were focused on considering sites in the southern part of Perth, given their existing presence at Inveralmond (covering the north area), leading to the selection of the application site. The Necessity Brae site considered to occupy a prominent location, in a walkable location which is highly accessible via a range of sustainable transport modes, given the proximity to the A93. The proposal therefore aligns with the principles contained within the Scottish Government's Retail Strategy for Scotland published in March of this year."

[10] At paragraph 48, the report concluded that the proposed retail use was contrary to Policy 7 of the Local Development Plan. However, the report also identified Policy 13 (above at [4]) as being a key policy in terms of considering the principle of Aldi's proposal.

In respect of that policy, the report concluded:

"... alongside the revocation of the Glasgow Road retail use it is considered that the proposal is in accordance with Policy 13: Retail and Commercial proposals, as it meets the sequential test which indicates there are no suitable opportunities within better locations. In addition, the proposal would see 0.97ha developed of the remaining 2.1ha at E165, leaving 1.13 ha for employment uses. In turn the proposal could allow the existing Aldi site to be utilised for Class 4, 5 and 6 potentially bringing 0.4 ha of serviced employment land forward, which is currently in Class 1 (retail) use." (paragraph 58)

It is clear that the author reached this conclusion, in part, influenced by the findings of a 2016 study which identified spare capacity for new store development in the Perth area.

[11] On this basis, the report recommended granting permission in respect of Aldi's application on the basis that the revocation of the use of the existing Glasgow Road store was secured.

[12] On 1 June 2022, the respondent determined that it was minded to grant planning permission subject to certain conditions.

#### *National Planning Framework 4*

[13] On 13 February 2023, the Scottish Government adopted National Planning Framework 4 ("NPF4"). Thereafter, as a result of section 24 of the Town and Country Planning (Scotland) Act 1997, the Development Plan for the purposes of the 1997 Act comprised both the National Planning Framework and the Local Development Plan.

[14] Policy 28 of NPF4 is entitled "Retail". For present purposes, Policy 28 provides, as follows:

##### *"Policy 28*

a) Development proposals for retail (including expansions and changes of use) will be consistent with the town centre first principle. This means that new retail proposals:

- i. will be supported in existing city, town and local centres, and
- ii. will be supported in edge-of-centre areas or in commercial centres if they are allocated as sites suitable for new retail development in the LDP.
- iii. will not be supported in out of centre locations (other than those meeting policy 28(c) or 28(d)).

b) Development proposals for retail that are consistent with the sequential approach (set out in a) and click-and-collect locker pick up points, will be supported where the proposed development:

- i. is of an appropriate scale for the location;
- ii. will have an acceptable impact on the character and amenity of the area; and
- iii. is located to best channel footfall and activity, to benefit the place as a whole.

c) Proposals for new small scale neighbourhood retail development will be supported where the proposed development:

- i. contributes to local living, including where relevant 20 minute neighbourhoods and/or
- ii. can be demonstrated to contribute to the health and wellbeing of the local community.

d) In island and rural areas, development proposals for shops ancillary to other uses such as farm shops, craft shops and shops linked to petrol/service/charging stations will be supported where:

- i. it will serve local needs, support local living and local jobs;
- ii. the potential impact on nearby town and commercial centres or village/local shops is acceptable;
- iii. it will provide a service throughout the year; and
- iv. the likely impacts of traffic generation and access and parking arrangements are acceptable."

[15] Annex A to NPF4 is entitled "How to use this document" and explains how each policy contained in Part 2 has been set out. The Policy Principles for Policy 28 are stated to be:

"Policy Intent:

To encourage, promote and facilitate retail investment to the most sustainable locations that are most accessible by a range of sustainable transport modes.

Policy Outcomes:

- Retail development and the location of shops support vibrant city, town and local centres.
- Communities can access the shops and goods they need by a range of sustainable transport modes including on foot, by bike, and by public transport, as part of local living.”

