

Submission to the Competition Commission Groceries Market Inquiry: Planning Remedies

Introduction

The Andrew George MP Cross Cutting Remedies group has worked together to draw up a series of planning remedies which we consider will improve choice and competition in the grocery market. These remedies should be seen as a coherent policy package. We welcome the opportunity to submit them to the Competition Commission.

Summary of recommendations for reform of retail planning policy

- 1 Retain the need test in Planning Policy Statement 6 (PPS6) as an integral part of an enhanced 'town centre first' policy
- 2 Extend the need test to town centres
3. Remove the large supermarket policy bias from PPS6
4. Clarify advice in PPS6 on local plan policy making
5. Confirm that store ownership should be considered in decisions if it makes a material difference in planning terms
6. Improve resources, guidance and expertise for local planning authorities.
7. Reform the system of Section 106 agreements
8. Clarify the award of costs in planning appeals
9. Ensure robust decision making by the Planning Inspectorate.

Rationale

The following points underpin the recommendations made in this paper:

(i) Planning policy has become an important focus of the current Groceries Market inquiry. Although the Competition Commission does not have powers to make changes to planning policy or planning law its recommendations to the Government will carry considerable weight. This has been explicitly recognised in the Government's recent commitment in the Planning White Paper *Planning for a Sustainable Future* (PWP) to consider the conclusions of the current inquiry in its proposed review of national planning policy PPS6ⁱ.

(ii) Although competition issues are not specifically within the remit of the planning system, it is clear that planning policies and the decision making process can have a significant impact on local grocery markets. Planners are charged with promoting existing policy on protecting and enhancing the vitality and viability of town centres. This requires them to assess the impact on existing retailers when a new development is proposed. On this basis planning authorities are of necessity involved in local competition issues. However, the planning system could make a much greater contribution to fostering healthy competition in retail markets, and ensuring that a genuine diversity of size of retail outlets and types of offer enhance consumer choice. The Government's current review of town centre planning policy acknowledges this.ⁱⁱ

(iii) As the Competition Commission's Emerging Thinking report makes clear, it is required to act or recommend action under section 134(4) of the Enterprise Act 2002 if adverse effect on competition results in 'any detrimental effect on customers'. As

the report makes clear detrimental effect is further defined in section 134(5) of the Act as:

“taking the form of: (a) high prices, lower quality or less choice of goods or services in any market in the UK (whether or not the market to which the feature or features concerned relate); or (b) less innovation in relation to such goods or services” (p3). As the Commission’s analysis in the report establishes, choice of goods or services relates to both products and outletsⁱⁱⁱ.

A key principle that draws on this definition and underlies the recommendations set out here is that the consumer benefits of choice cannot simply be measured by the number of product lines on offer in a supermarket or restricted to a choice between different multiple retailers in a locality. Choice also is about having access to different forms and size of retail within an area, including small specialist shops, farmers’ markets, street markets and independent convenience stores as well as supermarkets. In addition, a diverse mix of retail outlets can offer the broadest range of goods and services in terms of value for money, variety, quality of goods, level of service, and social support as well as a different kind of shopping experience. While larger stores offer a large number of product lines, many of these are similar in quality, ingredients and broad appeal. Smaller specialist stores may stock fewer products, but typically have a much greater range, including many that will be uniquely offered in such stores. Access to specialist advice and ordering of less common goods - as well as the opportunity for social interaction - are also critical elements of the choice and retail offer provided by local smaller scale and specialist outlets.

In addition, research by Caroline Cranbrook presented in the CPRE report *The real choice*^{iv} (2006) shows that a strong, diverse retail network acts as a central seed bed for small food businesses and allows innovation in food production and supply. Ensuring that there are such opportunities for small and medium sized businesses to bring new products to market is therefore an important element in maintaining choice and preventing detrimental effects on customers in the future.

(iv) The Competition Commission is investigating the way in which retailers use the planning regime and whether this may deter or restrict entry or expansion by an actual or potential competitor^v. Under the current planning regime supermarkets are able to use their greater resources to influence the outcome of planning decisions in a way which smaller rivals could not. For example by offering substantial planning gain or threatening costs against a local planning authority on appeal supermarkets can increase the likelihood of being granted planning permission for a new store. Evidence of this behaviour was found in an analysis of planning case studies carried out by Friends of the Earth.^{vi}

(v) While it is acknowledged that the Competition Commission must primarily be concerned with the impact of planning policy on competition and choice, it must also consider the wider consequences of any recommendations it makes – especially given the importance that the Government is attaching to the outcome of the inquiry in informing any changes to PPS6. In this respect PPS 1 states that “sustainable development is the core principle underpinning planning” (p2)^{vii}. The planning system is primarily designed to deliver sustainable development through the integration of four main aims: social progress, effective protection of the environment, prudent use of natural resources and maintenance of high and stable levels of employment and economic growth (PPS1 p2). Recommendations which refer to the planning system should take into account these core aspects and consider social and environmental as well as economic consequences of any policy change. Recommendations made

to Government on planning that are drawn from a narrow economic perspective are therefore necessarily deficient.

