

AMENDMENT SHEET

Planning Committee
13 July 2017

AMENDMENTS OF CONDITIONS AND REPRESENTATIONS RECEIVED

- 7.1 160825 – Colchester Northern Gateway, Land at Cuckoo Farm West off United way and Via Urbis Romanae, Colchester

Correction to Report paragraph 15.25. Please substitute and note the following revised wording as below:

“15.25 With regard to the issue of suitability, case law including *Tesco Stores* and *Aldergate Properties v Mansfield DC* has established, subsequent to the publication of the NPPF, that if a site is not suitable for the generic commercial requirements of the development in question (in this case a large-scaled multiplex cinema operation) then it is not a suitable site for the purposes of the sequential approach. Secondly, the availability of alternative sites is to be considered on the basis of suitability of the use as *proposed*, not an altered or reduced development that could be ‘made to fit’ an alternative site.”

Correction to paragraph 15.27 please delete third word, first line (in)

Correction to paragraph 15.29 Please substitute and note the following revised wording as below:

“15.29 The sequentially preferable site at Tollgate Village is able to accommodate the proposed development and is available. Nevertheless the Tollgate Village site does not meet the important test of *suitability* in that the retained operator of the cinema. i.e. Cineworld does not consider the Tollgate Village site to be *suitable* for its operational needs. Lichfields have provided further clarification on this point in their response to representations made by Barton Wilmore on behalf of Tollgate Partnership Ltd (see letter of 5 July). In particular Lichfields state: “*Cineworld’s explanation as to why the TV site is unsuitable is a valid material planning considerations, because the concerns are not operator specific. In our view these will be important considerations for any large scale multiplex cinema operators looking to locate in Colchester not just Cineworld, i.e. all large cinema operators will require a prominent and accessible location.*” The locational deficiencies identified in the case of Tollgate Village are therefore generic to the needs of the development and therefore TV is not a suitable site. In terms of the sequential test

requirements in the NPPF it is consequently considered that these are met in the case of the application site.

Additionally, it is noted that the Lichfields Critique comments on the issue of the viability limb of the sequential test as follows:

'...A critical mass of Class A3-A5 uses will be needed to underpin the viability of the cinema and leisure uses. In our view it is doubtful that the TV [Tollgate Village] location can support around 9000 sq. m of F&B [Food & Beverage] floorspace, and on this basis the TV could be considered to be unviable for the scale of development proposed at NG [Northern Gateway]...'

Your officers accept the Lichfields assessment in this regard."

Further representations have been received from Barton Willmore and response from Lichfields in their capacity as advisors to the Local Planning Authority

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20638/A3/AI/PN
3rd July 2017

BY EMAIL: Bradly.Heffer@colchester.gov.uk

Dear Mr Heffer

FULL PLANNING APPLICATION ON LAND AT CUCKOO FARM WEST, COLCHESTER
APPLICATION REF: 160825
FURTHER OBJECTION ON BEHALF OF TOLLGATE PARTNERSHIP LTD

We act on behalf of Tollgate Partnership Ltd ("TPL"), a key stakeholder, landowner and promotor of the Tollgate Village proposal in Colchester. TPL has previously objected to the above application by letters dated 23rd May 2016, 29th November 2016 and 24th April 2017. The objections included a Legal Opinion from Leading Counsel and highlighted a number of flaws in the Applicant's approach to promoting the application, the advice prepared by NLP on behalf of Colchester Borough Council (CBC) and Officers assessment of the application in the report to the 1st December 2016 Planning Committee.

The Application was subsequently withdrawn from the 1st December 2016 Planning Committee meeting in light of these representations which focused on i) the sequential test and ii) whether there is a fall-back for the proposed development.

Since that time, the Applicant has submitted a Supplementary Leisure Assessment prepared by Carter Jonas (March 2016) ("the SLA"), an Addendum Supplementary Leisure Assessment (May 2017) and the Council has commissioned Lichfields (formerly NLP) to critique the Addendum (June 2017). The Council's Policy response simply accepts the advice from Lichfields.

Following a review of the above, we maintain our position that the Applicant's approach to the sequential test is flawed and that the Critique provided by Lichfields does not robustly assess the scheme in a manner which demonstrates it is acceptable against the terms of the sequential or impact tests. We therefore maintain our **objection** to the application. We provide further comment on the Addendum and Critique below, although we do not repeat every point made previously in our various objections.

Sequential Test

We note that Lichfields accept in its Critique that the site known as Tollgate Village is sequentially preferable to Northern Gateway. Lichfields also recognise that the site is available and physically capable of accommodating the proposed development.



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However, in seeking to discount the site, they erroneously assess the Tollgate Village scheme, rather than the site subject of the Tollgate Village appeal. This is not the correct application of the sequential test.

Lichfields appear to discount the Tollgate Village site on the assertion by Cineworld, the proposed operator of the Northern Gateway cinema, that their cinema would not be viable in an alternative location. Lichfields, despite recognising that no evidence has been provided in relation to viability / funding, simply accept the very limited arguments put forward by Cineworld / Carter Jonas and themselves admit that they have taken Cineworld's statement that Tollgate is not of interest at 'face value'. This is however irrelevant in terms of the proper application of the sequential approach. Clearly, if sequentially preferable sites were discounted on the basis of a contractual commitment to an out-of-centre location, it would render the sequential test irrelevant.

As we have already set out, the approach taken by Carter Jonas and accepted by Lichfields is flawed and contrary to the principles established in the Aldergate v Mansfield High Court judgment. In that case, the locational specific justification for a scheme based on the requirements of an individual operator (as opposed to assessing the proposed use) in discounting alternative sites, was **firmly rejected**. Lichfields has failed to adequately address this matter in its Critique.

