

RE: REPORT NO DEV14/103 - UPDATE

RETAIL APPLICATIONS UPDATE AND CLARIFICATION REGARDING THE DETERMINATION OF THE TESCO APPLICATION (F/2012/0704/FUL)

1. This report is brought to Members firstly by way of an update and secondly to ensure that if any new relevant material has come available since the original decision this is taken account of.
2. Members resolved on 22 May 2013 and reaffirmed on 4 September 2013 a decision to grant planning permission to Morrisons. This planning permission was issued on 30 December 2013. Complete with a Section 106 Obligation.
3. In addition Members also resolved on 22 May 2013 and reaffirmed on 4 September 2013 a decision to grant planning permission to Tesco to extend their existing store at Fordham Road . This permission has not as yet been issued but it is now ready to be issued. Likewise an Agreement under Section 106 Town and Country Planning Act is about to be completed.
4. When these two decisions were taken to grant planning permission Members also decided to refuse a planning permission to Unex for a superstore at Queensbury Lodge/Fitzroy Paddocks .This refusal is now the subject of an appeal which will be considered at a local Inquiry on 25 to 28 February 2013.
5. Unex advised the Council in their letter dated 14th January 2014 that their evidence to the Inquiry would contain new material which ought to be considered by Members prior to the issue of the Tesco planning permission. The Council had not at the time received Unex's evidence to the local Inquiry but it has now been received and considered.
6. Officers accept that as a matter of law the Council needs to be satisfied at the time it actually issues any planning permission that it has had regard to the Development Plan prevailing at that time and likewise to any other material considerations. If therefore there are changes in the Development Plan or new material considerations, which could include a material change in circumstances or the existence of new material information, come to light between the date of the original resolution and the actual issue of the planning permission they should be taken into account.
7. The appellant's Counsel's opinion, received late last night, also states that the Council will be at substantial risk of a successful judicial review claim if it were to reconsider the May resolution to grant permission for Tesco without having first:
 - (i) **A written report which dealt with the new information/material considerations in detail and in writing, rather than verbally tonight** – The Council's legal advice on this matter is that provided that the information before the committee is presented in sufficient detail, there is no reason why this should have to be in a written report
 - (ii) **Reconsulted the public and relevant statutory bodies so that they have a fair opportunity to comment on the issues** – It is not considered that there are any new material considerations which would warrant reconsultation on either the Tesco or the Asda proposals
 - (iii) **Provided Members of the public with an opportunity to speak** – The Council's legal advice is that this matter would not be covered by the Right to Speak protocol and in any event the points raised by the appellants have been made available to Members. In any event, taking

into account exceptions, it is not considered that any new material has been brought up such that an exception to this protocol should be made. Further, in the interests of natural justice, no other parties (for example Tesco) have been invited to speak.

8. In this instance all the matters suggested by Unex as constituting new material considerations were considered by Members. They were all reported to Members within the original Officer's Report. At best, with one exception, Unex's evidence to the Inquiry elaborates upon material considerations already identified and/or provide additional but not new materials as such.
9. With regard to the matters raised by Unex in their letter of the 14 January 2014 and Counsel's opinion received last night, whilst they do not in Officers' views amount to new material considerations I would nevertheless comment as follows:
10. Unex in their letter of 14 January 2014 contend that there is new material in respect of:
 - (i) **Planning History of the site** - The Planning History of the site was rehearsed in the committee report and it is not considered that new information has emerged through the proofs of evidence which would warrant a different approach or recommendation to the Asda application. Matters regarding the applicability of the horse racing policies were also before Members at the May committee and raised by the supporting statements of the applicants at the time. It is not considered that new material considerations are raised with this regard in the proofs.
 - (ii) **Analysis of the impact on the conservation area of the Unex proposals** The Heritage evidence identifies that the main difference between the parties is whether the harm is substantial or less than substantial. This was an issue considered by Officers having regard to the views of the appellants, English Heritage and their own Officers. Officers reached the conclusion that there was substantial harm and notwithstanding the appellants' expert evidence to be submitted to the Inquiry we see no reason to change these findings.
 - (iii) **Evidence regarding the condition of the listed buildings and the fact that these will not be restored and returned to beneficial use if the Asda scheme does not proceed** - the proofs do not demonstrate why the Asda scheme is the only opportunity for these buildings to be restored and re-used. It is not considered that new information or material considerations are presented as a result of this assertion.
 - (iv) **The implications of the Council's grant of permission to Morrisons on 31 December 2013** – It was clear from the evidence of the Council's retail consultant at the time of the resolution last May what the retail impact implications of approving Morrisons were and it was made clear to Members that if they supported the heritage and horseracing objections to Asda, then Morrisons was recommended for approval on that basis. It is not considered that new material considerations have been put forward in the appellants proof regarding this point.
 - (v) **The threat to the vitality and viability of the town centre if the Tesco and Morrisons schemes proceed** - The cumulative impact report which was tabled on the 22 May and the verbal advice of the Council's retail consultant, Dr Norris, covered these points and were before Members

