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**PART B: RECOMMENDATIONS TO COUNCIL**

**REPORT TO: PLANNING COMMITTEE**

**DATE: 18 AUGUST 2015**

**REPORT OF THE: COUNCIL SOLICITOR  
ANTHONY WINSHIP**

**TITLE OF REPORT: JUDICIAL REVIEW - THE QUEEN ON THE APPLICATION  
OF MILTON (PETERBOROUGH) ESTATES COMPANY  
TRADING AS FITZWILLIAM (MALTON) ESTATE V  
RYEDALE DISTRICT COUNCIL**

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## **EXECUTIVE SUMMARY**

### **1.0 PURPOSE OF REPORT**

- 1.1 To advise members of the outcome of the judicial review proceedings against Ryedale District Council which involved a review of a planning permission granted by the Council on 12 September 2014 being for the construction of a supermarket and fuel station at the Wentworth Street Car Park Malton. (WSCP)
- 1.2 To inform members of the reasons why the judicial review was successful.
- 1.3 To advise Council of the costs of the litigation and the proposed method of funding.

### **2.0 RECOMMENDATIONS**

- 2.1 That the outcome of the judicial review proceedings be noted.
- 2.2 That Council be recommended to meet the award of costs from the improvement, contingency and emergency fund.

### **3.0 REASON FOR RECOMMENDATION**

- 3.1 To ensure that Members of the Planning Committee are aware of the decision of the High Court, and the implication for the planning application and any future officer report.

### **4.0 SIGNIFICANT RISKS**

- 4.1 There are no significant risks associated with the recommendations of this report.

## **REPORT**

### **5.0 BACKGROUND AND INTRODUCTION**

- 5.1 This report relates to a judicial review case of the Queen on the application of Milton (Peterborough) Estates Company trading as Fitzwilliam (Malton) Estate v Ryedale District Council. A copy of the approved judgement is attached. Judicial review is a specialised type of public law legal action. The nature of this type of legal action and other matters are summarised in a Q & A in the attached Appendix 1.
- 5.2 The planning history of this case is complex and is summarised in the attached Appendix 2. The account below is a brief summary of the key matters.
- 5.3 The Planning Committee meeting on 24 April 2014 granted a planning permission for the construction of a supermarket and fuel station at the Wentworth Street Car Park Malton. The planning permission was issued on 12 September 2014.
- 5.4 A judicial review action was lodged in the Leeds High Court on 23 October 2014 by the Claimants, the Milton (Peterborough) Estates Company trading as the Fitzwilliam (Malton) Estate, who are landowners affected by the grant of planning permission.
- 5.5 The court hearing took place before Mr Justice Dove in the Leeds High Court on Wednesday and Thursday of 10th and 11th June 2015.
- 5.6 The High Court judge Mr Justice Dove handed down his judgement on 9 July 2015 which allowed the claim, gave judgement for the claimants and ordered the Council to pay costs. The Judge determined that the Council's decision to grant planning permission for a supermarket and fuel station at the Wentworth Street Car Park Malton should be quashed.

### **6.0 POLICY CONTEXT**

- 6.1 This case has a bearing on the implementation of the local plan policies and managing the environment.

### **7.0 CONSULTATION**

- 7.1 The Chief Executive, Chief Financial Officer, and the Forward Planning Manager have been consulted on this report.

### **8.0 REPORT DETAILS**

#### **Why did the Council defend the judicial review action ?**

- 8.1 The reasons why the Council defended the judicial review case may be summarised as follows :
- (i) After taking Counsel's advice, the Council defended its position.
  - (ii) In making its planning decision and the planning permission being issued, the Planning Committee was functus officio. Functus officio is

latin for "having performed his function." The Planning Committee had performed its function and could not revisit its decision;

- (iii) A Local Authority has a general duty to defend its reasonable decisions. In this Judicial Review case, one High Court Judge had found the claim to be "totally without merit" and a Single Lord Justice had only found the case "arguable". The view of the Council's barrister was that the District Council had a good case. That was also the view of Leading Counsel for the interested party. The District Council relied on its own independent legal advice.
- (iv) Against the background of clear legal advice from Leading Counsel that the Council had a good case and the fact that the third party was defending the judicial review claim, there was no good reason why the District Council should concede the Fitzwilliam Malton Estate's claim for a judicial review of the Council's grant of planning permission.