Notwithstanding this fundamental point, we are also surprised that Lichfields accept Cineworld's / Carter Jonas' suggestion that that the Northern Gateway cinema has to be located next to the A12. Tollgate is clearly in close proximity and easily accessible from the A12 and Cineworld already operate a number of cinemas in similar or less accessible locations. Further, the suggested requirement that a cinema has to be adjacent to the A12 is weakened by the presence of its cinemas in Ipswich to the north and Braintree to the west.

Further, at the Tollgate Village Inquiry the Council argued that Tollgate currently has a wide attraction, drawing trade from across the Borough. Without any detailed evidence, to suggest that such a popular and accessible location would somehow not be viable for a cinema cannot be sustained.

Whilst Lichfields refer to the PPG in relation to locational requirements, the PPG is clear that "*Robust justification must be provided where this is the case, and land ownership does not provide such a justification*". Only very limited justification has been provided and is predicated on the assumed contractual position with Cineworld.

Similarly, the suggestion that the cinema would only be viable with circa 9,000 sq m of A3-A5 uses has not been justified by either Carter Jonas or Lichfield. Tollgate currently provides a number of such uses, with further uses to come forward as part of the Stane Park scheme and potentially as part of the Tollgate Village scheme or an alternative scheme in the future. Flexibility has also failed to be applied in this respect, contrary to the sequential test requirements.

We are concerned that the Council and its advisors appear to be actively looking for ways to support the development of an out-of-centre location, without appropriate justification, rather than correctly applying the sequential test in order to support development of a part in / part edge-of-centre location, consistent with the NPPF requirements.

We therefore maintain our position that, as it stands, the justification by Carter Jonas and critique by Lichfields fail to demonstrate compliance with the sequential test. Planning permission should therefore be refused on this basis as required by NPPF paragraph 27.

Impact

We maintain the position set out in our previous representations in relation to the evidence provided by Colchester Borough Council at the Tollgate Village Inquiry and the potential impact of a cinema on the Town Centre.

It should be noted that the Council's evidence to the Inquiry was presented after Lichfields had previously advised on the Northern Gateway application, so the current advice does not represent new evidence or a change in circumstance that has arisen since that time.

Similarly, at the Inquiry concern was raised in relation to the quantum of A3-A5 uses. For Lichfields to then readily accept that a greater quantum of such uses would be acceptable at Northern Gateway, cannot be accepted as robustly demonstrating compliance with the sequential test.

Lichfields have failed to address our comments and their advice is in clear conflict with, and entirely contrary to, the case presented by the Council at the Inquiry. This matter requires full consideration before the application can be determined.

As it stands, compliance with the impact test has not been robustly demonstrated and the application should therefore be refused.

Material Considerations

We note that Lichfields consider whether there are any material considerations that would outweigh non-compliance with the sequential test. Lichfields consider that such considerations would need to be "very significant and compelling". Based on the information provided by Carter Jonas and Lichfields, there are no such material considerations that would outweigh a failure to demonstrate compliance with the sequential test. We are therefore surprised with the comments set out in the Council's Policy response in that respect.

The NPPF (paragraph 27) is very clear that *"Where an application fails to satisfy the sequential test...it should be refused"*.

Therefore, should the Council accept, as it must, that the application fails to comply with the sequential test, then it must be refused.

Summary and Conclusions

Arising from the above, we maintain that the key issues raised in our previous representations are still not addressed by either the Applicant, the Council's retail / leisure advisor, or the Council's Policy Team.

It is clear that the sequentially preferable Tollgate Village site is available and suitable for the proposed development. The suggested 'viability' arguments put forward by the Applicant and Lichfields are predicted on very limited information relating to the suggested commercial requirements of Cineworld. They are however without foundation and clearly contrary to the principles of the Aldergate v Mansfield case. The Applicant continues to mis-apply the sequential test and as a result the only proper conclusion is that the application has to be **refused**.

In relation to impact, the advice from Lichfields is contrary to the case presented by the Council at the Tollgate Village Inquiry. The Council should adopt a consistent approach in the consideration of such applications. As it stands, compliance with the impact test has not been robustly demonstrated.

We would be grateful if you could confirm how you intend to deal with the matters raised in this letter. Please do not hesitate to contact Paul Newton or Alistair Ingram at this office should you wish to discuss further.

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Date: 5 July 2017
Our ref: 13184/03/PW/PW/14397115v3
Your ref:

Dear Mr Heffer

**FULL PLANNING APPLICATION ON LAND AT CUCKOO FARM WEST,
COLCHESTER**

APPLICATION REF: 160825

FURTHER OBJECTION ON BEHALF OF TOLLGATE PARTNERSHIP LTD

Thank you for forwarding the objection letter dated 3rd July 2017, submitted by Barton Willmore (BW) on behalf of Tollgate Partnership Ltd.

The letter makes three main claims:

- 1 Lichfields has not robustly assessed the application in relation to the sequential test;
- 2 There are no material considerations that outweigh the failure to comply with the sequential test; and
- 3 Lichfields' advice in relation to the impact test is not consistent with the Council's evidence presented at the Tollgate Village Inquiry.

Sequential Test

BW incorrectly claims Lichfields has assessed the Tollgate Village (TV) scheme rather than the site subject of the Tollgate Village appeal. Paragraphs 3.9, 3.17 and 5.8 of Lichfields' our report state:

"Regardless of the outcome of the TV appeal, the TV site could accommodate the uses proposed at NG. The TV site can accommodate a large multiplex cinema. The TV site cannot be deemed to be unavailable for the proposed development at NG based on the content of the two schemes as claimed by CJ. The TV site cannot be considered to be unavailable in sequential terms."

"The TV site is large enough to accommodate the scale of cinema required by Cineworld, including the creation of a leisure hub. At this stage the TV site cannot be considered to be physically unsuitable. "

"The TV site is available at least until the content of the reserved matters scheme becomes clear. The nature of the Class D2 leisure floorspace proposed at TV can be amended at the reserved matters stage to accommodate Cineworld's requirement."