In particular, policy change which favours a resurgence in out-of-town retail development would generate more car based journeys, and cut across other policy commitments on climate change, including the PWP's aim "through local authorities" to make it easier for individual citizens to contribute to tackling climate change through the choices they make about where to live, and the goods and services they use." (PWP para. 7.2 p104) There would also be social consequences were local retail to decline further forcing those without cars to spend more of their income on transport to shop for food at out-of-town stores. When smaller stores close non-car owners – over 25% of households in the UK^{viii} - suffer disproportionately as well as poorer households, if no alternative shopping of comparable standard is accessible on foot. This can add 23% to the average shopping bill of a low income family.^{ix} If the Competition Commission were to take a much wider view of what constitutes consumer benefit, it would in any case need to take these issues into account to ensure that retail planning policy is able to fulfil its potential to help deliver high quality places where people can live and shop.

Detailed recommendations for reform of retail planning policy

1 Retain the need test in PPS6 as part of an enhanced Town Centre First policy

1.1 Retain the need test

1.1.1

The need test is an essential part of the 'town centre first' policy enshrined in PPS6^x. The policy was introduced in 1996 to boost economic development in town centres and has resulted in a partial reversal of the decline of town centres seen in the 1980s. Research for the BCSC [BCSC 2007 "*Future of Retail Property: In Town or Out of Town?*"] showed that town centre retail developments rose from a low of 14% in 1994 to about 30% in 2002 and predicted that this would now be over 40% taking into account completions up to 2005 and developments in the pipeline. This was largely attributed to the revision to Planning Policy Guidance 6 (PPG6) in 1996. The Government has recently confirmed the success of these policies in the Planning White Paper.^{xi}

1.1.2

The need test was criticised in the Barker Review of Land Use Planning^{xii}. While recognising the importance of town centre policy and the role of the sequential and impact tests within it, Barker called for the need test to be removed as part of the planning application process.^{xiii} The main arguments given are the following:

- the market is better placed to assess the nature and scale of demand than local planning authorities;
- assessment of need results in "more limited choice and higher prices of goods in stores as it restricts the expansion of stores beyond the town centre that could enter the market without harming the town centre itself";
- perverse effects can result if for example existing businesses in out-of-town centres may expand incrementally "if need is demonstrated and there is no impact on the town centre" while "prospective local entrants fail at any one time to demonstrate sufficient need for a one-off increase of space" (sections 1.31 – 1.33 p29).

This line of thinking has subsequently been incorporated into the Government White Paper *Planning for a Sustainable Future* section 'Improving the effectiveness of the

town centre planning policy'. The Government has accordingly proposed a new test to replace the existing need and impact test.

The Competition Commission has subsequently identified the need test as a potential barrier to entry where an area has no identified need for additional grocery retail floor space or where the need is for less space than would be accounted for by a single large grocery store. It suggests that one of these scenarios exists in more than 50% of local planning areas covered by the Competition Commission survey.^{xiv}

1.1.3

We make the following points in response:

- Barker's recommendations are aimed at making the planning system more responsive to economic factors; however, as noted above overarching government policy charges the planning system with integrating economic, social and environmental factors in delivering sustainable development; so social need and environmental impact as well as economic benefits are vital considerations for planning authorities and ones which market applicants alone cannot be left to judge.
- The Barker report also makes some flawed assumptions about how removing the need test would aid retail productivity; to our knowledge there is no research evidence that makes this direct link between retail productivity in the UK and the planning regime nor is any offered in the Barker report.
- Previously the Competition Commission concluded in its Emerging Thinking report that there was no evidence that the tests introduced in PPG6/PPS6 have led to a barrier to entry to the product market for grocery retailing nor that the need test alone is constraining the construction of larger supermarkets (sect. 154 & 155 p55). The Barker report appears to exaggerate the impact of the need test on restricting development. The claims it makes that this results in "more limited choice and higher prices of goods in stores" is not supported by evidence, nor is the similar claim made in the Planning White Paper that the need test can have "the unintended effect of restricting competition and limiting consumer choice". The Competition Commission's more recent observations that in some areas there is not enough need to justify a large grocery store suggests that in those areas need could be met by a smaller store, or a number of smaller stores – a scenario which we believe would improve rather than restrict consumer choice.
- The need test currently only applies to development brought forward outside the important tests of the development plan, which will have been drawn up with community participation. As such it applies purely to speculative edge and out-of-town locations. The Competition Commission's Emerging Thinking findings indicate that it is such applications not in accordance with local development plans which cause some of the reported delays in the planning system because of failure by applicants to consult adequately with the relevant planning authorities.
- The Barker Report suggests that the town centre first policy including impact assessment and sequential test should remain. The ensuing Planning White Paper states that the Government will "replace the need and impact test with a new test which has a strong focus on our town centre first policy, and which promotes competition and improves consumer choice avoiding the unintended effects of the current need test".^{xv} In the absence of detail about what such a new test would comprise, it is not possible to comment on its likely effectiveness. However, the Barker proposal raises the question of the workability of the policy without the need test. Firstly, although impact assessment is based on issues which go beyond simply

need, it is a matter of logic that without understanding existing need and the impact of a development on meeting that need, it is difficult to adequately assess the impact of a development. While it would still be possible to refuse an inappropriate edge-of and out-of-town retail development, the removal of any need test would significantly diminish the ability of local authorities to make an effective case. Secondly, the Barker report recommendation ignores that from the revision of PPG6 in 1996 to the 1999 Ministerial Statement (the Caborn Statement) the sequential test operated without the need test. It was only when the Caborn Statement^{xvi} tightened up the rules that 'a full set' of controls was achieved. If the sequential test was relatively ineffective before when used without the need test, it follows that it will be rendered ineffective again if it is now deleted. This view is supported by a Friends of the Earth survey of local planning authorities. This shows that the planning officers responsible for implementing the Government's 'town centre first' policy disagree with Barker's analysis that the policy can work without the need test. Some 81% of the planning officers who responded believed that the absence of a need test would make it harder to focus new development in town centres.

- The PWP takes up and expands on Barker's point about perverse effects (PWP para. 7.53). The PWP suggests that – as a result of implementation of the need test - incremental out-of-town expansion is being allowed to meet identified need and stopping the development of sites closer to the centre. This thinking is flawed in several respects. Firstly, the Government has failed to provide any evidence of existing out-of-town retail space being expanded where a more central site was available. Secondly, existing policy as set out in PPS 6 should prevent this from happening both in the case of a new out-of-town proposal and in the case of an extension to an existing out-of town-store. In both cases the edge of centre site should be given preference in line with the sequential test. If this is not happening the Government needs to look at how to better enforce or strengthen existing policy. There is no logic in concluding that removing the need test is the solution. Finally, the Government is assuming that edge of town development contributes to the vitality and viability of centres. But evidence suggests the opposite (see below).

- The removal of the need test would not necessarily increase consumer choice or foster competition. In fact, its removal could mean a reversion to the pre-1996 situation. The four largest multiples, which operate out of large format stores, and the discount chains, would be best placed to benefit most from such a relaxation of planning restrictions on development outside the town centre. As a result, the move could be damaging to the smaller chains and independents (including those operating under symbol groups) that provide diversity and therefore choice in urban and rural areas.

- Relaxation of this policy would not necessarily provide more competition between major supermarkets in a local market as without further safeguards there would be nothing to stop a supermarket which was already dominant in a particular town from building more stores so increasing its dominance.

1.1.4

The need test is a specific and vital tool for resisting inappropriate development, promoting retail diversity and protecting consumers. If permission is granted to build a large format store **in excess of need** outside of the town centre it will inevitably draw trade away from the centre. This will do enduring and significant harm to the

economy of that town centre by reducing footfall. It will damage the diversity of the retail offer and the competition a different kind of retail offer brings, so ultimately reducing consumer choice. Shoppers without access to cars will be most severely affected if they lose shopping facilities within walking distance. Large format stores built in excess of need will also draw trade away from shops in the rural hinterland with similar harmful impacts, particularly social and economic.

Accordingly, **we recommend that the Competition Commission should advise the Government that a quantitative assessment of need should be retained as an essential part of the assessment of the impact of a proposed retail development. The Government should retain the need test as an essential component of its town centre planning policy or retain its key provisions in any replacement test which is proposed.**

1.2 Enhancing the 'town centre first' policy

However, we acknowledge that the need test is not perfect for several reasons. The test currently may not for example prevent inappropriate applications from succeeding or adequately support delivery of existing policy aspirations.

