

IN THE MATTER OF AN APPLICATION FOR PLANNING PERMSSION BY
TESCO STORES LTD AT FORDHAM ROAD, NEWMARKET

OPINION

Introduction

1. I am instructed to advise Unex (No. 3) Ltd (“Unex”) on legal issues relating to the consideration by Forest Heath District Council (“the Council”) of an application for planning permission by Tesco Stores Ltd for a new retail store at Fordham Road, Newmarket.

Background

2. Tesco’s proposal was considered alongside three other proposals for retail stores in Newmarket – an ASDA store proposed by Unex, a Morrisons store and a Sainsbury’s Store – at a meeting of the Development Control Committee on 22 May 2013. The advice of the Council’s officers to the Committee was, in summary, that:
 - a. there was capacity for two but no more than two new retail stores in Newmarket;
 - b. the ASDA store was the best scheme in retail planning policy terms since it was the nearest to the town centre and had the greatest potential for linked trips to the town centre;
 - c. however, there were objections to the ASDA store based upon its alleged heritage impact and its alleged non-compliance with planning policies designed to protect the horse racing industry; and
 - d. accordingly, the Morrisons and Tesco stores, which were the next most preferable in retail planning policy terms, should be permitted.
3. The Committee accepted this advice and resolved that planning permission should be granted for the Morrisons and Tesco stores, subject to the satisfactory completion of s.106 obligations.
4. Pursuant to this resolution Morrisons were issued with a planning permission on 30 December 2013. However, Tesco have not yet received planning permission.
5. Over eight months have passed since the resolution to grant planning permission to Tesco. Thus far, the Planning Committee has not re-considered

whether the resolution to grant remains appropriate in the light of the up-to-date circumstances today.

The law

6. It is well established in planning law that when, after a planning committee has resolved to grant planning permission for a development but before the decision notice granting planning permission has been issued, a new material consideration has arisen (which may be a material change of circumstances and/or the existence of new material information or evidence), the matter must be re-considered by the planning committee in the light of the new material consideration. If that does not happen, the local planning authority will have acted contrary to its statutory duty under s.70(2) of the Town and Country Planning Act 1990 to have regard to all material considerations. See *R (Kides) v. South Cambridgeshire District Council* [2003] 1 P. & C.R. 19 per Jonathan Parker LJ at para. 125.
7. Where such a re-consideration takes place, two further requirements are as follows.
8. First, the re-consideration is subject to the general principle of administrative law that a decision-maker is “under a duty to inform itself of the information relevant to the decision”: see *R (Law Society) v. Legal Services Commission* [2010] EWHC 2550 (Admin) at para. 209, applying *Secretary of State for Education and Science v. Tameside MBC* [1997] A.C. 101 per Lord Diplock at p.1065B (“the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly”). This was described by Stadlen J. in *R (RP) v. Brent LBC* [211] EWHC 3251 (Admin) as “a requirement of general application to all decision makers and a necessary condition for a decision to be characterised as lawful.” What this means is that the planning committee cannot simply make a generalised assertion that the change of circumstances or new material information does not justify a different conclusion to that previously reached. It must grapple with the material details of the change in circumstances and/or new information or evidence and specifically address whether they individually or cumulatively justify a different decision. Failure to do so would be unlawful. In practice, one would expect an Officer’s Report to be written to assist the planning committee in appraising the details of the change in circumstances and new information.
9. Secondly, the re-consideration is subject to the common law requirements of procedural fairness. It is relevant in this respect that members of the public and certain statutory bodies are entitled under the Town and Country Planning (Development Management Procedure) Order 2010 to be given an opportunity to comment on the merits of a planning application: see Articles 13 and 16 respectively. In a situation where, after this consultation with the public and relevant statutory bodies has concluded, there has been a change of circumstances or new material information/evidence has arisen which is

relevant to the application, there are strong grounds for concluding that common law procedural fairness requires at the very least that those persons and bodies who responded to the consultation exercise to be re-consulted before the planning committee consider the matter. Otherwise they will have been deprived of the opportunity to make a fully informed response, since their only opportunity of consultation would have been at a time before the new circumstances or evidence arose, and they will be denied the chance to explain whether their responses remain unchanged in the light of the new circumstances and/or new information or the chance to make representations on the question of whether the new circumstances and/or new information justifies the authority reaching a different conclusion to that which it previously reached. As Otton LJ held in *R v. Secretary of State for Trade and Industry ex parte UNISON* [1996] I.C.R. 1003 at p.1051F, “fair consultation involves giving the body consulted a fair and proper opportunity” to express its views on the subject matter of the consultation “with the consultor thereafter considering those views properly and genuinely”.

10. Thirdly, the local planning authority must abide by the relevant provisions of its constitution. In the present case, the Development Control Committee - Decision Making Protocol of the Council’s Constitution provides that, when an item is debated by the Development Control Committee, “there are opportunities for members of the public to speak to the Committee prior to the debate” (see p.59). This creates a legally enforceable legitimate expectation that, prior to the Committee debates a matter, an opportunity will be provided for interested persons to address it: see e.g. *R (Nadarajah) v. SSHD* [2005] EWCA Civ 1363 at para. 68, where Laws LJ held “Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so”. A departure from a legitimate expectation must be for cogent and proportionate reasons which are clearly explained at the time (ibid; see also *R (Bibi) v. Newham LBC* [2002] 1 W.L.R. 237 at para. 59).