It is clear from these statements that Lichfields considered the suitability of the TV site rather than the current TV scheme.

BW claims the sequential approach adopted by the applicant and accepted by Lichfield's is flawed because it is contrary to the principles established in the Aldergate v Mansfield High Court Judgment.

This judgment suggests the sequential test cannot be interpreted as requiring "suitability" and "availability" simply to be judged from the retailer's or developer's perspective, but should 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 case related to a proposed food store, where the intended occupier was Aldi. Aldi indicated they would not occupy a town centre site because it would compete with their existing store, therefore the site was discounted based on Aldi's preference rather than identified deficiencies that made the town centre site unsuitable more generally for the proposed food store use.

In my view the circumstances are different at Northern Gateway. First, the Mansfield decision relates to a medium sized food store, where the scale of store proposed could accommodate the business model/needs of a number of food store operators not just Aldi. In the Northern Gateway case the application proposal is operator specific. Paragraph 3.11 and 3.12 of our report state:

"Cineworld's requirements in this particular case are important because there are no obvious other cinema operators who would occupy a multiplex cinema of the size proposed. Of the big three operators (Cineworld, Odeon and Vue), in recent years Cineworld has focused more on large markets where they can provide cinemas of 10 screens or more within over 4,000 sq.m floorspace. The other operators have tended to focus on smaller cinema.

Cineworld requires a very large multiplex cinema with an IMAX/Superscreen to anchor the leisure destination, which will generate footfall and demand for food and beverage facilities. The food and beverage uses will help to cross fund the cinema and D2 leisure uses. The size and nature of the cinema proposed can be considered to be operator specific in this case."

In our view the scale of cinema and its ability to meet Cineworld's business model is a material consideration in this case. Notwithstanding this business model, the TV site has been discounted not only on the basis of Cineworld's business requirements and site preference. References have been made to the respective suitability of the two sites in terms of accessibility, links to the strategic road network and site prominence/visibility. In considering whether a site is suitable the views of the potential cinema occupier must be of relevance, particularly where it relates to the physical attributes of the site rather than business preferences.

Cineworld's explanation as to why the TV site is unsuitable is a valid planning considerations, because the concerns are not operator specific. In our view these will be important considerations for any large scale multiplex cinema operators looking to locate in Colchester not just Cineworld, i.e. all large cinema operators will require a prominent and accessible location.

We did not suggest, as claimed by BW, that sequentially preferable sites can be discounted on the basis of a contractual commitment to another site. Paragraph 3.30 of our report states:

"Cineworld's legal commitment to the NG is not in itself a reason to discount the TV site, but adds support to Cineworld's statement regarding the respective suitability of the two sites and the reasons why they would not locate at TV."

As indicated above, we also noted that in market terms it is unlikely the size of cinema proposed would be taken by another operator, and that no other cinema operator is considering providing a cinema of a similar size at TV or elsewhere in Colchester. In our view this is a valid material consideration in this case.

We concluded at paragraph 3.29:

“In our view, collectively, the evidence presented provides a robust justification that market and locational requirements mean the proposed development cannot be located at TV.”

BW suggests the justification provided by the applicant is “very limited” and “predicated on the assumed contractual position with Cineworld”. This is not the case. Our report appears to have been misinterpreted by BW. Our conclusions relating to the suitability of the TV site is not based on the Cineworld contractual position. We noted that the contractual position provides support, and is consistent with, Cineworld’s views on the suitability of the TV site. The adequacy of the justification provided the applicant is clearly a matter of judgement, which the Council must consider when it determines this planning application.

We did not suggest the cinema would only be viable if 9,000 sq.m of A3 – A5 uses was proposed. We indicated that relocating the application proposals (which includes 4,548 sq.m gross of F&B) to TV would create a cluster around 9,000 sq.m of F&B uses when added to existing F&B uses in this location, which we agreed was unlikely to be viable in terms of operator demand. As a result the scale of F&B floorspace proposed within the application would not be viable at TV. This is a separate issue to the viability/suitability of the location for a large scale cinema, which we have concluded would not locate to TV for the reasons outlined above.

Material Considerations

Our advice in relation to this issue is clear at paragraph 4.2:

“If the NG development is considered to have failed the sequential approach, then in our view other material considerations would need to be very significant and compelling in order to out-weigh the sequential test guidance within the NPPF.”

BW does not appear to dispute other material considerations could out-weigh the failure to comply with the sequential test, but suggests the information provided by the applicant and Lichfields does not provide very significant or compelling justification. We indicated these are matters for the Council to consider if it concludes the sequential test has not been satisfied.

Impact

BW suggests Lichfields should not have concluded that the quantum of A3-A5 uses at NG is acceptable in impact terms because the Council raised concerns relating to a smaller quantum at the TV appeal inquiry. BW suggests our advice is in conflict with the case presented by the Council at the Inquiry.

Lichfields was commissioned to undertake an independent review of the NG planning application and we have considered this application on its own merits. The TV scheme proposes much more than just a cinema and F&B uses. The TV application included over 30,000 sq.m gross of retail, food/beverage and leisure floorspace. In particular the TV scheme proposes a significant uplift in Class A1 retail floorspace at an already large existing shopping destination at TV. The cumulative impacts of retail, leisure and F&B uses at TV on Colchester town centre will be much higher than the likely impact of the proposals at NG. Furthermore, it does not follow that a certain quantum of F&B use at NG and TV will have the same impact on the town centre.

I hope this letter addresses the points raised by BW. Please let me know if you have any queries or require more assistance.

