

AGENDA ITEM NO.4	
PLANNING COMMITTEE	
Date	23 JANUARY 2013
Title	LEGAL IMPLICATIONS REGARDING PLANNING MATTERS

1. PURPOSE/SUMMARY

To advise members of legal challenges to the decisions of the Planning Committee on 29 August 2012 and 19 September 2012 in respect of planning applications F/YR11/0482/F, F/YR11/0930/F and F/YR11/0895/O.

2. KEY ISSUES

- On the 29 August 2012 and further on the 19 September 2012 the Planning Committee considered three Planning Applications namely:
 - i. F/YR11/0482/F application by Harrier Developments
 - ii. F/YR11/930/F application by Sainsbury's Supermarkets Limited
 - iii. F/YR11/0895/O application by Whitaker Management Limited
- The decisions of the Planning Committee have been the subject to considerable scrutiny by the parties and a number of issues surrounding the appropriateness of the decisions and process have been raised.
- This report summarises the current position and the legal risks and asks members to consider whether they wish to reconsider the applications.
- Members are advised that Counsel will be in attendance at the meeting to assist them in considering this matter.
- Counsel's assistance has also been sought by officers in the preparation of this report.

3. RECOMMENDATION(S)

- (i) Officer's recommendation is to reconsider all three applications.
- (ii) It is open to members to determine otherwise in respect of each such application.
- (iii) Whichever course is chosen, it would be sensible for reasons to be formulated and adopted prior to moving on to any further business (if any).

Wards Affected	All
Forward Plan Reference No. (if applicable)	NA
Portfolio Holder(s)	
Report Originator	Ian Hunt, Chief Solicitor
Contact Officer(s)	Ian Hunt, Chief Solicitor
Background Paper(s)	

The discretion to reconsider any decision to grant planning permission prior to formal grant.

1. The Committee has a discretion to reconsider any decision to grant planning permission prior to formal grant, see *Burkett v LB Hammersmith and Fulham* [2002] 1 W.L.R. 1593.
2. In some circumstances it may be obliged to do so, see e.g. *Kides v South Cambridgeshire DC* (2003) 1 P & CR 19. In the current circumstances, Sainsbury's suggests the Council is obliged to reconsider the decision in respect of the Harrier application.
3. A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taker(s) considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission (or vice versa). Practical considerations can, however, be important in that context and members should address not merely the legalities but also the practicalities of reaching any different conclusions, see *King's Cross Railway Lands Group v Camden LBC* [2007] EWHC 1515 (Admin).
4. An important factor to bear in mind prior to exercising such discretion is the impact on administrative decision making if apparently final decisions are revisited. Clearly, there is significant advantage in consistency and finality and significant but not overriding weight can be accorded to that aim.
5. In this case, the 3 applications by Harrier, Whitacre, and Sainsbury's were all considered as separate applications by the Planning Committee on 29 August 2012. Members resolved to refuse the Harrier application, and approve the Whitacre and Sainsbury's applications (subject to s.106 Agreements). All three decisions were contrary to officer recommendation. The 3 applications were returned to Planning Committee on 19 September 2012. On that occasion the s.106 Agreements for the Sainsbury's and Whitacre applications were approved prior to completion. Members also reconsidered the Harrier application and subsequently approved it subject to completion of a s.106 Agreement. No decision notices have been issued.
6. The Council's decisions of 29 August and 19 September 2012 have been the subject of varying threats of legal action and complaint.