### **The reasons why the judicial review was successful.**

- 8.2 It is worthy of note that Mr Justice Dove made the following observation at paragraph 44 of his judgement :

*"During the course of argument the grounds as originally pleaded by the claimant were refashioned and I propose to deal with them in the manner in which they emerged during the hearing."*

- 8.3 The Fitzwilliam Malton Estate challenged the grant of planning permission for a supermarket and fuel station at the Wentworth Street Car Park Malton LPA Ref; 11/00927/MOUT on five grounds of which four were accepted by the Judge, namely :

Ground 1; The report to the Planning Committee had not properly reported the Planning Inspectors decision on the Livestock market site appeal in relation to the sequential approach.

Grounds 2 and 4; The report had not properly taken into account the Planning Inspectors conclusions in relation to treating the Livestock Market site as a town centre site for retail impact purposes.

Ground 5; The Council had not undertaken a further screening opinion for the purposes of the Environmental Impact Assessment Regulations.

Ground 3 relating to an allegation of the report to the Planning Committee not properly reporting the intentions of Booths and Fitzwilliam Malton Estate on redeveloping the Livestock Market site at Malton was dismissed.

In his judgement Mr Justice Dove made a finding that the Officer report to the Planning Committee seriously misled the Planning Committee. Members are advised that there was no intention to mislead the Planning Committee.

- 8.4 The essence of the High Court decision of Mr Justice Dove in the Judicial Review case was mainly to the effect that and largely turned upon the reasoning contained in the officer report to the Planning Committee meeting on 24 April 2014

in relation to the decision of the Planning Inspector on the Livestock Market Malton appeal decision.

- 8.5 At the heart of these grounds was the issue of whether or not the retail impact of the WSCP proposals on the Livestock Market site had been sufficiently and properly addressed in the Officers report and the appended information as a material consideration. Mr Justice Dove clearly considered that this had not been the case.
- 8.6 Litigation risk hugely increases if a matter is regarded as irrelevant or immaterial rather than being dealt with as a matter of weight.
- 8.7 The findings of the Judge were disappointing, particularly given the evidence presented to him. The Planning Committee is requested to note the views of Mr Justice Dove, that there was a lack of clarity in certain aspects of the report, namely the reasoning relating to the Inspectors decision on the livestock market appeal and the retail impact of the WSCP proposals on the Livestock Market site which was a material consideration all of which emerged during the High Court's scrutiny of the case. Due regard also needs to be given to the need for further screening opinion for the purpose of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 as amended.
- 8.8 Consideration was given to an appeal against the High Court's decision but, an appeal was not recommended having weighed up the prospects of success against the cost of further litigation. Accordingly it was considered that it would not be in the general public interest to appeal the judgement.
- 8.9 The planning permission which was the subject of the judicial review has therefore been quashed and, should the applicants wish to continue with the planning application, that application will need to be reconsidered by the Council's Planning Committee.
- 8.10 Whilst this is the first time that this Council has been involved in a judicial review relating to its planning decisions which has been successful, it is not by any means alone nationally. In the past few years there has been a significant growth in the number of judicial review cases involving planning decisions across the country. By way of context reference is made to a retail planning decision relating to The Queen On the application of Midcounties Co-Operative Ltd v Forest of Dean District Council (2015). That Council has had three successful judicial review challenges in respect of the same retail planning application. In that particular case Mr Christopher Katkowski QC the most famous retail planning law barrister in England represented the Interested Party.

#### **Status of the Planning Application**

- 8.11 As a result of the judgement and court order quashing the planning permission dated 12 September 2014, the planning application remains live and the District Council as Local Planning Authority has a duty to re-determine it, unless the application is withdrawn by the applicant or called in by the First Secretary of State for him to determine.
- 8.12 If the application is not withdrawn the Local Planning Authority would reassess the planning application and address the issues raised in the judgement, and any material changes in circumstances since the application documents were prepared and since the 24 April 2014 Planning Committee meeting. This will require the

submission of additional information from the applicant, consultation with statutory and non-statutory consultees and members of the public before it is reported to the Planning Committee to be re-determined. The District Council would also need to undertake a further screening opinion for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 as amended.