Yours sincerely

**Further representation submitted by Barton Willmore on behalf of
Tollgate Village together with an associated legal opinion from
Christopher Katkowski QC**

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Dear Mr Heffer

FULL PLANNING APPLICATION ON LAND AT CUCKOO FARM WEST, COLCHESTER
APPLICATION REF: 160825
FURTHER OBJECTION ON BEHALF OF TOLLGATE PARTNERSHIP LTD

We act on behalf of Tollgate Partnership Ltd ("TPL"), a key stakeholder, landowner and promotor of the Tollgate Village proposal in Colchester. TPL has previously submitted several objections to the above application, most recently by letter dated 3rd July 2017.

These objections, which included a Legal Opinion from Leading Counsel, highlighted amongst other matters, the ongoing failure of the Applicant and the Council's advisors (Lichfields, formerly NLP), to demonstrate that the application complies with the sequential test in relation to the Tollgate Village site.

We have now had the opportunity to review the Officers Report that will be considered by Members of the Planning Committee at their meeting on 13th July 2017. We consider that the Officer assessment of the application scheme's compliance with the sequential test continues to be flawed.

We enclose a further Legal Opinion prepared by Leading Counsel which details the flaws in the sequential assessment, Officer Report and recommendation.

In particular the Opinion states:

"...should the Council proceed to determine this application having accepted that the sequential test is met, its decision will be liable to be quashed in judicial review proceedings."

This is a very clear and unequivocal conclusion and can only lead to Members refusing the planning application.

We would therefore be grateful for your confirmation as to how you intend to deal with the matters raised in this letter and the enclosed Legal Opinion. Please also confirm that this letter and the Legal Opinion will be provided to Members of the Planning Committee in full, and in advance of their consideration of the application.

In the meantime, please do not hesitate to contact Paul Newton or Alistair Ingram at this office should you wish to discuss further.

IN THE MATTER OF PROPOSED DEVELOPMENT AT COLCHESTER
NORTHERN GATEWAY

OPINION

Introduction and overview

1. We are asked to advise the Tollgate Partnership Ltd ("TPL"), for a second time, in respect of the approach taken to the sequential test in the latest officer's report in respect of an application for full planning permission – reference 160825 – for a mixed use development on land to the south of the A12 at Cuckoo Farm, Colchester, also known as the Northern Gateway ("the proposed development"). The officer's report in question has been prepared for the meeting of the Planning Committee for Colchester District Council ("the Council") scheduled for 13 July 2017.
2. Our previous opinion, dated 27 November 2016, identified several serious flaws in the approach taken to the sequential test in the previous officer's report for the proposed development. Following the provision of that advice, the Council determined to withdraw the application from the Planning Committee's consideration.
3. The current Leisure and Town Centre Critique (Lichfields, dated 14 June 2017, hereinafter "the Lichfields' LTC Critique"), commissioned by the Council affirms that officers' previous approach did *"not reflect a lawful application of the sequential test"*. At paragraph 1.6, the Lichfields' LTC Critique says this:

"Lichfields and Council officers previously concluded that the alternative sequential site at Tollgate Village could be discounted as unsuitable in impact terms. In response to the Counsel's opinion submitted within TPL's representations, the Council has sought its own legal advice. This legal advice is consistent with TPL's representations, i.e. the approach does not reflect a lawful application of the sequential test, because it imports extraneous considerations to justify a conclusion based on compliance with the test, rather than to justify a decision to grant permission contrary to it. On this basis the application of the sequential test has been revisited."
4. Regrettably, the approach taken in the latest officer's report continues to take an approach to the sequential test that is seriously flawed. Those flaws are also found

in the Lichfields' LTC Critique. That being the case, **it is again our opinion that should the Council proceed to determine this application having accepted that the sequential test is met, its decision will be liable to be quashed in judicial review proceedings.**

The key passages in the officer's report

5. The following paragraphs in the officer's report are of relevance to this opinion, both in respect of the application of national policy more generally, and in respect of the approach taken to the sequential test:

- (1) 7.1: here it is confirmed that the *"NPPF makes clear that the purpose of the planning system is to contribute to the achievement of sustainable development."* No further mention is made within the report of whether the application represents sustainable development. We return to this below;
- (2) 15.3: here it is confirmed that the proposed development does not accord with the development plan. For this reason, it is confirmed that should the Committee resolve to grant permission, the proposal will have to be referred to the Secretary of State *"as a departure"*. The obvious significance of this advice is that the presumption under s. 38(6) of the 2004 Act is that the proposed development should be refused permission, unless material considerations indicate otherwise;
- (3) 15.16: the report here quotes paragraph 24 of the NPPF which sets out the sequential test. By paragraph 27 of the NPPF, if *"an application fails to satisfy the sequential test ..., it should be refused."* Paragraphs 24 and 27 are thus restrictive policies in NPPF terms. If the sequential test is not passed, then the proposed development would be contrary to national policy also;
- (4) 15.19: here the town centre first approach in national policy is confirmed, with the report stating *"the preferred location for this type of development (incorporating as it does main town centre uses) would clearly be the town centre itself"*. At 15.21,

Tollgate Village is identified as a sequentially preferable site to the Northern Gateway since it “has a centre/edge of centre position.” This is correct;

- (5) 15.21: reference is made to the pending decision on the appeal against the refusal for a mixed use retail and leisure scheme at Tollgate Village. The officer’s report properly does not rule out Tollgate Village as being a sequentially preferable site for this reason. The report accepts the advice in this regard found in the Lichfields’ LTC Critique;¹
 - (6) 15.22 – 15.25: in these passages Tollgate Village is ruled out as a sequentially preferable site. The nub of the reasoning is set out in 15.25, where it is said “*if a site is not suitable for the commercial requirements of the developer in question then it is not a suitable site for the purposes of the sequential approach*” (underlining in the original).
6. The above passage is highlighted in bold since it demonstrates the key area where the officer’s report is flawed. We explain why below.