1.2.1

Problems with the need test itself should be addressed. Better data are required especially on small shops to enable improved decision making. As has been argued elsewhere to the Commission, retail data are so poor that it is very difficult to make rational decisions based on statistical argument. Research for Friends of the Earth [Friends of the Earth, *Shopping the Bullies: Why the planning system for retail needs to be strengthened, not weakened*, April 2007] has also found that supermarket submissions often contain inadequate or even inaccurate information. Despite this, they may still succeed because local planning authorities can be ill equipped to recognise and so challenge inadequate or flawed data. It is unacceptable that a retailer could make a successful case for need on the basis of assumptions derived from flawed data.

Guidance on assessing need, promised to local planning authorities in PPS6 but never published, would help to ensure more robust and consistent decision making. PPS6 stated that "guidance on undertaking assessments of need and impact for retail and leisure uses will be published separately." This guidance has not appeared. Instead, the Barker report was commissioned and its proposal to remove the need test has now been taken up by the Government in the Planning White Paper in its proposal to replace the need and impacts test with a new test.

1.2.2

We firmly believe that there is also scope to improve the package of tests which make up the Town Centre First policy. An enhanced set of tests could provide an opportunity to bring forward a set of qualitative measures designed to give an understanding of the impact of new development on quality of places and the retail experience.

This would not require a radical departure from the existing PPS6 but would help Government and local planning authorities to deliver on existing policy aspirations. For example, PPS6 already calls on local authorities to ensure that "provision is made for a range of sites for shopping, leisure and local services, which allow genuine choice to meet the needs of the whole community, particularly the needs of those living in deprived areas." Local authorities are supposed to tackle deficiencies

in retail provision in deprived areas. Local authorities are also required to take account of the benefits offered by alternative types of retail. PPS6 states that local authorities “should, where appropriate, seek to protect existing facilities which provide for people's day-to-day needs.” In particular, village shops and farm shops are acknowledged to contribute to local communities and economies and are harmed by inappropriately located large stores.

In fact many of these issues are included in some detail in the ‘Health Check’ section of PPS6 (chapter 4). Paragraph 4.4 of PPS6 sets out a comprehensive list of 12 factors key to town centre health checks which range from qualitative economic information on rents to qualitative human perception of issues of safety and crime and diversity of experience.

1.2.3

We propose that the new test should comprise several key elements. Perhaps most importantly for the Competition Commission the development's contribution to **diversity** and therefore to consumer choice should be tested. The Government and the Competition Commission will need to consider, with stakeholders, how diversity would best be measured. For example a local market share test would help to prevent dominance of one particular company. This could be by means of a reference to the Office of Fair Trading (OFT) to comment on local dominance (see section 5 below). However to ensure genuine diversity the test would need to go beyond an assessment of choice between major fascias. Alternatively or as a complementary measure the planning authority could assess the type and scale of development proposed to ensure that it adds to the retail mix of the local area. In this way a local authority would be able to ensure that the development contributed to a vibrant town centre and increased choice for shoppers.

An enhanced need test could also provide a more robust means of measuring **local economic benefits**; for example by taking account of whether money spent by shoppers will stay in the local economy or leak out of the area. A considerable amount of work in developing such tests has already been done by the New Economics Foundation^{xvii}.

Access could also be tested for more robustly by ensuring that new developments are accessible to shoppers using alternatives to the car, including those arriving on foot. The Competition Commission, by looking at choice within a 10 – 15 minute drive time, is not giving full consideration to shoppers who do not have access to a car. But planning policy should provide a means of ensuring that everyone has a choice of retail outlets.

We would also want to see stronger **environmental** tests for new retail development but these are likely to be considered to be outside of the remit of the CC.

1.2.4

We recommend that the Competition Commission should advise the Government to supplement the quantitative assessment of need with a new set of tests along the lines set out above, and which could make a greater contribution to ensuring healthy competition and choice in local markets.

2 Extend the need test to town centres

2.1

The existing town centre first policy rightly directs development to town centres. It recognises that large out-of-town stores are the most damaging form of supermarket

development not least because they work against sustainable development by contributing to the increase in shopper car miles and drawing trade out of the centre into locations inaccessible to those consumers without cars. However, very large scale developments **on the edge of or in the centre of towns** can also be very damaging to other town centre businesses and therefore reduce choice to consumers. Case studies have shown that a large supermarket, locating in a small town centre - and especially where poorly integrated - can have similar negative effects to an out-of-town development (see box).

