

Claim No.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

LEEDS DISTRICT REGISTRY

PLANNING COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO CLAIM A JUDICIAL REVIEW

BETWEEN:

THE QUEEN

-on the application of-

MILTON (PETERBOROUGH) ESTATES COMPANY

TRADING AS THE FITZWILLIAM (MALTON) ESTATE

Claimant

-and-

RYEDALE DISTRICT COUNCIL

Defendant

-and-

GMI HOLBECK LAND (MALTON) LIMITED

Interested Party

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STATEMENT OF FACTS AND GROUNDS

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Introduction: The Parties and The Decision under Challenge

1. Milton (Peterborough) Estates Company, trading as the Fitzwilliam (Malton) Estate ("the Claimant"), is the owner of, and proposed developer of a consented supermarket-led development on, what is known as the Livestock Market Site ("LM Site") in Malton. The site is approximately 0.9ha in size and located immediately adjacent to the existing town centre site at Malton Livestock Market, Horsemarket Road, Malton, North Yorkshire.
2. It is important to note that the Claimant's status in developing the LM Site is not that of a normal developer promoting retail development. Importantly, the Claimant is also the major landowner of the town centre in Malton. The Borough of Malton was

originally purchased by the Hon Thomas Watson Wentworth in 1713; twelve generations later, much of Malton is still owned by his descendants, the Naylor-Leylands, who hold the Fitzwilliam Malton Estate. As a result, the Claimant has been closely engaged with plan-making and wider planning matters in Malton for many years and it has a deep and pervasive interest in the proper protection and effective planning of the area. The independent Inspector appointed by the Secretary of State for Communities and Local Government ("**the Secretary of State**") who allowed the Claimant's appeal permitting development on the LM Site recognised that the Claimant's concerns about protecting the town centre had an added significance and that it would not have made sense for the Claimant to have promoted a development for the LM Site which would do anything but boost the town's vitality and viability<sup>1</sup>.

3. Ryedale District Council ("**the Council**") is the local planning authority for Malton.
4. On 10 May 2011 the Claimant submitted an outline application for planning permission in respect of the LM Site for "the demolition of the existing livestock market including associated buildings and redevelopment of the site for retail with 3-storey car-parking and public square" (ref 11/00412/MOUT) ("**the LM Application**"). In so doing, the Claimant had identified a location and a size of development which would deliver additional convenience and comparison shopping floorspace for the town, but in a location which would become part of the town centre itself. Both the size and the location of the development were chosen to provide vitality and viability to the town centre, rather than to compete with it. Although this site is technically "edge-of-centre", it immediately adjoins and is linked to the existing town centre shops; as the Inspector who determined the appeal concluded, this meant that it should in fact be assessed as being a development as a functional part of the town centre itself<sup>2</sup>.
5. By contrast, the Interested Party, GMI Holbeck Land (Malton) Limited ("**GMI**") came forward as a proposed commercial developer of a large non-town centre supermarket scheme (Use Class A1) on a car park site owned by the Council known as Wentworth Street Car Park ("**WSCP**"). WSCP is an edge of centre site, but which the Inspector did not identify as one that would become a functional part of the town centre. To the contrary, the Inspector specifically concluded that the WSCP was sequentially less preferable and (having visited both sites) concluded that the WSCP would have poorer pedestrian links to the town centre notwithstanding proposed enhancements works to the route that would be used<sup>3</sup>.
6. GMI is a purely commercial developer with no wider interest in the vitality and viability of Malton Town Centre. In August 2011, GMI submitted an outline application for planning permission (ref 11/00927/MOUT) for "Erection of retail units (Use Class A1), offices (Use Class B1), petrol filling station, car park and associated landscaping" on the WSCP site ("**the WSCP Application**").
7. GMI has entered into a conditional sale contract with the Council in respect of the WSCP site. Under this, the Council stands to receive £5 million if this out-of-centre supermarket proposal for the site goes ahead. Indeed it was the nature of this inherent commercial interest in securing planning permission for the WSCP site that led the Council originally to commission officers from East Riding of Yorkshire Council to handle the planning application. Unfortunately the Council has abandoned this approach after the Inspector's adverse assessment of the WSCP site over the LM Site and in its recent purported decision to grant planning permission to itself for the development of the WSCP site with the consequential large capital receipt it stands to gain.
8. Although the LM Site proposal had been submitted before that for the WSCP site, the Council decided to consider them together. At a controversial meeting on 29 March 2012, the Council's Planning Committee resolved to refuse the LM Site Application

<sup>1</sup> See Inspector's Decision Letter dated 29 October 2012 ("**the DL**"), paragraph 40

<sup>2</sup> See Inspector's DL paragraphs 41-44

<sup>3</sup> See Inspector's DL paragraphs 26 and 32

and instead chose to grant planning permission for the WSCP site subject to completion of a s.106 agreement and referral to the Secretary of State.