The relevance (or not) of the commercial requirements of the developer

7. In our previous opinion, the Council was directed to the decision of the High Court in *Aldergate Properties Ltd v Mansfield DC* [2016] EWHC 1670 (Admin), per Ouseley J. The decision of *Aldergate* has moreover been referred to in letters of objection sent by Barton Willmore on behalf of TPL. In the recent letter of 3 July 2017, it was pointed out to officers that the approach to the sequential test taken by

¹ The Lichfields’ LTC Critique says this about availability of Tollgate Village:

“3.7 There appears to be no dispute that the TV site is:

1 **available for development**, although a different scheme is currently proposed;

2 **in a sequentially superior location** when compared with the out of centre site at NG; and is

3 **physically capable of accommodating the development proposed** at NG.

3.8 CJ has previously argued the TV site is not available because it is the subject of current proposals for a different mix of uses.

3.9 Regardless of the outcome of the TV appeal, the TV site could accommodate the uses proposed at NG. The TV site can accommodate a large multiplex cinema. **The TV site cannot be deemed to be unavailable for the proposed development at NG** based on the content of the two schemes as claimed by CJ. The TV site cannot be considered to be unavailable in sequential terms.”

the applicants in this matter and in the Lichfields' LTC Critique is contrary to *Aldergate* and so seriously flawed. This objection has been ignored.

8. The specific issue of the commercial requirements of the developer in the application of the sequential test was the central issue in *Aldergate*. Ouseley J concluded that the developer's individual commercial justification in that case did not determine whether the sequential test was satisfied. The outcome in *Aldergate* is of course in contradiction to the approach of officers in this matter which is that if *"a site is not suitable for the commercial requirements of the developer in question then it is not a suitable site for the purposes of the sequential approach"*.
9. By way of expansion on the main conclusion in *Aldergate*, the reasoning of Ouseley J was as follows (all underlining added):
 - (1) At [35], Ouseley J's overarching conclusion was that for the sequential test, *""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 [24] NPPF, and excludes, generally, the identity and personal or corporate attitudes of an individual retailer"*;
 - (2) At [37], Ouseley J emphasised that the sequential test *"positively "requires" retail investment in the first place to locate in town centres rather than elsewhere."* This, he explained, was so as to *"permit, prevent, encourage, inhibit or limit and condition it, so that the individual private or commercial interest and the broader public interest meet in reconciliation however uneasily"*. For these reasons, the requirements of suitability and availability *cannot "simply ... be judged from the retailer's or developer's perspective"*; and
 - (3) At [38], by way of emphasis of this point, Ouseley J explained that the sequential test furthermore *cannot "be interpreted as envisaging that the requirement or preferences of an individual retailer's trading style, commercial attitudes, site preferences, competitive preferences whether against itself or greater competition should dictate what sites are "suitable" or "available" subject only to a*

degree of flexibility. NPPF [23] and [24] are simply not couched in terms of an individual retailer's corporate requirements or limitations. That would be the antithesis of planning for land uses and here, its default policies. It would take very clear language for such an odd result to be achieved."

10. Plainly, the officer's report has adopted an approach which contradicts the judgment in *Aldergate*, since it has: (a) excluded Tollgate Village solely on the basis of the corporate attitudes of Cineworld, (b) judged the suitability of Tollgate Village solely from Cineworld's perspective, and (c) only taken into account the requirements or preferences of Cineworld in relation to its trading style, commercial attitudes, site preferences and commercial preferences.
11. What officers should have done, but failed to do, was to judge whether Tollgate Village was suitable and available for the broad type of development which is proposed in the application.² Since the present appeal in respect of Tollgate Village comprises cinema, and food and beverage uses, plainly there is every reason why Tollgate Village should have been judged to be both suitable and available. Nowhere in the officer's report is there any justification for why Tollgate Village is not suitable and available for the "broad type" of development which is proposed.
12. The conclusions reached in the Lichfields' LTC Critique are flawed for the same reason. This critique also concludes that the Cineworld cinema would not be viable at Tollgate Village. But this conclusion cannot in our view be given any material weight since:
 - (1) It is premised on the same flaw about assessing compliance with the sequential test by reference only to a developer's individual commercial justification, without any justification for why Tollgate Village is not suitable and available for the "broad type" of development which is proposed; and

² To be clear, when assessing Tollgate Village, what needs to be assessed is the site (i.e. a part town centre and part edge of centre site compared to the Northern Gateway out of centre site), and not whether the proposed development could be accommodated as part of the present Tollgate Village appeal scheme.

- (2) It is unsupported by any viability evidence, as would be necessary to override the positive requirement for retail investment to be located in the first instance in town centres (and then in edge of centre locations).
13. In summary, no good reason has in our view been given for concluding that Tollgate Village is not a sequentially preferable site for the proposed development that is both suitable and available.

Sustainable development

14. As set out above, the officer's report at paragraph 7.1 confirms that the "*NPPF makes clear that the purpose of the planning system is to contribute to the achievement of sustainable development.*"
15. In *Barwood Strategic Land II LLP v East Staffordshire BC and the Secretary of State for Communities and Local Government* [2017] EWCA Civ 893, a decision handed down on 30 June 2017, the Court of Appeal gave recent consideration to when the presumption in favour of sustainable development arises in national policy. The Court concluded that the presumption applies only if the terms of paragraph 14 of the NPPF are satisfied. The Court said this at paragraph 35(2):
- "Paragraph 14 of the NPPF describes what the "presumption in favour of sustainable development" means, explaining in clear and complete terms the circumstances in which, and the way in which, it is intended to operate. The presumption, as described in paragraph 14, is the so-called "golden thread running through both plan-making and decision-taking". There is no other "presumption in favour of sustainable development" in the NPPF, either explicit or implicit, and no other "golden thread".*" [Underlining added.]
16. The terms of paragraph 14 are familiar and need not be set out. In light of the officer's report, however, it is clear that:
- (1) The proposed development does not accord with the development plan, so it does not benefit from the presumption in favour of sustainable development for this reason;
 - (2) The only other basis that the presumption may arise is if the development plan is absent, silent or relevant policies are out-of-date, and neither of the last

two sub-bullet points in paragraph 14 apply. One of these sub-bullet points provides that permission should not be granted if specific policies indicate that development should be restricted. Here, the failure to meet the sequential test can only result in the conclusion that the presumption in favour of sustainable development in national policy does not apply.