The “Policy Intent” was provided to aid plan makers and decision makers to understand the intent of each policy and help deliver policy aspirations. The “Policy Outcomes” of Policy 28 are said to set out what the drafters of the document want to achieve and are to influence future monitoring of the planning system.

[16] NPF4 also contains a Glossary of definitions in Annex F.

*The respondent's supplementary report*

[17] On 10 February 2023, the respondent’s Head of Planning and Development issued a Supplementary Report of Handling in connection with the application. This report was issued following the approval by the Scottish Parliament of NPF4 on 13 January 2023 and, presumably, in anticipation of its subsequent adoption.

[18] The supplementary report began by recognising the decision on 1 June 2022 that it was minded to approve the application subject to the signing of a legal agreement with the developer securing developer contributions and the restriction on the use of the Glasgow Road site. The Supplementary Report then identified that Policy 28 of NPF4 was applicable to Aldi’s application. The Supplementary Report continued, at paragraphs 10 and 11:

“Productive Places supports development which attracts new investment, builds business confidence, and stimulates GDP, export growth and entrepreneurship, as well as facilitating future ways of working. The applicable policy within this section is Policy 28: Retail, which seeks to encourage, promote and facilitate retail investment in the most sustainable locations accessible by a range of sustainable transport modes. The policy states that there may be a need for further retail provision, and this should be first in existing city centres, within edge of centre areas

or in commercial centres – if they are allocated as sites suitable for new retail development. It further states that new retail proposals will not be supported in out-of-centre locations, with some exceptions as stated in part c (i). This allows for proposals for new small scale neighbourhood retail development that contribute to local living (including where relevant 20-minute neighbourhoods), and/or, c (ii) contribute to the health and wellbeing of the local community.

In this case, as fully assessed previously, there are no suitable city centre sites and the LDP has no allocated retail sites which are available or would be suitable for supermarket development. LDP3 will consider this issue through the development plan process. In relation to the application before us it is considered that a supermarket of this scale, which [sic] would not result in a significant increase in overall floor area (711m<sup>2</sup>) out-of-centre, with the existing use to be extinguished – as discussed in the Planning and Retail Statement. Its location within an underserved part of the city would contribute to local living. Particularly the local community would be able to access the premises by a range of sustainable transport modes, supporting the concept of 20-minute neighbourhoods. It is however appreciated that there will be an element of wider draw to the facility.”

[19] The supplementary report concluded at paragraph 13 that:

“... the proposal is contrary to LDP2 Policy 7 in that it would lead to a loss of employment land, but a justification has been provided for the retail need in the area in accordance with Policy 13. In addition, the recommendation is considered to comply with NPF4 [policies] 1, 2, 13, 14, 15 and 28.”

### *The respondent's decision*

[20] On 20 February 2023, the petitioner made further representations in relation to the application. These representations were put before the respondent. Among other points, the petitioner queried whether the proposed development could properly be considered to be a “new small scale neighbourhood retail development” in terms of Policy 28(c).

[21] On 23 February 2023, the respondent reconsidered the planning application in light of the Scottish Government’s adoption of NPF4 and in light of the Supplementary Report of Handling. The respondent resolved to grant planning permission subject to a section 75 Agreement (under the 1997 Act) and subject to the conditions set out in the supplementary report.

[22] On 31 May 2023, the respondent granted the planning permission.

### **The petitioner's arguments**

[23] The petitioner seeks the reduction of the respondent's decision on two related grounds.