## **9.0 IMPLICATIONS**

9.1 The following implications have been identified:

a) Financial

The Council must pay the Claimant's reasonable costs for the judicial review .

b) Legal

Detailed in the body of the report. The Planning decision made by the Planning Committee on 24 April 2014 is quashed. The Local Planning Authority has a duty to determine Planning Applications before it.

c) Other (Equalities, Staffing, Planning, Health & Safety, Environmental, Crime & Disorder

None.

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**Background Papers:**  
Planning Application LPA Ref 11/00927/MOUT

## APPENDIX 1

### Q & A

#### **Approved Judgment: The Queen on the application of Milton (Peterborough) Estates Company trading as Fitzwilliam (Malton) Estate v Ryedale District Council - CO/4915/2014**

**Q1.** What is the background to this case ?

**R1.** Please see the attached chronology of events in Appendix 2.

**Q2.** What is a judicial review ? How does it differ to an appeal ?

**R2.** A judicial review is different to a planning appeal.

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body.

In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision.

This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way.

In a planning appeal the Planning Inspector considers the merits of the proposal and makes a decision to approve or refuse.

In a judicial review case the High Court judge is not considering the merits of the proposal but the legality of the decision.

The judgement is not challenging the appropriateness of the development, but has considered the process of reaching the decision.

The High Court ruling nullifies the decision taken by the Planning Committee in April 2014 if there is no appeal. If there is no appeal the decision enables the application to be re-considered by councillors of the Planning Committee at a later date.

**Q3.** What is the usual procedure for a judicial review ?

**R3.** The usual sequence of events in a judicial review action is briefly summarised. When a planning application is approved, within a specified timescale, third parties with a legitimate interest in the application can apply to the High Court to have the decision quashed. Judicial review is a two stage process. At the first, the permission stage, an applicant needs to satisfy the High Court that there is an arguable case. This stage is done on paper, although there is scope for a hearing. If permission is refused then, subject to a right of appeal, that is the end of the matter. If permission is granted, the matter goes to the hearing stage. The parties submit detailed arguments and a full hearing is fixed.

At the full hearing, the Court may quash the Council's decision to grant planning permission. If this occurs, the decision is referred back to the Council for redetermination.

**Q4.** What was the decision of Mr Justice Dove ?

**R4.** In challenging the grant planning permission for a supermarket and fuel station at the Wentworth Street Car Park (WSCP) Malton the barristers for the Fitzwilliam Malton Estate relied heavily on the decision of the Planning Inspector in the planning appeal decision letter dated 29 October 2012 for the proposed redevelopment of the Livestock Market site at Malton.

The Fitzwilliam Malton Estate challenged the planning approval on five grounds of which four were accepted by the Judge, namely;

Ground 1 - That the report to the Planning Committee had not properly reported the Planning Inspectors decision on the Livestock Market site appeal in relation to the sequential approach

Ground 2 and 4 - The Council had not properly taken into account the Planning Inspectors conclusions in relation to treating the Livestock Market site as a town centre site for retail impact purposes

Ground 5 - That the Council had not undertaken a further screening opinion for the purposes of the Environmental Impact Assessment Regulations.

Ground 3 - Relating to an allegation of the report to the Planning Committee not properly reporting the intentions of Booths and Fitzwilliam Malton Estate on redeveloping the Livestock Market site at Malton was dismissed.

**Q5** In his judgement Mr Justice Dove makes a finding that the officer's report did mislead Members of the Planning Committee and misled them significantly.

Was there an intention by Officers to mislead Members of the Planning Committee ?

**R5.** In paragraph 31 of his judgement Mr Justice Dove makes reference to the principles governing the approach to a committee report to seek to establish whether or not there may have been an error of law in the following case relating to Selby District Council :

*"An application for Judicial Review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at a meeting of the planning committee before the relevant decision is taken." (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby*

District Council (18<sup>th</sup> April 1997) 1997 WL 1106106 per Judge LJ as he then was)

The officers' recommendations were guided by national planning policy advice and professional retail planning advice. They are a professional and dedicated team and are committed to providing the best possible report.