17. On the basis that the proposed development failed the sequential test, it would necessarily follow that it would also not benefit from the presumption in favour of sustainable development found in national policy. The proposed development would in other words then be contrary to both: (a) the development plan, and (b) national policy, which, per *Barwood* at [14], is a matter that is likely to command significant weight.

Conclusion

18. Should the Council proceed to determine this application having accepted that the sequential test is met, its decision will in our view be liable to be quashed in judicial review proceedings.

10 July 2017

CHRISTOPHER KATKOWSKI QC

ANDREW BYASS

Landmark Chambers
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Please find attached a letter setting out the applicant's response to some of the points raised in the late representations lodged by others.

Carter Jonas

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Your ref: 160825
Our ref: 4028612v1

Mr B Heffer
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12th July 2017

Dear Mr Heffer

ERECTION OF USE CLASS A3/A5 RESTAURANT/HOT FOOD TAKEAWAY UNITS (IN THE ALTERNATIVE), ERECTION OF A USE CLASS C1 HOTEL, ERECTION OF A USE CLASS D2 MULTIPLEX CINEMA, ERECTION OF USE CLASS D2 LEISURE UNITS, ERECTION OF USE CLASS A3/D2 RESTAURANT/LEISURE USES (IN THE ALTERNATIVE), PROVISION OF A LANDSCAPED PIAZZA THAT SHALL INCLUDE EXTERNAL SEATING/DINING AREAS FOR THE A3/A5 AND/OR D2 UNITS, ASSOCIATED LANDSCAPED AREAS, ERECTION OF AN ANCILLARY MULTI-STOREY CAR PARK, PROVISION OF SEPARATE DROP-OFF/PARKING AREAS, THE PROVISION OF CYCLE/PEDESTRIAN LINK TO TOWER LANE AND ASSOCIATED WORKS INCLUDING THE ERECTION OF SUBSTATIONS AND ASSOCIATED INFRASTRUCTURE APPARATUS – APPLICATION 160825

COLCHESTER NORTHERN GATEWAY – LAND AT CUCKOO FARM WEST, OFF UNITED WAY AND VIA URBIS ROMANAE, COLCHESTER

Further to the submission of additional representations made in respect of application 160825 by the promoters of the Tollgate Village site and their advisors, I write to set out the applicant's final observations on the key matters raised within those submissions.

Within the Barton Willmore representation dated 3rd July, it is stated that the Lichfields' critique of the Supplementary Leisure Assessment prepared and lodged by Carter Jonas in May 2017, erroneously assesses the Tollgate Village Scheme (as detailed within the current planning appeal) rather than the Tollgate Village site. The Council will no doubt be seeking a response directly from Lichfields on this point but it is clear to us that this statement is factually incorrect. It is clear from paragraphs 3.9, 3.17 and 5.8 of the Lichfields' critique dated 14th June 2017 that the assessment carried out was not limited to any specific scheme but rather the physical suitability of the Tollgate Village site itself to accommodate the development proposed at Colchester Northern Gateway (CNG).

Notwithstanding the above, Barton Willmore question the statement made in the Lichfields' critique that the provision of a cinema on the Tollgate Village site would not be viable. Again the Council will no doubt be seeking appropriate clarification from Lichfields but it is our understanding that the Lichfields' critique is

simply stating at paragraph 3.21 that a critical mass of Class A3-A5 floorspace is needed to financially support the proposed cinema and leisure uses. This is of course correct. It is widely acknowledged that cinemas and supporting D2 uses are not self-sufficient and are financially dependent on revenue being generated by supporting uses to ensure the development is viable.

In addition to the cinema and active leisure D2 uses, the application for CNG is seeking approval for 4,548 sq.m of Food and Beverage (F+B) floorspace. This quantum of F+B floorspace needs to be delivered in order to financially support the cinema and D2 floorspace, which do not deliver development profit. While the Tollgate Village site is of a sufficient size in physical terms to accommodate the 4,548 sq.m of F+B floorspace, in addition to the cinema and D2 floorspace proposed at CNG, it already benefits from an extensive array of F+B units.

The Tollgate Village site itself already has circa 2,000 sq.m of F+B floorspace provided in the form of a Harvester Pub, a Chiquitos, a Frankie & Benny's restaurant, a Costa coffee shop and a McDonalds. In addition, a further 2,300 sq.m of F+B floorspace has recently been approved and is to be delivered on the nearby Stane Park site. This therefore gives a cumulative total of 4,300 sq.m of either existing or consented F+B floorspace in the immediate vicinity of the Tollgate Village site. With this quantum of F+B offering already existing/consented in the local area, the market demand to deliver a meaningful quantum of additional F+B floorspace to financially support the proposed cinema and D2 floorspace will be substantially reduced in our opinion.

The provision of any additional F+B floorspace at or near to the Tollgate Village site, over and above that which either already exists or which is already consented, will rapidly saturate the market. The Lichfields' Critique states that a cluster of 9,000 sq.m of F+B floorspace (i.e. what is proposed within this application in addition to what is existing or consented in and around the Tollgate Village site) would not be viable in terms of operator demand. Carter Jonas supports this conclusion. The costs of delivering a cinema and other D2 floorspace will not therefore be able to be offset through the delivery of a scheme that also provides significant A3/A5 floorspace. The applicant at CNG is clear that he requires the 13 proposed A3/A5 units to subsidise/fund the loss-leading leisure uses. Carter Jonas therefore agree that the provision of the proposed cinema and D2 floorspace would not be economically viable on the Tollgate village site as a sufficient quantum of "enabling" A3/A5 uses would not be able to be delivered in light of existing provision.