Because existing policy encourages development in town centres, it can be hard for local communities or local authorities to resist such developments even where they are likely to damage existing retail trade and therefore reduce fascia choice.

Although local authorities are required by PPS6 to assess whether retail development in the centre is of an appropriate scale, this is a much less robust test than the needs test. Extending the need test to town centres would remedy this deficit. This view is shared by a large majority of planning officers. A survey of local planning authorities carried out by Friends of the Earth has revealed a considerable amount of support for extending the need test. Of the planning officers surveyed by Friends of the Earth, 69% agreed that the need test should be extended to town centres.

Impacts of edge of centre and town centre stores

A study in **Hove, Sussex** in November 2006, revealed that a new 30,000 sq ft Tesco store in central Hove had resulted in an average drop in turnover of 15% amongst existing businesses in Hove town centre. Though the store is situated on one of the main roads in the town centre, it has no entrance on the street. Local traders complained that the pedestrian linkage from the store to the pedestrianised George Street was poorly lit and not visible enough^{xviii}.

In **Stalham, Norfolk**, a 'Health Check' was carried out on the town centre in 1996 - it found the centre to be 'underperforming' and subsequently identified a need for additional grocery floor space in the town. An edge of town Tesco was granted planning permission and opened in 2002. In 2006 a second pedestrian footfall survey was carried out to compare with the 1996 survey. This revealed that footfall had declined by over 55% showing that the Tesco store had done nothing to improve the health of the town centre and in fact had been a key factor in its decline. A low percentage of Tesco customers were found to be making linked trips to the High Street. Several local traders have since closed. Tesco also backtracked on a promise to allow the weekly market to continue on its car park – further reducing consumer choice in Stalham^{xix}.

When refusing the application for a 100,000 sq ft Tesco hypermarket in **Dartford, Kent**, the Planning Inspector concluded that despite the fact the store would be in the town centre, it would not be well linked with the existing shops by the proposed raised travelator, so would have a negative impact on the existing centre. The Inspector claimed that at that size the store would be "to all intents and purposes a self-contained development at the edge of the retail area" and that "such a large store would have some adverse retail impact on existing stores in the town^{xx}."

There is also a need for constant monitoring of the impact of existing large format stores. Many district centre superstores were given pre-1996 open A1 consents. As a result the 'Big 4' multiples are able to squeeze out more sales floor space from a site.

Stores that once did not damage nearby rivals now do so. The expansion of the already-large Sainsbury store in Liphook, Hampshire, is a case in point.

3. Remove the large supermarket policy bias from PPS6

3.1

PPS6 currently encourages local planning authorities to “make provision for” large format stores on the edge of town centres. PPS6 says that “larger stores may deliver benefits for consumers and local planning authorities should seek to make provision for them in this context... to identify, designate and assemble larger sites adjoining the primary shopping area (i.e. in edge-of-centre locations).”

3.2

There may be a case for these stores in some circumstances, but there is a stronger case that other forms of retail, including street markets and small specialist independent shops, deliver more significant benefits overall. However, despite an acknowledgement of their beneficial role in boosting the vitality and viability of town centres, PPS6 contains no equivalent encouragement for farmers markets or street markets in the policy. Nor is there a sound planning reason for retail need in the centre or edge-of-centre to be provided by a large format store rather than an alternative format, particularly in the case of convenience and food shopping.

This policy bias towards larger stores remains despite evidence from the Office of the Deputy Prime Minister (ODPM) that edge-of-centre stores can draw trade from shops in the centre especially where they are not well linked to the existing centre (see box above). In this way the bias also contributes to the loss of alternative forms of retailing such as street markets, which could compete with the supermarkets, offering consumers more choice of where to shop and acting as incubators for new local businesses, which may expand and move to permanent premises.

Moreover, the bias in favour of larger stores works almost exclusively in the favour of the bigger chains which operate superstores and hypermarkets. In this way it directly favours the activities of particular companies. As such we consider this policy to be **anti-competitive**.

3.3

We believe that the planning system should be strongly plan-led at the local level with strong community involvement. **Local planning authorities should be able to decide future allocation for retail and allocate specific sites in appropriate locations without there being a policy bias towards a particular format in the national policy. We therefore recommend revision of PPS6 to remove the bias towards large supermarkets.**

4. Clarify advice in PPS6 on local plan policy making

4.1 Local authorities to be required to carry out Food Mapping

All local planning authorities should be required to carry out food mapping as part of the local plan making process. The main purpose of the mapping would be both to assess what is missing and also how best to fill the gaps. The mapping would be used to inform local retail strategies and inform a food access strategy that could be part of the development plan. Food mapping would be used to ensure that everyone

in the local community has access to healthy food and a diverse and sustainable retail offer, which are existing policy aims of PPS6.