### *The law*

[24] Senior counsel for the petitioner submitted that the legal context for the respondent's decision was not in dispute between the parties. The dispute concerned the application of the law to the particular circumstances of the case. In particular, the petitioner's arguments were focussed on whether the respondent had properly interpreted Policy 28 of NPF 4. In this regard, senior counsel drew attention to what Lord Reed had said in *Tesco Stores v Dundee City Council* 2012 SC (UKSC) 278 at paragraphs 17 to 19 as to the correct approach to the interpretation of policy statements: they required to be interpreted objectively in accordance with the language used, read as always in its proper context. Such statements were not to be read as though they were statutes or contracts. Sometimes, the provisions of development plans were framed in language whose application to a particular set of facts required the exercise of judgment. Nevertheless, as Lord Reed put it:

“... planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”  
(paragraph 19)

Senior counsel also referred to the helpful summary provided by the Senior President of Tribunals, Sir Keith Lindblom in *Corbett v Cornwall Council* [2022] EWCA Civ 1069 at paragraph 19.

*The petitioner's first argument*

[25] First, the petitioner argues that the respondent erred in law in failing to address the opening phrase of Policy 28 paragraph (c). The respondent had failed to address the issue of whether the proposed development was a “small scale neighbourhood retail development”.

[26] The starting point for the petitioner’s first argument is that the application site is in an out of centre location. Therefore, paragraph (a)(i) of NPF4 Policy 28 does not apply. Further, the application site is not allocated as a site suitable for new retail development in terms of the Local Development Plan (paragraph 48 of the Report of Handling). Therefore, it does not satisfy paragraph (a)(ii) of NPF4 Policy 28. Accordingly, the petitioner argues that the application will not be supported by NPF4 unless it is a “new small scale neighbourhood retail development” and otherwise meets one or both of the criteria in paragraph (c) of Policy 28.

[27] This issue was not addressed in paragraph 11 of the respondent’s supplementary report (above at [18]). The reference in that paragraph to the development not resulting in a “significant increase in overall floor area” might have been relevant to the issue of retail impact raised by Policy 13 of the Local Development Plan. However, this simply did not address the issue of the scale and nature of the proposed development.

[28] Senior counsel highlighted that Policy 28 represented a significant tightening up of the policy. Policy 28 made clear that new retail proposals would not be supported in out of centre locations unless the exceptions in Policy 28(c) and (d) were met, whereas Policy 13 allowed for out of centre retail developments provided that a sequential approach was adopted and, where necessary, an impact assessment was prepared.

[29] Senior counsel for the petitioner rejected the respondent’s argument that paragraph 11 of the supplementary report could be construed as being an exercise of

planning judgment in concluding that the net increase of 711 square metres in floor area represented by the proposed development (when the closure of the Glasgow Road store was taken into account) equated to a new small scale neighbourhood retail development. Apart from anything else, neither paragraph 11 nor any other part of the supplementary report actually said this.

[30] Senior counsel also rejected any suggestion that Policy 28 might be said not to apply to relocations. It was contended that such an approach to the interpretation of the policy would leave a gaping lacuna within it. Paragraph (c) of Policy 28 represented a concept exception to the restriction on retail development proposals in out of centre locations where such developments were small scale neighbourhood developments which fulfilled one or both of the criteria in that paragraph. As such, paragraph (c) did not contemplate or allow for a “netting” argument which might have been relevant when considering, for example, the net impact on the city centre.

[31] Looked at objectively, there was no way in which Aldi’s application for an 1800 square metre development, with 100 car parking spaces, having a catchment area of half of the city could be said to be a “small scale neighbourhood development”. One would require to apply the logic of Humpty Dumpty to conclude otherwise.

### *The petitioner’s second argument*

[32] In the alternative, the petitioner argues that the respondent has failed to provide adequate and intelligible reasons for concluding that the proposed development was a “small scale neighbourhood development”. The construction which the respondent now sought to place on paragraph 11 of the Supplementary Report (above at [18]) was not supported by any material before the respondent when the decision was made.

### **The respondent's arguments**

[33] The respondent seeks the dismissal of the petition.