Carter Jonas remains of the view therefore that the Tollgate Village site is not a suitable site for the proposed development. The disaggregation of the proposed uses would not overcome the fundamental constraint imposed by the need to deliver "enabling" F+B floorspace. The conclusion that the CNG is the only suitable site to accommodate the proposed development therefore remains sound.

Further letter from CBRE on behalf of Odeon Cinemas



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11th July 2017

Dear Sirs

PLANNING APPLICATION REF: 160825

PROPOSED MIXED USE DEVELOPMENT INCLUDING MULTIPLEX CINEMA BY TURNSTONE COLCHESTER LTD

LAND AT CUCKOO FARM WEST (NORTHERN GATEWAY), COLCHESTER, ESSEX

Cushman and Wakefield are instructed by CBRE Global Investors to **OBJECT** to the above planning application. We understand after significant delay this is now proposed to be heard at Committee on the 13th July 2017. We have already made some representations to this proposal, but would be grateful for you drawing the attention of the Committee to this further objection.

As freehold owners of the site occupied by ODEON Cinemas and the adjacent food and drink units, CBRE Global Investors represent a key stakeholder within the town centre and remain concerned about the detrimental impact that a cinema and mixed food and drink development at Northern Gateway will have on future investment in Colchester Town Centre. CBREGI also hold additional interests in Colchester Town Centre, notably Red Lion Yard and Lion Walk Shopping Centre. Previous letters of objection have been submitted to this effect and Metropolis have also objected separately on behalf of ODEON Cinemas.

Within Colchester Town Centre, the ODEON Cinema and supporting restaurants provide much more than just a cinema but a key anchor of the town's evening economy: encouraging people to visit or remain in the town centre after shopping hours. The food and drink units similarly add vitality to the town centre.

As set out in more detail below, we have identified a number of shortcomings with the planning application that are not in accordance with national and local planning policy and, as a consequence, consider that the application should be refused.

The planning application seeks permission for (inter alia):

- A3/A5 restaurant / hot food takeaway units totalling 3,808sqm (with an upper limit of 400sqm being A5);
- An 80 bed Class C1 Hotel;
- A 12 Screen D2 Cinema;
- Use Class D2 leisure units totalling 3,286sqm; and
- A3/D2 restaurant / leisure units of 688sqm.

We are aware that there is a reserved matter approval across part of the site for a mix of uses including restaurant and some unspecified D2 use. However this does not cover the principal cinema element, as this was not approved as part of the historic grant of outline planning permission across the former Cuckoo Farm site.

It is pertinent to note that the cinema use suggested for the leisure floor space is a multiplex cinema which will compete directly with the ODEON cinema in the town centre, impacting significantly its trade. The impacts associated with granting such a large leisure use outside of a designated town centre are considered in more detail below.

Policy

The site is situated within the North Colchester Strategic Growth Employment Zone.

Whilst this includes elements such as *'assembly and leisure'* as secondary uses, the policy is not intended for this to be of such a scale as that proposed here.

Indeed, the policies are reflective of the outline planning permission for the former Cuckoo Farm / Northern Gateway which included health and fitness and other leisure uses around the new Colchester Community Stadium, which are referred to explicitly in the grant of planning permission (and limited for such purposes). It is not for a commercial multiplex cinema use. The applicants have previously sought to justify the cinemas as a 'reserved matter' as part of the original outline, which clearly it is not and have been forced into a fresh application, which needs to be judged on issues of first principle.

The Council's own site allocations document similarly does not include a cinema in its list of acceptable uses: referring instead to sports, leisure and conferencing facilities.

The National Planning Policy Framework (NPPF), March 2012 defines town centre uses as including cinemas and restaurants.

Paragraph 24 requires a sequential assessment is undertaken of proposals, favouring a town centre location in order to help further boost 'vitality' and 'viability' of such towns

Paragraph 24 states:

'Local planning authorities should apply a sequential test to planning applications for main town centre uses that are not in an existing centre and are not in accordance with an up-to-date Local Plan. 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.'

Paragraph 26 of the NPPF states that:

'When assessing applications for retail, leisure and office development outside of town centres, which are not in accordance with an up-to-date Local Plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floor space threshold (if there is no locally set threshold, the default threshold is 2,500 sq m). This should include assessment of:

- 1. the impact of the proposal on existing, committed and planned public and private investment in a centre or centres in the catchment area of the proposal; and*
- 2. the impact of the proposal on town centre vitality and viability, including local consumer choice and trade in the town centre and wider area, up to five years from the time the application is made. For major schemes where the full impact will not be realised in five*

years, the impact should also be assessed up to ten years from the time the application is made.'

Paragraph 27 of the NPPF concludes:

'Where an application fails to satisfy the sequential test or is likely to have significant adverse impact on one or more of the above factors, it should be refused.'

The Sequential Assessment

Paragraph 24 of the NPPF requires a sequential assessment for planning applications for main town centre uses that are not in an existing centre and are not in accordance with an up to date development plan.

The applicants appear to rely on the business case of a potential operator. However in our view this is not fully explored sufficiently to discharge the obligation of the sequential assessment.

Assessment of Impact

Further work has been undertaken for this planning application since its submission to try and justify the acceptability of the proposal's impact on the vitality and viability of Colchester Town Centre.

This has been assessed by Lichfields on behalf of the Council, who have concluded that the proposals will, in fact, have an impact on both the ODEON and new Curzon cinemas within the town centre. However, Lichfield then go on to suggest that this impact will not be 'significant' put in the context of the vitality and viability of Colchester town centre as a whole.

This is disputed by CBREGI and ODEON who have previously advised that, taking account of the opening of the boutique Curzon, which will add to competition within the town centre, that a 10/11 screen cinema of the type proposed at a location such as Northern Gateway would have a significant impact.