Analysis

11. A number of new circumstances and new evidence/information have arisen since the May 2013 resolution to grant Tesco planning permission.
12. First, an appeal against the refusal of the ASDA scheme is due to be heard before an Inspector in little over two weeks’ time. Accordingly, the robustness of the Council’s heritage and horseracing based objections to the ASDA scheme will very shortly be tested and determined before an independent tribunal. If the outcome is that the Inspector rejects those objections, then it would follow on the Council’s own evidence that the ASDA scheme ought to be granted permission and the Tesco scheme ought to be refused permission since the Council’s position is that there is only capacity for only one further new retail store (in addition to the recently consented Morrisons) in Newmarket and that the ASDA scheme is preferable in retail policy terms than the Tesco scheme

due to its greater proximity to the town centre. **The acceptability of Tesco's scheme is therefore dependent upon the outcome of an inquiry which is now imminent. That is plainly a new material consideration. It is very unlikely that a Court would hold otherwise.** At the very least, therefore, a balancing exercise needs to be undertaken between the benefit of waiting a relatively short time to receive the result of the Inspector's decision against the disadvantages (if any) of the delay to the determination of the Tesco scheme which would be caused as a result. It is also relevant in this context that the determination of the Tesco scheme has not to date taken place with any particular expedition, which strongly suggests that there is no compelling public interest in an immediate grant of permission to Tesco which would outweigh the obvious public interest in ensuring that Tesco does not obtain a permission which the Inspector's decision subsequently reveals ought not to have been granted.

13. Secondly, as noted above, a highly material consideration in the Council's resolution to grant permission to Tesco was the conclusion that the sequentially-preferable ASDA scheme promoted by Unex was objectionable due to its alleged conflict with planning policies relating to the horseracing industry and its alleged impact on the conservation area. On 28 January, the Council and Unex exchanged proofs of evidence which contained material new information about these matters as well as the overall pros and cons of the ASDA Scheme. **The material in the proofs of evidence is also plainly relevant to the merits of the Tesco scheme since the acceptability of the Tesco scheme is acknowledged to be dependent on the unacceptability of the ASDA scheme.** Applying the principles set out in the *Law Society* and *Thameside* cases, the Development Control Committee needs to conscientiously consider the specific points made in the proofs of evidence and assess whether they either individually or cumulatively affect the decision to prefer the Tesco scheme to the ASDA scheme and/or whether they at least justify staying the final determination of the Tesco scheme until the Inspector's decision on the ASDA scheme is published. It is not for Unex to do this job for the Council – the case-law referred to above makes clear that the legal duty in these circumstances rests with the decision-maker to conscientiously appraise itself of all relevant material and grapple with the points made. By way of illustration, however, the material information and analysis contained in the proofs of evidence which was not before the Development Control Committee in May 2013 include (but are not limited to):

- a. The expert planning analysis by David Henry of Savills, which is in significantly greater detail than the planning history before the Development Control Committee in May 2013, and which concludes that the planning status of no part of the site is for racehorse training use and that the consequence is either that the ASDA scheme would involve no breach of development plan policies relating to the horseracing industry or that any breach should carry limited weight.

- b. The expert heritage analysis of Dr Nicholas Doggett of Asset Heritage, which concludes that the effect of the proposals on the listed buildings at the site is beneficial and contributes to a conclusion that the harm to the conservation area caused by the ASDA scheme is outweighed by the scheme's benefits in accordance with para. 134 of the NPPF (a more positive analysis than that presented with the application).
 - c. The expert retail analysis by Alastair Wood of Savills, which concludes that the proximity of the ASDA scheme to the town centre will have significant benefits in 'clawing back' retail trade for the town centre that has been lost to existing out of centre retail stores and will continue be lost once the permitted Morrisons scheme is built. This is plainly a material consideration in considering the balance between the benefits and adverse impacts of the ASDA scheme in accordance with s.38(6) of the Planning and Compulsory Purchase Act 2004 and para. 14 of the NPPF, and also in considering the overall comparative merits of the ASDA scheme and the Tesco scheme. So too is the evidence of Dr Doggett that the ASDA scheme's benefit to the retail performance of the town centre will have beneficial knock-on effects in heritage terms.
14. **Thirdly**, on 2 October 2013 Council received an application for planning permission for 400 dwellings at Hatchfield Farm in the close vicinity of the Tesco scheme. Moreover, the Council's December 2013 Site Allocations Local Plan seeks through Policy N14 to allocate Hatchfield Farm for 700 dwellings. This is the single biggest allocation for new residential development in Newmarket. **This proposal to focus Newmarket's main residential growth in the immediate proximity of the Tesco scheme has obvious potential implications for the effect of the Tesco scheme on the town centre, since the town centre will be at a clear competitive disadvantage to Tesco in attracting retail customers from the residents of these proposed 400-700 homes due to its greater distance from where they live. Again this is undoubtedly a new material consideration which needs to be properly assessed before the Committee determined whether it affects their May 2013 decision on the Tesco scheme.**
15. **In relation to each of these matters, the Council will be at substantial risk of a successful judicial review claim if it were to fail to re-consider the May 2013 resolution to grant planning permission to Tesco having first:**
- a. Conscientiously grappled with the material details of the new circumstances and information/evidence. It is difficult to see how this could be done 'on the hoof' at the Development Control Committee meeting on 5 February 2014. One would expect to see an Officer's report to Committee appraising and grappling with the various points;
 - b. Re-consulted the public and relevant statutory bodies so that they have a fair opportunity of commenting on this issue; and

- c. Provided members of the public with an opportunity to address the Committee.

16. It follows that the proper and lawful course of action at the meeting on 5 February 2014 would be for the matter to be deferred in order to allow the above to be undertaken.

Conclusion

17. I have nothing to add as currently instructed but would be happy to advise further if so required.



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