#### *The law*

[34] Like the petitioner, senior counsel also referred both to *Tesco Stores* (above at [24]), at paragraphs 17 to 20. Senior counsel also drew attention to the “seven familiar principles” (which originate from the judgment of Lord Justice Lindblom (as he then was) in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2017] PTSR 1283 at paragraph 19 and, in particular, the fifth principle:

“(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question: see the judgment of Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment (Practice Note)* [2017] PTSR 1075, 1076–1077; (1992) 66 P & CR 83, 85.”

[35] Senior counsel also referred to *Corbett* (above at [24]) at paragraph 19(2) at which the Senior President emphasised that, in seeking to establish the meaning of a development plan policy, the court must not allow itself to be drawn into an exhaustive exercise of construction. The court must avoid unduly complex or strict interpretations remembering that development plan policy is not an end in itself but a means to the end of coherent and reasonably predictable decision making in the public interest.

#### *The respondent's four propositions*

[36] Senior counsel advanced and developed four propositions in support of his motion.

*The initial report*

[37] First, the respondent's initial report (above at [9] to [11]) was relevant to the respondent's decision. The initial report was appended to the supplementary report which adopted the earlier report's analysis and conclusions. The initial report set out the approach taken by the respondent to the assessment of the proposed development in terms of the retail policy. The report concluded that the proposed development was, primarily, a relocation and found that it was supported by Policy 13 of the Local Development Plan. The respondent had concluded that the proposed development was "a direct, if slightly larger, replacement for Aldi's existing store at Glasgow Road." (paragraph 53). As such, the initial report represented an exercise of planning judgment which the respondent was entitled to make. It was not challenged by the petitioner.

[38] Senior counsel for the respondent submitted that it was important to recognise that the second paragraph of Policy 13 of the Local Development Plan required an impact assessment for any proposed development of 1500 square metres or more gross floor space (see [4] above). The respondent had concluded that the proposed development in this case did not require such an assessment precisely because it was a relocation which involved the closure of the Glasgow Road site.

[39] The initial report also concluded that the Necessity Brae location was walkable and highly accessible via a range of sustainable transport modes.

*Policy 28 of NPF4*

[40] Second, although the first sentence of Policy 28(a) of NPF4 (above at [14]) applied to all retail development proposals, including expansions and changes of use, the second sentence applied only to "new" retail proposals. On this basis, there was no question that

the first sentence of paragraph (a) of Policy 28 applied to the proposed development in this case - it required to be consistent with the town centre first principle. As to whether a proposal was “new”, that was a question of planning judgment. In this regard, senior counsel drew attention to the fact that elsewhere in NPF4, in the “Cross-cutting Outcome and Policy Links” section, Policy 28 was described as restricting “additional out of town retail development” (emphasis added).

[41] In the present case, as the respondent was dealing with a relocation, the respondent, exercising planning judgment, had focussed on the additional element of the proposed development. If paragraph (a) was read as strictly as the petitioner contended, then relocation for pre-existing developments at out of centre locations would be prevented.

[42] In relation to paragraph (c) of paragraph 28, this was an open-textured policy. The respondent required to exercise planning judgment in order to determine whether a development fell within the scope of “small scale neighbourhood retail development”. Provided that the proposal met one or both of the criteria in paragraph (c), there was nothing in the policy which prohibited an out of centre development from relocating to another out of centre location. The respondent had exercised planning judgment in determining that the small addition to the size of the relocated development was the “new small scale neighbourhood retail development”.

[43] Senior counsel submitted that the petitioner’s approach to Policy 28 was not consistent with its “Policy Intent” (see [15] above). The policy intent was seeking to promote the right development in the right, most sustainable, locations. This was a relevant factor to take into account when one considered the sequential assessments which the respondent had carried out in the initial report in concluding that Policy 13 supported the development. The Policy Outcomes were neutral when considering the proposed development.

Senior counsel suggested that it was not immediately apparent how the outcomes were to apply to a relocation. It was, it was submitted, difficult to see why, in policy terms, a relocation such as the proposed development would offend against either the Policy Intent or Outcomes. Why, it was contended, would it be unacceptable for an out of centre development to relocate further away from the centre?