4.2 Clearer policy on the use of floor space caps

4.2.1

Research studies suggest that 30,000 sq ft is the tipping point above which productivity levels cease increasing. In recent years Belgium, Norway and Denmark have all set 3,000m² caps with the underlying research assumption that there are no further size-related efficiencies to be gained from stores larger than this threshold.

Floor space caps on individual developments can be a useful tool in reducing dominance by one company and ensuring a more diverse mix of retailing providing more consumer choice of where to shop.

4.2.2

PPS6 should set out clearer guidelines for using floor space caps. All Local Development Frameworks should incorporate a cap of 3,000 m² of net retail floor space in retail outlets. In some local authority areas a lower cap will be necessary for example in areas where a large proportion of retailing is already provided in large format stores. Local authorities should also be encouraged to set significantly lower caps in specific towns and neighbourhoods where they want to protect the existing character of a town centre or encourage a greater diversity of shopping choice. The Local Development Framework should then contain a presumption against the approval of developments above the threshold unless there are exceptional circumstances.

5. Confirm that store ownership should be considered in decisions if it makes a material difference in planning terms

5.1

Planning decisions which allow a major supermarket chain to build new stores or large store extensions may enable them to become more dominant locally and to add incrementally to their national market share. The Competition Commission's own report in 2000 raised concerns about areas of the UK where consumers have a limited choice of store type or fascia: "subject to planning permission being granted, there are not effective constraints on particular multiple retailers securing further sites for grocery retail development". [CC 2000 Supermarkets para. 2.600] The phenomenon has since gained public recognition in the emergence of the term 'Tesco towns' to describe a situation where one major grocery retailer has gradually increased local dominance through a series of planning applications and takeovers.

5.2

Existing policy does not adequately address this problem. Currently, PPS6 does not require consideration by planning authorities of the type of retail operator or store in an application, on the basis that this is not a material planning issue. Nor are these issues currently covered by Competition policy. Whilst in the case of merger applications the OFT/Competition Commission will consider whether a change of ownership of an individual store would result in dominance of one company in a particular area as it did in the Safeway inquiry, no such assessment is made by the competition authorities when a **new** store is proposed, whatever its scale.

5.3

This is an area where the lines between retail planning policy and competition policy are often blurred or indeed where policy does not adequately support existing practice. The Competition Commission's own survey found that 44% of local planning authorities said that they take some account of the choice of grocery retailers when reviewing planning applications. Planning officers are already involved in issues of competition when assessing the impact on existing traders if a new store is proposed. So, where one type of retailer is likely to have a higher impact on existing shops and therefore on the future of the town centre, the type of retailer is in fact a material planning issue. This point has been acknowledged in recent decisions of the Planning Inspectorate (see box below).

In considering an application for an Asda store in **Worthing, Sussex** the Planning Inspector concluded that Asda's position would allow it to have too big an impact on the existing centre: "in that it would offer the same goods, albeit with a greater range and at cheaper prices because of the company's considerable purchase power, I consider that [the store] would act like a Goliath to the existing shops in what would prove to be an unequal fight. It would effectively unbalance the centre^{xxi}."

Similar considerations were taken into account by a Planning Inspector considering an application for a retail unit in **Newington Green, in Islington, North London**. Permission already existed for a mixed use development including two small restaurant units. The Inspector was considering a further application to replace the smaller units with a larger retail unit, and concluded that the larger unit would be too harmful to residential amenity. However, the impact would be even greater for "a supermarket operated by one of the major foodstores, which is a very likely prospect in my judgement", which would generate even more traffic^{xxii}.

5.4

In 2000 the Competition Commission recognised the need for a remedy in recommending to Government that in cases where one supermarket was already dominant, and where it wished to build a new store over a certain size within a 15 minute drive time of an existing store, they should have to apply to the Director General of Fair Trading (DGFT) for named consent [CC 2000 para. 1.15]. This recommendation was not taken up.