Whilst Mr Justice Dove made a finding that the officer's report did mislead Members of the Planning Committee and misled them significantly, Officers' did not intend to mislead Members of the Planning Committee.

**Q6.** Does the judgement Mr Justice Dove mean that Wentworth Street Car Park is not a good site for a superstore ?

**R6.** No. As mentioned above in a judicial review case the High Court judge is not considering the merits of the proposal but the legality of the decision.

The judgement is not challenging the appropriateness of the development, but has considered the process of reaching the decision.

On 22 May 2013 at the Examination in Public hearing at Ryedale House Peter Village QC for the Fitzwilliam Malton Estate made the following points :

*"Peter Village QC made the point that Wentworth Street Car Park is a more attractive site for a supermarket operator and needed to be "strangled at birth" and that any reference to the Northern Arc should be removed from the Plan. It will stifle the ability of the LMS site to come forward."*

The above quote is taken from the minutes of the Examination in Public hearing.

**Q7.** Will the District Council have to pay costs in the judicial review case ?

**R7.** The general rule is that costs follow the event in the sense of the successful party being entitled to an order for costs against the unsuccessful party. The usual costs order is that the defendant pays the reasonable and proportionate costs of the claimant such costs to be subject to detailed assessment if not agreed. In the absence of agreement on costs assessment usually takes place before a High Court Official.

The terms of the order for costs in this case are still before Mr Justice Dove for his consideration.

The Fitzwilliam Estate has claimed £145,602.71 plus VAT costs . The costs claim as a whole appears to be completely unreasonable and is being contested.

**Q8.** In 2012 Ryedale District Council was ordered to pay £148,000 costs to the Fitzwilliam Malton Estate in relation to the Livestock Market Appeal. Now the District Council will be ordered to pay costs to the Fitzwilliam Malton Estate in the Judicial Review of the grant of planning permission for the WSCP site. Has the District Council repeated the same mistake?

**R8.** The District Council has not repeated the same mistake.



In the Planning Inspectors Livestock Market appeal decision dated 29 October 2012, costs were awarded against the Council for not being able to substantiate two out of four reasons for refusal in refusing the retail planning application to redevelop the Livestock Market site.

The reason for the costs award was the misapplication of the retail planning policy sequential test in PPS 4 terms.

There was no award of costs on the remaining two reasons for refusal relating to impact on heritage assets and loss of the livestock market. They were material considerations. The Planning Inspector attached a different weight to those reasons than the Council. He was legally entitled to do that.

At the end of the day the High Court decision of Mr Justice Dove in the Judicial Review case in relation to the grant of planning permission to redevelop Wentworth Street Car Park Malton, was to the effect that and largely turned upon the reasoning contained in the officer report in relation to the decision of the Planning Inspector on the Livestock Market Malton appeal decision.

Mr Justice Dove made a finding that the officer's report did mislead Members of the Planning Committee and misled them significantly.

The Fitzwilliam Malton Estate challenged the planning approval on five grounds of which four were accepted by the Judge, namely;

Ground 1 - That the report to the Planning Committee had not properly reported the Planning Inspectors decision on the Livestock Market site appeal in relation to the sequential approach

Ground 2 and 4 - The Council had not properly taken into account the Planning Inspectors conclusions in relation to treating the Livestock Market site as a town centre site for retail impact purposes

Ground 5 - That the Council had not undertaken a further screening opinion for the purposes of the Environmental Impact Assessment Regulations.

Ground 3 - Relating to an allegation of the report to the Planning Committee not properly reporting the intentions of Booths and Fitzwilliam Malton Estate on redeveloping the Livestock Market site at Malton was dismissed.

To state that the judicial review case was the repeat of the same mistake as the Livestock Market appeal is not an accurate characterisation of the position.

**Q9.** What happens next ?

**R9.** The ruling nullifies the decision taken by the Planning Committee in April 2014 if there is no appeal and means that the application will have to be re-considered by councillors of the Planning Committee at a later date if there is no appeal or if the planning application is not withdrawn.