[44] However, it was clear that neither the intent nor the desired outcome of the policy was the protection of other competing out of centre retailers such as the petitioner.

*The supplementary report*

[45] Third, the respondent's supplementary report, and in particular, paragraph 11 (above at [18]), when viewed in the context of the initial report, could be seen to be proceeding on the basis that as the proposed development was a relocation, which would not result in a significant increase in overall floor area, it fell within the scope of paragraph (c) of Policy 28. This was apparent from the reference in paragraph 11 to "a supermarket of this scale, which would not result in a significant increase in overall floor area (711m<sup>2</sup>) out-of-centre".

*The respondent's reasons*

[46] Fourth, it was clear to the informed reader the approach which the respondent had adopted. This could be seen not least from the objections which had been submitted on behalf of the petitioner. It could not properly be said that the respondent had failed to provide adequate and intelligible reasons.

## **Decision**

[47] The dispute in the present case essentially turns on whether the respondent erred in law in its treatment of Policy 28 of NPF4 and, in particular, paragraph (c) of that policy.

## ***Approach***

[48] The correct approach to be adopted both by the planning authority and the court reviewing the planning authority's decision has been authoritatively set out in Lord Reed's judgment in *Tesco Stores* (above at [24]) at paragraphs 17 to 20. As a starting point, it is necessary for the decision maker properly to interpret the development plan (paragraph 17). The policy statement should be interpreted objectively in accordance with the language used in its proper context (paragraph 18).

[49] Such statements should not be construed as though they were either contracts or statutes. Development plans are full of broad statements of policy framed in language whose application to a given set of facts requires the exercise of judgment. The exercise of such judgment is a matter which falls within the jurisdiction of the planning authority and the exercise of such judgment can only be challenged in the event that it is perverse or irrational (paragraph 19). However, the jurisdiction given to planning authorities to apply the policies contained in the development plan does not detract from the need for the decision maker properly to have interpreted the development plan. On the contrary, it emphasises the importance of this exercise of interpretation.

[50] On this basis, it is for the court to determine whether, as a matter of law, the words of the policy statement are capable of bearing the meaning which the planning authority has ascribed to them. In carrying out that exercise, I consider that it is useful to bear in mind the

“basic points” emphasised by the Senior President, Sir Keith Lindblom, at paragraph 19 of

*Corbett* (as above at [24]):

“(2) In seeking to establish the meaning of a development plan policy, the court must not allow itself to be drawn into the exercise of construing and parsing the policy exhaustively. Unduly complex or strict interpretations should be avoided. One must remember that development plan policy is not an end in itself but a means to the end of coherent and reasonably predictable decision-making in the public interest, and the product of the local planning authority’s own work as author of the plan. Policies are often not rigid, but flexible enough to allow for, and require, the exercise of planning judgment in the various circumstances to which the policy in question applies. The court should have in mind the underlying aims of the policy. Context, as ever, is important (see *Gladman Developments Ltd. v Canterbury City Council* [2019] EWCA Civ 699, at paragraph 22, and *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610, at paragraphs 16, 17 and 39).

(3) The words of a policy should be understood as they are stated, rather than through gloss or substitution. The court must consider the language of the policy itself, and avoid the seduction of paraphrase. Often it will be entitled to say that the policy means what it says and needs little exposition. As Lord Justice Laws said in *Persimmon Homes (Thames Valley) Ltd. v Stevenage Borough Council* [2005] EWCA Civ 1365 (at paragraph 24), albeit in the context of statutory interpretation, attempts to elicit the exact meaning of a term can ‘founder on what may be called the rock of substitution – that is, one would simply be offering an alternative form of words which in its turn would call for further elucidation’.”