- a) Berwin Leighton Paisner's (on behalf of Tesco) letter of 5/9/12 – note second and final paragraph. It is to be noted that Berwin's letter threatens not just Judicial Review in respect of its own decision but also the Sainsbury's decision.
 - b) Various letters from SNR Denton (on behalf of Sainsbury's) alleging misconduct by members (21/9/12) and from Sainsbury's (25/9/12) and from Berwin Leighton Paisner (24/09/12, 1/10/12) and ICIS (24/9/12, 24/09/12 2nd letter) refuting the same.
 - c) Formal Complaint on behalf of Whitacre Management Limited dated 25/9/12.
 - d) Letter before action from SNR Denton dated 11 December 2012
7. Regard can also be had to an Opinion from Leading Counsel supplied to the Council on behalf of Harrier dated 8 August 2012. A copy of which is attached. Whilst it does not threaten specific action (and indeed predates the decisions in question) it provides substance to the threats in Berwin Leighton Paisner's letter of 5/9/12.
8. The existence of these threats alone could justify a reconsideration of the decision making process.
9. Further, it is considered that the decisions are at least material one to the other and that a challenge to one may be difficult to be dealt with in isolation. It is at least arguable the decisions are directly linked, e.g. Sainsbury's letter dated 25/9/12 makes it clear that its view is that "*The town is simply not big enough to accommodate two [superstores]*".

Potential grounds for judicial review

10. The following potential grounds of challenge have been identified and are summarised below.

a) F/YR11/0482/F (Harrier Developments Limited)

- i) Although as stated above there is a discretion to reconsider a decision such discretion must be exercised fairly, including giving proper notice to objectors of the proposal as a matter of fairness/legitimate expectation. This applies to the Planning Committee resolution of 19 September 2012.
- ii) Bias due to member conduct. Allegations in this regard remain unresolved. (It has been suggested that these allegations may have been withdrawn, but

that is not the confirmed position as far as officers are currently able to determine).

- iii) Irrationality arising from the grant of a second permission for a food store. In this case a resolution to grant permission for Sainsbury's was passed at the meeting on 29 August 2012 when the retail impact evidence suggested no more than one at best and given the potential detrimental effect on the town centre's vitality and viability. It may be that this was passed on the view that the Station Road permission would not be implemented (contrary to Tesco's argument that they are contractually committed to occupy that site – see Opinion from Leading Counsel on behalf of Harrier dated 8 August 2012 attached and the planning report for consideration of this issue). A resolution to grant a second permission to Harrier (in addition to the Sainsbury's permission) at the subsequent meeting on 19 September 2012 would potentially be irrational given the retail impact evidence.

b) F/YR11/0930/F (Sainsbury's)

- i) Reasons have to make clear whether the proposal accords with the development plan or not. The current reasons do not appear to do so, although they refer to the relevant policies. In the current circumstances provision of further reasons could well open fresh grounds of challenge. This applies to the Planning Committee resolutions of 29 August 2012 and 19 September 2012.
- ii) Irrationality arising from the grant of a second permission for a food superstore (in this case further to the existing Station Road permission which Tesco argue that they are contractually committed to occupy) when the retail impact evidence suggested no more than one at best as referred to in (a)(iii) above. This applies to the Planning Committee resolution of 29 August 2012. There is also a possible ancillary reasons argument in this regard as well.

c) F/YR/11/0895/O (Whitacre Management Limited)

See (i) in (b) above. Also consequent upon Sainsbury's decision in any event.

11. Representations on a draft of this report on behalf of Harrier appear to have confirmed that officers have correctly understood the position in respect of (b) and (c) above. Similarly, both correspondence and other documents on behalf of Sainsbury's appear to confirm that officers have also correctly understood the position in respect of (a). Further, it may have come to members' attention that Judicial Review proceedings have been launched on behalf of Sainsburys challenging the refusal of the Council to release Counsel's advice, which the Council is defending and in respect of which the Court has refused a speedy hearing. That such a challenge has been made is not relevant to this or any other decision to be made at the meeting save that Sainsbury's may argue they are disadvantaged by not having sight of such Advice (indeed they have requested members be informed of the proceedings). Members should be aware that following the lodging of such proceedings Sainsbury's had been told that any decision whether or not to reopen will be made on the basis of the advice/information contained in this report and any further advice provided orally at the meeting. That is the basis upon which the decision should be made.

12. Irrespective of the challenge concerning member's conduct [see at 8 (a) (ii) above] about which officers offer no advice as to merit of any challenge, it is officer's advice that it is considered that there is scope for challenge in respect of each application on each of the grounds set out above that stands a reasonable chance of succeeding; but any challenge is not certain to succeed. There is no benefit in waiting for a challenge and then having to concede (or contemplate concession) and, because notices recording the grant of planning permission have not been issued, the Council is in a position to avoid that step if it considers advisable to do so and accepts officer's advice as to the extent of the risk.