ODEON estimate this to be in the order of 50% of overall attendance, with the most significant impact felt on large premier releases and family films. Importantly, ODEON has confirmed this level of impact would result in a loss making ODEON cinema.

This will have both a huge impact on ODEON as a business and as the primary anchor of family entertainment in the town centre, with a concomitant significant adverse impact on the town centre as a whole.

Impact on the Evening Economy of Colchester Town Centre

Chapter 7 of the Better Town Centre Plan Colchester states that the Council will seek to create a welcoming Town Centre after dark.

A key part of this is:

'pursuing strategies which cover both early evening hours when there are opportunities to provide more activities and uses cater to families, older people and town centre workers as well as the provision of bars, clubs and restaurants which predominate in the late evening hours.'

The ambitions to support an active and vibrant evening economy are also supported in the Colchester's Development Plan documents, notably Policy SA TC1.

It is clear that the ODEON Cinema and supporting food and drink uses are a key feature of Colchester Town Centre and that ODEON anchors the primary family entertainment in the centre. Survey work undertaken by

the Council's own consultants show the importance of cinema provision within the town centre, especially for families. This figure highlights the catchment draw of the existing ODEON in bringing people to visit Colchester Town Centre.

With the scale of the cinema proposed, the proposals will seriously undermine the Council's own ambition to create a vibrant and prosperous evening economy with the scale of evening and leisure uses proposed in the scheme likely to discourage use and dissuade further investment in the town centre.

It is very clear that the 'leisure' element of the Northern Gateway did not envision a cinema as part of the commercial leisure mix for this very reason.

The impact on ODEON and its wider implication for vitality and viability in Colchester town centre means that the planning application can and should be refused.

Conclusion

As freehold owners of the site occupied by ODEON Cinemas and the adjacent food and drink unit, CBRE Global Investors represent a key stakeholder within the town centre and remain concerned about the detrimental impact that the proposal will have. CBREGI also hold additional interests in Colchester Town Centre, notably Red Lion Yard and Lion Walk Shopping Centre. Previous letters of objection have been submitted to this effect and Metropolis have also objected separately on behalf of ODEON Cinemas.

We consider that the planning application should be **REFUSED**

- The ODEON is a foundation of the leisure provision within the town centre, notably for family oriented entertainment;
- The Council's policies support further enhancement of leisure provision within the town centre and note the importance of family based entertainment. The same policies and outline application granted for the land at Cuckoo Farm do not support a multiplex cinema;
- The proposals will impact significantly both the ODEON and new Curzon Cinema;
- This is recognised by the Council's own consultants;
- There will be significant adverse impact on the ODEON and as a consequence town centre vitality and viability and the Council's plan led approach;
- This will dissuade use and further investment within the town centre, to the detriment of vitality and viability; and
- In our view the application also fails to demonstrate the adequate discharge of the sequential assessment.

We urge the Committee to have regard to this letter as part of its determination, and to **REFUSE** the proposals.

Response to CBRE's representation on behalf of Odeon by Council's consultants Lichfields

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Date: 12 July 2017
Our ref: 13184/03/PW/PW/14447452v1
Your ref:

Dear Mr Heffer

FULL PLANNING APPLICATION ON LAND AT CUCKOO FARM WEST, COLCHESTER

APPLICATION REF: 160825

FURTHER OBJECTIONS ON BEHALF OF TOLLGATE PARTNERSHIP LTD AND CBRE GLOBAL INVESTORS

Thank you for forwarding the second objection letter (dated 11th July 2017) and legal opinion, submitted by Barton Willmore (BW) on behalf of Tollgate Partnership Ltd and the objection letter (also dated 11th July 2017) submitted by Cushman & Wakefield (CW) on behalf of CBRE Global Investors.

The BW letter and legal opinion reiterates the previous claims relating to the application of the sequential approach, i.e. the sequential approach adopted by the applicant and accepted by Lichfield's is flawed because it is contrary to the principles established in the Aldergate v Mansfield High Court Judgment.

As indicated in the response letter dated 5th July 2017, this case related to a proposed food store, where sequential sites were not considered based on Aldi's preference rather than identified deficiencies that made the sites unsuitable. The circumstances are different at Northern Gateway and Tollgate Village (TV). The TV site has been discounted not only on the basis of Cineworld's business requirements. Cineworld's explanation as to why the TV site is unsuitable is a valid planning considerations, because the concerns are not operator specific and will be considerations for any large scale multiplex cinema operators looking to locate in Colchester not just Cineworld.

In terms of viability, we indicated that relocating the application proposals TV would create a cluster around 9,000 sq.m of F&B uses, when added to existing F&B uses in this location. We agreed with the applicant that this was unlikely to be viable in terms of operator demand. As a result the scale of F&B floorspace proposed within the application would not be viable at TV. The cinema would not be unviable per se, but the overall mix of uses within the application proposal would be unviable. We accept that an alternative mix of uses to that proposed at NG could help to cross fund a cinema, but the other issues relating to the suitability of the site would remain.

CW argues the impact on the Odeon cinema will be significant as will the wider implications for the vitality and viability of Colchester town centre.

Odeon's previous concerns have been reiterated but no further evidence has been provided i.e. to support the claim that a loss 50% of overall attendance would result in a loss making Odeon cinema. Lichfields' critique report indicated evidence had not been provided to support these claims. The Odeon is trading significantly above the national average and the Odeon has not commented on whether the cinema in Colchester would close, or what level of trade is required to continue to trade in Colchester.

We are satisfied that the impact figures provided by the applicant, suggest the NG cinema will not jeopardize or delay the proposed Curzon cinema. If the Odeon cinema were to close then the new Curzon cinema will retain an important cinema facility within the town centre, and as a result the wider implications for the evening economy and the town centre will not be significant.

I hope this letter clarifies the issues raised by the objectors.