#### ***Policy 28 of NPF4***

[51] In considering Policy 28, it is first necessary to consider paragraph (a). The first sentence of which appears straightforward: “Development proposals for retail (including expansions and changes of use) will be consistent with the town centre first principle.”

The meaning of “town centre first” is set out in the “Glossary of definitions” in Annex F to the Framework document:

“The Town Centre First Principle asks that government, local authorities, the wider public sector, businesses and communities put the health of town centres at the heart of decision making. It seeks to deliver the best local outcomes, align policies and target available resources to prioritise town centre sites, encouraging vibrancy, equality and diversity.”

[52] The question which then arises is the meaning of the second sentence of paragraph (a) and, in particular, what is meant by the word “new”. As I understood it, the respondent sought to argue that “new” should be understood to be qualifying “retail”. In other words, whereas the first sentence of paragraph (a) applied to all retail development proposals, the second sentence had a more restricted scope and applied only to “new retail” as that phrase was applied by the planning authority.

[53] I am not persuaded by this argument. It seems to me to fall into precisely the kind of overly complex construction which Sir Keith Lindblom warns against in paragraph 19(2) of *Corbett*. As I understood it, the argument was developed by the respondent in order to distinguish between development proposals which related to pre-existing retail as opposed to “new” retail. While I can see how such an approach could potentially be relevant to a proposed development which involved the relocation of pre-existing premises (such as the present case), I struggle to conceive of other examples in which the distinction which the respondent sought to draw would be relevant. Furthermore, such a construction would appear to mean that retail developments which were not “new” would not require to conform to the three sub-paragraphs ((i) to (iii)) of the second sentence of paragraph (a). Such a result is inconsistent both with the Policy Intent and the second Policy Outcome both of which emphasise the importance of sustainable transport and accessibility.

[54] On this basis, I see no reason not to give the words of the second sentence of paragraph (a) what seems to me to be their plain meaning: namely, that retail proposals being consistent with the town centre first principle means that they require to conform to the three sub-paragraphs set out at (i) to (iii). On this basis, “new” simply describes the retail proposals which are to be considered in light of Policy 28.

[55] It follows from this interpretation that all retail proposals require to conform with the three sub-paragraphs contained in paragraph (a) of Policy 28. In the present case, that has the consequence that the proposed development which is located in an out of centre location will not be supported unless it meets the policy detailed in paragraph (c). (There is no dispute, as I understand it, that the exception contained in paragraph (d) does not apply.)

[56] In paragraph (c), the critical wording, for present purposes, is as follows: "Proposals for new small scale neighbourhood retail development will be supported where the proposed development: ..." I see no reason not to understand these words as they are stated. In order for a proposed retail development to be supported, it requires to be both small scale and a neighbourhood development.

[57] The respondent argues that the wording of paragraph (c) is capable of being interpreted as encompassing a small scale addition to a pre-existing retail development. I disagree. I do so for three related reasons.

[58] First, the respondent's argument effectively disregards the word "neighbourhood". That word importantly qualifies the nature of the retail developments which fall within the scope of paragraph (c). When the word "neighbourhood" is included, I consider that it becomes difficult, if not impossible, to interpret the phrase as encompassing only the net increase in retail development, as contended for by the respondent. It is hard to envisage an addition in itself as being "neighbourhood" - it is the retail development as a whole which would satisfy (or fail to satisfy) this criterion.

[59] In this regard, I consider that it is significant that the policy in paragraph (c), unlike those contained in paragraphs (b) and (d) does not contain any reference to the assessment of impact into which the assessment of what is additional would fit more naturally.

[60] Second, that qualification, which has the effect of restricting the size of retail developments out of centre, is consistent with the first of Policy 28's two Policy Outcomes: "Retail development and the location of shops support vibrant city, town and local centres". This qualification is also consistent with the town centre first principle referred to in paragraph (a) of Policy 28 (see above at [51]).