5.5

The need for such a remedy remains. **This issue could be addressed by local authorities being able to distinguish between particular companies - or by a reference to the OFT in certain cases. If the former, this remedy would allow local planning authorities to take account of store ownership to help prevent the proliferation of areas in which one retailer is dominant. Moreover, this remedy would be most effective if combined with an enhanced package of tests (see section 1 above) aimed at increasing retail diversity** in order to ensure that consumers have a genuine choice between types of store including independent and specialist outlets, as well as having more choice between different major supermarkets.

6. Improve resources and expertise available to local planning authorities

6.1

In the past more retail expertise was available among planning officers at the county level and there was a central source of advice in the form of the Unit for Retail Planning Information. These resources have been lost and local authorities tend to be tied to knowledge specific to their own area.

There is a mis-match between the resources available to the big supermarkets and the resources available to local planning authorities. As a result there are cases where local planning officials do not have the expertise – and therefore the confidence - to challenge the need and impact assessments that major grocery retailers can produce with their extensive resources. For instance, in recent appeal cases the Inspector has found the data supplied by the retailer were inaccurate / inadequate yet they remained unchallenged by the local planning authority. This suggests that the relevant local authorities did not have the resources or expertise to properly assess the retailers' submissions. In one case the Inspector referred to "numerical mysteries on a grand scale" in a submission backing an Asda application.

One way of dealing with this would be to **ensure that each local planning authority has access to retail expertise potentially at the regional level to help assess individual applications, but also to assess impact where it may cross more than one local planning authority area.**

6.2

The Competition Commission has also considered whether planning authorities should be required to consider the identity of companies applying for planning permission, but one of its concerns was that planning authorities have not hitherto had any role in competition issues. Indeed, many observers now question whether planning officers are trained and receive adequate guidance on competition issues. It would be surprising if they are, given that we have found a lack of resources and expertise which would enable them to deal with the current requirements of retail planning policy. However, planning officers already have to get involved in issues of competition when assessing the impact on existing traders of a proposed new store. Accordingly, **there is a need to develop skills training for existing and new planning staff and councillors and to devote the resources to achieve this.** A current lack of such skills should not be grounds for dismissing a logical and sensible extension of policy.

7. Reform the system of Section 106 agreements (planning gain) so that they cannot be used as a local inducement for an otherwise undesirable development

Major retailers are able to make major contributions to local facilities, which gives them an unfair advantage over smaller retailers. This can also distort the decision making process if objections can be overcome by financial gain to the local authority.

Diverting planning gain to a central fund would remove the possibility of local 'inducements'. The Government's proposed Planning Gain Supplement -where the local authority would identify infrastructure needs associated with new development and levy a set charge - would go some way to overcome the more extreme abuse of this system. It would at least reduce local negotiations because the contribution to be made would be codified. However, this system could still favour large companies and large developments which could bring the most additional resources to a scheme. Accordingly, **the Government needs to ensure that small businesses are not disadvantaged by the new system.**

8. Clarify the situation regarding award of costs to give elected councillors more confidence in the decision making process

8.1

The award of costs mechanism underlies all planning decisions and its operation can significantly influence the outcome of the planning process, for better or worse. If as a result of the threat of costs awards local planning authorities are unwilling to make decisions in the best interests of the wider community, then it will fail in its objectives of regulating the use of land in the public interest.

8.2

Evidence suggests that if a major supermarket expresses its intention to appeal an unfavourable planning decision the threat of award of costs against local planning authorities can influence the decision of elected councillors in favour of the development^{xxiii}. This should be of particular concern to the Competition Commission because major supermarkets are able to deploy far greater resources to pursue their application than their smaller competitors in such situations and this could give them an advantage over other retailers.

8.3

The Government could help to restore confidence in what should be a democratic process of decision making by issuing new advice on the award of costs. Such advice should address the following issues:

Firstly, guidance should resolve any concerns about the likelihood of local authority members being individually surcharged as a result of costs awards. Although there have been no incidents of a councillor being surcharged as a result of a successful bid for costs, it appears that in the past this has influenced the outcome of planning decisions.

Secondly, many local planning authorities fear they will be liable for costs if the application is subsequently taken to appeal because of the ambiguous wording of DoE Circular 8/93 *Award of Costs Incurred in Planning and Other (including Compulsory Purchase Order) Proceedings* and the consequently restrictive, and sometimes threatening, advice given to local authorities by their legal staff. The Award of Costs Circular should be revised to ensure that local authorities are liable for costs on the grounds of procedure alone, and not on policy grounds. This would free local planning authorities from one of the most powerful brakes on their application of plan policies.