13. Challenges, even if they fail, lead to delay, uncertainty, cost and bring the planning system into disrepute. In particular, the costs in cases involving Tesco (as the working partners of Harrier) and Sainsbury's are likely to be significant given that both are using London solicitors and will no doubt be instructing experienced senior/leading Counsel (Harrier's Opinion dated 8 August 2012 is from Leading Counsel and they have recently re-confirmed he is instructed and it would also appear that Sainsbury's have also recently sought advice from Leading Counsel.) Further, Judicial Review challenges can take years, particularly if there is an appeal and Whittlesey should not, if possible, have to wait for that outcome for obvious reasons. In this regard, it is only reasonable to take notice of the fact that both parties concerned have been involved in a significant number of challenges in the Courts historically and that whilst reconsideration would not totally avoid risk of challenge if there are arguable errors in the process so far it may eliminate those. Planning judgments should

be taken on planning merits and legal challenges, whilst they have their place, should be avoided if possible.

14. The point is made on behalf of Sainsbury's that a threat of Judicial Review should not justify reconsideration in normal course. Of course a mere threat of Judicial Review should not do so. However, in this instance and in these circumstances and given the assessment of risk set out above this is not a normal situation. Members will be aware just how unusual the current circumstances are, no such similar advice having been given in response to mere threats for some time if ever and certainly not within the writer's knowledge.

Conclusion

15. It is considered that notwithstanding arguments as to consistency and finality that:-

- i) the risks of challenge (and attendant risks as to costs and delay) justify a reconsideration of matters at this stage given that no decision notices recording the grant of planning permissions have been issued, particularly as
- ii) the result of the resolutions has been the approval of two supermarkets when the retail evidence (or the majority of it) suggests that only one should be approved (see 8 (a) (iii) and (b) (ii) above).

16. Final Recommendations and considerations of options.

- (i) Officer's recommendation is to reconsider all three applications.
- (ii) It is open to members to determine otherwise in respect of each such application.
- (iii) Whichever course is chosen, it would be sensible for reasons to be formulated and adopted prior to moving on to any further business (if any).

Re WHITTLESEY

OPINION

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Re RETAIL APPLICATIONS IN WHITTLESEY

OPINION ON RETAIL CONSENT OPTIONS.

1. My opinion is sought by Harrier Developments Limited ('Harrier') as to the opportunities for supermarket developments in Whittlesey. The key components for analysis are the existing supermarket permission at Station Road, and further individual applications at Eastrea Road for Tesco and J Sainsbury. The specific issue is the likelihood of the Station Road consent being built out in the event that of the two further applications the J Sainsbury is granted permission and Tesco is refused. The background is an apparent consensus that only one store should be introduced into the retail hierarchy in Whittlesey. I turn to the several retail projects.

The Station Road Permission.

2. The permission is for 3,304 sq.m. gross and 2,272 sq.m. net. The execution of the permission is controlled by Harrier who also have control of the Tesco Eastrea Road site. There is an agreement of 24th February 2011 by which a lease is granted of a retail foodstore to be constructed on the south side of Eastrea Road, or in the alternative north side of Station Road. This has been disclosed to Fenland District Council and is thus overt. If the Eastrea Harrier/Tesco proposal is not granted permission, then Tesco is obliged to take a store built for them by Harrier on Station Road. Harrier, not Tesco, is to construct the food store and Tesco is a contracted lessee. That is the factual matrix on which any judgement as to the future supermarket regime is to be set.

The Eastrea Road Applications.