when the applications was determined in May. This is not a new issue for Members to consider.

In the Appellant's Counsel's opinion received late last night the main points outlined to be considered relate to the following:

- (i) **Asda store preferable in retail policy terms. Horseracing and heritage matters about to be tested at appeal. If the appeal Inspector rejects the horseracing and heritage argument Asda should be approved, not Tesco and the Tesco permission should be delayed until the outcome of the appeal is known.** - Having considered the detail contained in the proofs, it is not considered that there is new evidence contained in them that bring into play new material considerations not considered by Members in May. Moreover, Members will recall that the National Planning Casework Unit were asked by the appellants to call in the Morrisons and Tesco applications into a four way planning inquiry but the National Planning Casework Unit declined to do this and confirmed that the Council was free to determine these applications at a local level. See letters from NPCU attached. On that basis, it is not considered that the issuing of the Tesco decision should be delayed
- (ii) **Benefits of the reuse of the listed buildings contributes to a conclusion that the harm to the con area caused by the scheme is outweighed by the scheme's benefits in accordance with para 134 of the NPPF** – This argument is no different to the points raised in the application and in particular the heritage statement submitted with the application. These points were before Members at the time of the resolution in May.
- (iii) **The proximity of the Asda scheme to the town centre will claw back retail trade for the town centre which has been lost by existing out of centre stores and the impending Morrisons development** – The issue of clawback and linked trips from the Asda scheme was considered in May, as was the cumulative impact of the various combinations of stores that could have been approved. Put simply, and on the basis of the retail impact assessments and recommendations from Dr Norris – the evidence identified capacity for 1 store, Asda is an out of centre store but preferable in retail policy terms because of its propensity to provide for linked trips and a bookend to the High Street. However, Dr Norris recognised the horseracing and heritage objections to the Asda scheme and Officers recommended to Members that if the Asda scheme was found to be unacceptable on policy grounds that Morrisons should be approved. The recommendations from Dr Norris then explained that Tesco could also be approved taking into account the projected impact on the town centre and Tesco's overtrading situation, which meant that the convenience impact on the town centre would be neutral. The summary recommendations from Dr Norris then went through the various scenarios and combinations of stores and projected impacts on the town centre if approved. He recommended that if Members found Asda to be unacceptable in policy terms, that Morrisons and Tesco could be approved. He also outlined that approving Asda and Morrisons would have a greater impact on the vitality and viability of the town centre than would be forecast from approving Tesco and Morrisons. It is not

considered that any new material considerations have emerged as a result of the proofs of evidence such that Members should reconsider the decision to approve Tesco.

(iv) A new application has been submitted for Hatchfeild Farm for 400 dwellings, close to the Tesco site rendering the town centre at a clear competitive disadvantage to Tesco in attracting retail customers – This is the new matter referred to earlier. The Council's retail consultant has confirmed that this current application, yet to be determined, would not change his approach to his consideration of retail policy matters – it would not impact significantly on population and spending capacity data and there is an existing store on site already which is significantly overtrading. In any event, the Hatchfield Farm application is yet to be determined and can not be viewed as a commitment.

Recommendation:

That Members note this update and, having regard to the material before them, reaffirm their decision to issue the consent for Tesco (application reference F/2012/0704/FUL) subject to the conditions previously determined and the completion of the Section 106 Obligation.