Thirdly, the Government should also make it very clear that intimidating behaviour on the part of an appellant developer – in the form of letters sent direct to councillors from solicitors or agents for example threatening to apply for costs against them - is unacceptable in the planning process. Councillors have a key role as representatives of their local community and this role must not be allowed to be de-valued by narrower, sectoral interests.

More generally, there is the question of why penalties need be imposed at all other than for vexatious behaviour on the part of the local planning authority. Given that the large majority of planning applications tend to succeed and that such permission enables developers to gain a windfall rise in land values once a store occupies previously lower-value land, it is reasonable that the costs of appeal should be borne by the applicant. Penalties are generally small in relation to the windfall rise in land values, yet may be a considerable burden for under-resourced Local Authorities. They can thus act as a disincentive to democratically accountable decision making.

9. Ensure robust consistent decision making by the Planning Inspectorate

Concerns have been raised about the reliance on an individual Planning Inspector's view when an application is considered on appeal. One case that has been cited is Halesworth in Suffolk where there were objections to a proposed supermarket development from statutory consultees, including the Environment Agency and Highways Authority, as well as the town council, neighbouring parish councils and county council. The district council refused the application and the developer went to appeal. The Planning Inspector then reversed the previous decision and granted planning permission. **One way of making the decision making process more robust would be to require the opinion of more than one Planning Inspector.**

References:

- ⁱ "We will also consider how best to address competition considerations in our town centre policies, taking into account the conclusions of the Competition Commission inquiry into the groceries market." (*Planning for a Sustainable Future* – White Paper p116 sect. 7.55)
- ⁱⁱ In the PWP the Government proposes to improve town centre planning policy to promote competition and improve consumer choice (p103).
- ⁱⁱⁱ See New Economics Foundation, *Detrimental Effects - Defending consumers from distorted markets: a response to the Competition Commission*, April, 2007.
- ^{iv} Caroline Cranbrook / Campaign to Protect Rural England, *The real choice*, 2006.
- ^v Competition Commission, Groceries Market Investigation; Statement of Issues
- ^{vi} Friends of the Earth, *Shopping the Bullies, Why the planning system for retail needs to be strengthened, not weakened*, April 2007
- ^{vii} Office of the Deputy Prime Minister, *Planning Policy Statement 1: Delivering Sustainable Development*, TSO 2005
- ^{viii} National Statistics (2001) *Living in Britain*
- ^{ix} A survey of low income families carried out by NCH, The Children's Charity
- ^x Office of the Deputy Prime Minister, *Planning Policy Statement 6: Planning for Town Centres*, TSO 2005
- ^{xi} "7.51 Our town centre policies are showing real signs of success. In 1994 only a quarter of new development was in or around our town centres. By 2004 it was up to 41 per cent. We want this trend to continue and we want investors to continue to have the confidence to locate in town centres." (p115)
- ^{xii} *Barker review of Land Use Planning Final Report – Recommendations*
At http://www.hm-treasury.gov.uk/media/4EB/AF/barker_finalreport051206.pdf
Accessed 25th May 2007
- ^{xiii} Recommendation 4: supporting the town centre first policy and the impact and sequential tests that help to deliver it, but removing the requirement to demonstrate need (the 'needs test') as part of the planning application process" (p32)
- ^{xiv} Competition Commission, Groceries Market Inquiry, Working Paper on barriers to entry, 2007
- ^{xv} P116 para. 7.55.
- ^{xvi} This required developers to demonstrate that there was a forecast need for additional retail floor space which could not be met in the town centre.
- ^{xvii} See New Economics Foundation, *Plugging the Leaks* report, 2002 at http://www.neweconomics.org/gen/z_sys_publicationdetail.aspx?pid=125 and associated work
- ^{xviii} Friends of the Earth, *Shopping the Bullies, Why the planning system for retail needs to be strengthened, not weakened*, April 2007
- ^{xix} Submission to CC by Nigel Dowdney, November 2006
- ^{xx} Planning Inspector's report on planning application by St James's Investments for a mixed use development on land at Lowfield Street and Market Street, Dartford, Kent, July 2006
- ^{xxi} Planning Inspector's decision notice on planning appeal by Asda Stores Limited and Worthing College against Worthing Borough Council for erection of food store at Worthing college, Bolsover Road, Worthing, West Sussex, July 2006
- ^{xxii} Planning Inspector's decision notice on appeal by Windermere Construction Limited against the London Borough of Islington for the removal of a condition attached to planning permission at 20 Newington Green, London N16 9PU, February 2006
- ^{xxiii} Friends of the Earth, *Shopping the Bullies, Why the planning system for retail needs to be strengthened, not weakened*, April 2007

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