[61] Third, essentially for the first two reasons, it seems to me that the respondent's argument falls foul of depending upon a gloss or substitution of the sort that Sir Keith Lindblom suggested ought to be avoided in paragraph 19(3) of *Corbett*.

*The petitioner's first argument – the respondent's supplementary report*

[62] When it comes to the respondent's decision, I consider that it is the supplementary report dated 10 February 2023 which is primarily relevant. This is for the simple reason that the respondent did not consider Policy 28 of NPF4 in the initial report.

[63] Looking at the chronology, one can have a degree of sympathy for the respondent requiring, at a relatively late stage in the decision making process, to revisit matters in light of the adoption of NPF4. However, the fact remains that, thereafter, in terms of section 24 of the 1997 Act, the "development plan" for the purposes of the act comprised both the Local Development Plan and NPF4.

[64] The petitioner argues that the respondent failed even to consider the opening words of paragraph (c) of Policy 28, namely, whether the proposed development constituted a "new small scale neighbourhood retail development". Taking into account both paragraphs 10 and 11 of the supplementary report (see [18] above), I do not consider that this is a fair reading. It is reasonably clear from the foot of paragraph 10, that in

paragraph 11 the respondent was specifically considering whether or not the proposed development fell within the scope of paragraph (c) of Policy 28.

[65] However, I do agree with the petitioner that the respondent has failed properly to interpret the words “new small scale neighbourhood retail development” and, in so doing, has erred in law.

[66] In paragraph 11, it appears from the third sentence that the respondent has concluded that, because the proposed development would result only in a 711 square metre increase in overall floor area (when the closure of the Glasgow Road site is taken into account), therefore the proposed development falls within the scope of paragraph (c) of Policy 28. Interestingly, paragraph 11 of the supplementary report does not say this explicitly. Instead, one is left with a somewhat uncomfortably worded sentence which, on one view, appears to be missing its final clause:

“In relation to the application before us it is considered that a supermarket of this scale, which [sic] would not result in a significant increase in overall floor area (711m<sup>2</sup>) out-of-centre, with the existing use to be extinguished – as discussed in the Planning and Retail Statement.”

[67] But, in my opinion, in reaching this conclusion, the respondent has erred by attributing to the words “new small scale neighbourhood retail development” a meaning which they are not capable of bearing. For the reasons which I have set out above (see paragraphs 57 to 61), I do not consider that paragraph (c) of Policy 28 can be interpreted as referring to a small scale increase to a retail development which would otherwise, in no sense, satisfy the requirements of being “small scale” or “neighbourhood”. However, that is plainly what the respondent has done in paragraph 11 of the supplementary report.

[68] I agree with the petitioner that, looked at objectively, there is no way in which a proposal for an 1800 square metre development, with 100 car parking spaces, having a

catchment area of half of the city could be said to be a “small scale neighbourhood retail development” as envisaged by paragraph (c) of Policy 28.

*The petitioner’s second argument – the respondent’s reasons*

[69] It follows from my reasoning in respect of the petitioner’s first argument, that I do not consider that the petitioner’s second argument is well founded.

[70] It seems to me that the reasoning contained within the supplementary report is sufficient to enable both the parties and the court to understand it (see *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 at pages 49 to 50). In this regard, I agree with senior counsel for the respondent that it is clear from the representations made on behalf of the petitioner that the respondent’s approach to Policy 28 was sufficiently clear.

**Disposal**

[71] For completeness, I should note that in its answers, the respondent pled that, in any event, the court should not exercise its discretion to reduce the decision (plea-in-law 5).

However, this argument did not feature in either the written note of argument nor the oral submissions advanced on behalf of the respondent.

[72] Accordingly, in light of the foregoing, I will sustain the petitioner’s first plea-in-law and reduce the respondent’s decision dated 31 May 2023.

[73] It was also a matter of agreement during the course of the debate before me that expenses should follow the event. Accordingly, the petitioner having been successful, I will award the petitioner the expenses of the petition.