## APPENDIX 2

### CHRONOLOGY OF EVENTS

**03.09.2007** Planning application LPA Ref 07/00813/MOUT which was submitted by the Fitzwilliam Malton Estate for the redevelopment of the Livestock Market site Malton was registered on 3 September 2007.

**13.02.2009** Planning application LPA Ref 07/00813/MOUT which was submitted by the Fitzwilliam Malton Estate was withdrawn on 13/02/09.

**17.11. 2010** At its meeting on 17<sup>th</sup> November 2010 the Council considered and approved a recommendation to accept an offer to purchase land at Wentworth Street Car Park in Malton. This decision was subsequently implemented through the completion of a legal agreement with GMI Holbeck Land (Malton) Ltd (GMIHL) which was completed in May 2011.

**10.05.2011** Planning application LPA Ref 11/00412/MOUT which was submitted by the Fitzwilliam Malton Estate for the redevelopment of the Livestock Market site Malton was registered on 10 May 2011.

**26.08.11** The planning application LPA Ref 11/00927/MOUT which was submitted by GMI Holbeck Limited for the redevelopment of the Wentworth Street Car Park was registered by the Council on 26 August 2011.

**29.03.12** The planning applications LPA Ref 11/00412/MOUT and LPA Ref 11/00927/MOUT were originally considered by Members at a Planning Committee Meeting on 29 March 2012. It was resolved to :

- (i) refuse planning application LPA Ref 11/00412/MOUT; and
- (ii) grant planning permission for LPA Ref 11/00927/MOUT for the proposed development subject to the Secretary of State confirming that the application did not need to be referred to him for determination, the completion of a S106 Agreement and the imposition of conditions. The Secretary of State subsequently confirmed in writing that he would not 'call in' the application for his own determination.

**29.10.12** Livestock Market Site appeal decision issued, allowing the appeal and granting of planning permission for the Livestock Market Scheme. The Inspector made a partial award of costs against the Council. Despite the resolution of the 29 March 2012 Planning Committee to grant planning permission for the WSCP scheme, and the Decision of the Secretary of State not to call it in, the planning permission was not issued prior to the Livestock Market Site appeal decision being published. However in the light of the Inspector's decision and specifically his observations relating to Wentworth Street Car Park, Officers considered that it was appropriate that the matter was considered afresh by Members.

**13.05.13** The Fitzwilliam Malton Estate agreed the sum of £148,000 in costs. The original claim for costs was £251,505

**26.11.13** Revised information for the Wentworth Street Car Park application submitted by the applicants to the Local Planning Authority taking into account the Livestock Market appeal decision, as well as other amendments to the scheme.

**24.4.14** The revised Wentworth Street Car Park planning application LPA Ref 11/00927/MOUT was considered by Members at Planning Committee. It was resolved to grant planning permission for the proposed development subject to the Secretary of State confirming that the application did not need to be referred to him for determination, the completion of a S106 Agreement and the imposition of conditions.

**9.9.14** Letter received from the National Planning Casework Unit that the Secretary of State would not 'call in' the application for his own determination.

**12.09.14** Planning permission was issued.

**23.10.14** The Fitzwilliam Malton Estate lodged a claim for Judicial Review which was issued by Leeds High Court on 23 October 2014.

**17.12.14** At first instance Mr Justice Gilbert designated the claim for Judicial Review as "totally without merit".

**29.12.14** The Fitzwilliam Malton Estate gave notice that they would appeal that Order. It was later confirmed that the appeal would be considered by Lord Justice Sullivan of the Court of Appeal.

**23.3.15** Lord Justice Sullivan found that the Fitzwilliam Malton Estate's grounds for a Judicial Review were properly arguable.

**7.5.15** District Council election.

**10-12.6.15** The Fitzwilliam Malton Estate's grounds for Judicial Review were considered before a Judge at Leeds High Court on 10 – 12 June 2015.

**9.7.15** The High Court judge Mr Justice Dove handed down his judgement which quashed the decision to grant planning permission for a supermarket and fuel station at the Wentworth Street Car Park Malton. The Council was ordered to pay the reasonable costs of the Estate.