Sequential Testing – the legal implications of recent decisions

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1. The sequential test is set out in NPPF [24, 27]. The meaning and effect of this planning policy (and all planning policies) is a matter of law (*Tesco v Dundee City Council* [2012] UKSC 13).

2. In relation to the meaning of the concept of “suitable” sites in the sequential test – in essence, “suitable for what” is the question which arises.

3. The Supreme Court has told us in *Dundee* what “suitable” means and this is legally binding case law on the meaning of the sequential approach. In summary *Dundee* establishes (1) 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; and (2) that in terms of the size of the alternative site, provided that the applicant has demonstrated flexibility with regards to format and scale, the question is whether the alternative site is suitable for the proposed development, not whether the proposed development could be altered or reduced so that it can be made to fit the alternative site.
4. The case does not do away with the sequential test – instead it instructs us what the sequential test means as a matter of law. (For the record the passages in question in *Dundee* are: Lord Reed [1, 3-6, 13, 14, 21, 24, 25, 27, 28 – 30] - it is important to note that “the recommended approach” referred to in [29, 2nd sentence] relate to the particular terms of the Scottish guidance set out in [6 at indent 13] which are not found in the NPPF or the PPG) and [33, 36 – 38] Lord Hope.)

5. There is nothing in *Dundee* to support the argument that flexibility applies to the retailer’s judgment of its commercial requirements. It is telling to recall that in *Dundee* Asda’s judgement of its commercial requirements meant that what was said to be a suitable sequentially preferable site was not suitable after all – see Lord Reed’s speech at [30] where he says the sequentially preferable site was judged by Asda as not “suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate.” This is where it is important to bear in mind Lord Hope’s speech where he says at [38] that the sequential test criteria “are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.”
6. The *North Lincs.* case (R (oao Zurich Assurance) –v- North Lincolnshire Council [2012] EWHC 3708 (Admin)) bears this out; there the Judge picked up on the concept of the real world in [61] where he said: “It is also important to mark that developers ....work in the real world. Marks & Spencer had assessed the only available town centre alternative to the Site, and had concluded that a development that was smaller than that proposed, or one with a more restricted range of goods, was neither commercially viable nor suitable for their commercial requirements.” (My emphasis.) The Judge went on to explain in [62] that the decision-maker was “bound” to take this and that the retailer would not go to the sequentially preferable site if the application was refused into account. This English High Court case shows the application of *Tesco Dundee* to the expression of the sequential test in English planning guidance. In *North Lincs.* the guidance in question was PPS4. More recently *Tesco Dundee* was applied by the High Court to the sequential test as now set out in the NPPF: *Warners Retail (Moreton) Ltd –v-Cotswold DC* [2014] EWHC 2504 (Admin) where, interestingly, the Judge [35] drew on a decision of the Secretary of State in *Rushden Lakes* to support this (also finding [34] that such differences as there are between the NPPF and the Scottish policy statement are “not ...material”.)
7. The Inspector in the *LxB Rushden Lakes* call-in accepted these points. The key passages of his conclusions in his report (edited to remove references to points which related to the facts of the Rushden case and to the old, now cancelled, PG) are:

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8.43 The sequential test relevant to decision-taking is found at NPPF [24]. .... – in essence, “suitable for what” is the question which arises. The answer to this question of law is suitable for the development proposed by the Applicant. .... It is, of course, correct that the meaning of the term should be construed in its context. That involves consideration of the question of “flexibility” which is referred to in the last sentence of NPPF [24]. However, that the terms are to be construed (and therefore applied) in the real world of real development is beyond argument. The real world is the context.....
8.44 The Supreme Court has told us in Dundee what “suitable” means .... and it has expressly rejected the notion that “suitable” means that one should alter or reduce the proposal so as to fit onto an alternative site. The policy concerning the sequential approach as set out in the NPPF, .... must be applied in a manner which complies with the legally binding case law on the meaning of the sequential approach. Plainly the case in question (Dundee) is of seminal importance ..... 

8.45 In summary it establishes [a] 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; and [b] that in terms of the size of the alternative site, provided that the Applicant has demonstrated flexibility with regards to format and scale, the question is whether the alternative site is suitable for the proposed development, not whether the proposed development could be altered or reduced so that it can be made to fit the alternative site. These points although related are distinct. .....
8.46 It is important to bear in mind that the sequential test as set out in NPPF [24] require applications for main town centre uses to be located in town centres and it then runs through the sequence, edge and then out-of-centre. This makes good the very simple point that what the sequential test seeks is to see whether the application i.e. what is proposed, can be accommodated on a town centre site. There is no suggestion here that the sequential test means to refer to anything other than the application proposal. So Dundee clearly applies to the NPPF.

8.48 .... The sequential test relates entirely to the application proposal and whether it can be accommodated e.g. on a town centre site. ....

8.49 The NPPF requires developers to demonstrate flexibility on issues such as format and scale. No indication as to what degree of flexibility is required is contained in the NPPF. ....
8.54 .... the task is to identify sequentially preferable sites that are suitable and available which necessarily includes consideration of deliverability/viability.

8.55 In terms of availability, NPPF [24] simply asks whether town centre or edge of centre sites are “available”. It does not ask whether such sites are likely to become available during the remainder of the plan period or over a period of some years. .... “
8. In the Rushden decision the Secretary of State accepted all of the key conclusions in relation to approach reached by the Inspector (including in relation to availability). Thus, with my emphasis:

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15. The Secretary of State agrees with the Inspector that the application site is out of centre and that the sequential test would be satisfied if “suitable [in or edge of centre] sites are not available”, albeit that that involves consideration of the question of “flexibility” (IR8.43). Furthermore, having regard to the arguments put forward by the Inspector at IR8.44-8.48, the Secretary of State agrees with his conclusion at IR8.48 that the sequential test relates entirely to the application proposal and whether it can be accommodated on an actual alternative site (eg a town centre site). The Secretary of State agrees with the Inspector’s conclusions on the sequential test in IR8.48.
He notes that the Framework requires developers to demonstrate flexibility on issues such as format and scale (IR8.49); and that the new Planning Guidance asks decision makers to consider whether there is scope for flexibility in the format and/or scale of a proposal, making it clear that it is not necessary to demonstrate that a potential town centre or edge of centre site can accommodate precisely the scale and form of development being proposed, but rather to consider what contribution more central sites are able to make individually to accommodate the proposal.

....

17. ... for the reasons in IR8.55-8.57, he agrees (IR8.58) that there is no suitable and available sequentially superior site.”
9. I have highlighted the passage in the decision letter which refers to the PPG which make my point that what one is to consider is flexibility in relation to format and scale, and that although it isn’t right to rule out a sequentially preferable site because it cannot accommodate *precisely* the scale and format of what is proposed, the issue relates to the accommodation of the proposal.