3. The Tesco application is for 4,238 sq m gross split 1,855 net convenience and 605 sq.m comparison, total net 2,460 sq m. The JS application is for 2,330 sq.m. convenience net and 736 sq. m net comparison. The consensus view appears to be that there is not sufficient capacity to allow trading of any combination of two permissions.
4. It is therefore critical in any judgement that there is a clear understanding as to whether or not the Station Road opportunity will be taken up in the event that another permission is granted. It is an imperative that two permissions are not executed for reasons of adverse impact on the vitality and viability of Whittlesey town centre.
5. The contractual position is that if Tesco is granted on the Harrier Eastrea Road site, the Station Road consent will in effect be cancelled out by legal arrangement. Harrier controls both and can ensure that only one new shop will be built. The decision maker FDC has certainty that there are no extra impact implications for Whittlesey town centre.
6. On the other hand if FDC grant permission for the J.Sainsbury at Eastrea Road there is no constraint on the execution of the Station Road permission. It is clear Harrier can enforce the contractual commitment from Tesco in building out the store and requiring Tesco to occupy it. That position is of considerable value to Harrier.
7. Thus is set up a straight forward judgement for FDC – leaving aside the other criticisms of the JS Eastrea Road application such as being further out of centre than Harrier/Tesco - if it is given permission it will be assumed to trade alongside the consent FDC have already granted at Station Road. At first look

that sets a simple approach – it must be prudent planning to avoid any risk of creating a situation of unacceptable impacts for existing traders.

The error.

8. However FDC have seen fit to instruct retail consultants Roger Tym & Partners to “*assess the likelihood of the existing permission for a foodstore scheme at Station Road...being implemented if permission is granted for a new larger foodstore at Eastrea Road also in Whittlesey.*”¹
9. The report gives little profound insight into the question of whether the contractual commitment of Tesco to Harrier to take Station Road will not be enforced. They claim there is no guarantee that a foodstore operator would occupy Station Road if the Eastrea Road site is developed. The test is one of likelihood not guarantee. Indeed there is certainly no guarantee a foodstore operator would not occupy Station Road.
10. However they concede that occupation by one of the top 4 operators would create a viable development including Section 106 commitments if there is no other store. Thereafter it has to be a matter for any retailer to assess whether they are prepared to compete with another retailer.
11. RTP descend into the tendentious and unscientific data source of telephone gossip with developers², none of which can be tested. Where that concludes that the “*developer and Tesco will state that they will build out the Station Road store if they don't get consent at Eastrea Road, but this is likely to be a scare tactic*”³ the analyst clearly has not seen or understood the contractual arrangement between Tesco and Harrier. Similarly, the presumption that Tesco would not want to proceed with a new smaller store in a position of

¹ Para 1.1 RTP Report July 2012.

² Ibid 5.1

³ *ibid*

competition with a larger store has no knowledge of what the Tesco board may or may not do, given their contractual obligations and desire not to concede ground to rivals.

12. Similarly, it is surprising that RTP seek to invoke the report on the Station Road railway crossing undertaken by Vectos on behalf of J Sainsbury as a criticism of the Station Road. Of course there is a railway crossing impinging on the Station Road site. FDC knew that when they granted planning permission, and Tesco knew that when they entered into the contractual arrangement with Harrier. Clearly FDC and Harrier/Tesco did not see it as an overwhelming problem.

The decision.

13. A decision of FDC on the retail applications, if it is to be rational, must follow the following pattern:
 - a. Address the issue as to whether it is appropriate to allow two new supermarkets to be built to compete with town centre trade. It is probably inevitable that the conclusion must be in the negative.
 - b. From there an informed judgement is to be made as to the efficacy of the Station Road consent and the commitment of Harrier and Tesco that it be delivered. The judgement is informed by the clear contractual position that Harrier will deliver and Tesco must occupy a store at Station Road. That material is disclosed to FDC. It is overt and unchallengeable.
 - c. Thereafter a conclusion that the Station Road consent will not be executed on the present evidence would be no more than a speculative guess, high risk and irrational. It would be susceptible to successful

judicial review not least by the town centre traders who are vulnerable to excess impact. A material element would not have been given sufficient weight.

14. In conclusion there is a contractual commitment that requires Tesco to occupy a store at Station Road if Harrier not deliver permission at Eastrea Road.

15. It follows that a grant of permission for a J Sainsbury at Eastrea Road would engender development of two stores to the agreed detriment of the existing trade of Whittlesey.



Patrick Clarkson QC

Landmark Chambers.

8th August 2012