9. The Claimant appealed to the Secretary of State against the Council's decision under s.78 of the Town and Country Planning Act 1990 ("TCPA"). A public inquiry was held by the Inspector into that appeal at which the Inspector heard detailed evidence from the Claimant, the Council and others about the LM Site proposal and the WSCP proposal. By the time of the Claimant's appeal the Council had not in fact issued any planning permission for the WSCP site. Moreover, the expert retail consultant instructed by the Council as its witness accepted during the inquiry that the Council had erred in its application of Government retail policy in relation to the sequential approach when deciding the two planning applications at its meeting on 29 March 2012 and he accepted that the Council would inevitably have to revisit its assessment of the WSCP proposal before any permission could be issued.
10. It is also important to note that it was common ground at that inquiry (and confirmed by the Council's expert retail consultant) that the cumulative scale of the LM scheme and the WSCP scheme would significantly exceed the retail capacity identified for Malton in a number of retail studies such that only consent for one scheme should be permitted<sup>4</sup>.
11. The Inspector, David Wildsmith BSc (Hons), MSC CEng MICE FCIHT MRTPI, allowed FME's appeal as set out in his Decision Letter ("DL") dated 29 October 2012. The full terms of the Inspector's decision and the reasons for that decision are important. However, by way of summary only it should be noted that:
  - 11.1 The Inspector unequivocally concluded that the LMS was sequentially preferable to the WSCP site as a matter of national planning policy (formerly under Planning Policy Statement 4 ("PPS4") but with the same approach now contained in the National Planning Policy Framework ("NPPF"), paras 24-27)<sup>5</sup>.
  - 11.2 The Inspector also found that whilst the LM Site is physically located on what is technically an edge-of-centre site in terms of physical location, it would in fact function "as a logical extension to the town centre" once it is completed<sup>6</sup>. Consequently the Inspector expressly concluded that custom drawn to the LM scheme would be seen as contributing to the town centre turnover because it would function as a logical extension to the town centre and that the LM scheme would lead to an overall positive impact of 24% to the town centre.
12. The Inspector also granted the Claimant an award of costs by decision letter dated 29 October 2012 ("**the Costs DL**"). The Inspector found that the Council had acted unreasonably in the misapplication of the sequential test under Government policy and in delivering the wrong advice to members that the WSCP site was sequentially preferable to the LM Site. This led to a number of consequential errors and there was a failure to produce substantive evidence on this topic, with much of the evidence put forward by the Council being unsupportable<sup>7</sup>.
13. Following the Inspector's decision, the Claimant has been acting to implement the LM scheme in the interests of the town centre. It had been making good progress and has identified and entered into an exclusivity agreement with a convenience retail operator to be the anchor store at the LM Site (E H Booth & Co trading as "Booths") to enable the development as a whole (with the comparison floorspace units the Claimant would provide) to go forward. The viability of the proposal depends upon the provision of such a convenience retail operator to occupy the anchor foodstore. As the

<sup>4</sup> See Inspector's DL para 41

<sup>5</sup> See Inspector's DL paras 21-32

<sup>6</sup> See Inspector's DL paras 42-44

<sup>7</sup> See Inspector's Costs DL paragraphs 7-8

Claimant stated in writing, the Claimant would not proceed with the investment in the LM scheme if the WSCP scheme were to be granted planning permission<sup>8</sup>.

14. Despite all this and the clear conclusions of the Inspector about the comparative problems with the WSCP site, the Council and GMI have persisted in their attempts to gain a planning consent for this site (on which the Council's sale of the site for £5 million depends). The Council instructed new retail consultants from a list recommended to them by GMI<sup>9</sup> and that retail consultant has purported to appraise the extant WSCP scheme in a different way to that previously done by the Council's expert consultants and in a way which is fundamentally at odds with the Inspector's recent decision. The Council's new consultants have now sought to suggest that although there is not sufficient retail capacity for two schemes currently, there would be in 2023. In direct contradiction to the Inspector's conclusions, the Council's retail consultant has purported to conclude that the WSCP site and the LM Site are "sequentially equal". However, neither the Council's retail consultant nor the Council have acknowledged (let alone dealt with) that part of the Inspector's conclusions which identified that the LM Site proposal should be treated as part of the functional town centre. This serious omission and misunderstanding of the Inspector's decision is dealt with below.
15. Based on this sort of flawed and inconsistent analysis, the Council has purported to re-determine the extant GMI application for the WSCP and to grant planning permission to itself once again, despite the outstanding planning permission for the LM Site. Pursuant to an Officers' report to Committee, the Council resolved to grant itself a new permission at a controversial meeting held on 24 April 2014. The resolution was strongly opposed by 4 out of the 10 Councillors present at the Committee meeting; they subsequently departed from the Council chamber after their motion to refuse the application was not passed. The resulting resolution to grant planning permission was therefore only made by 6 members who remained present.
16. Following referral to the Secretary of State and agreement on a section 106 agreement, the Council eventually issued a Decision Notice granting planning permission on 12 September 2014 ("**the Decision Notice**") for the WSCP scheme. It is the grant of that planning permission which is now challenged by the Claimant.
17. In summary, the Claimant submits that the grant of planning permission was unlawful for any or all of the following reasons:

17.1 Ground 1: The Sequential Approach

In purporting to apply the sequential approach to the assessment of the WSCP scheme as compared with the LM scheme, the Council failed to take into account the importance of consistency with the Inspector's conclusions in dealing with the LM Site appeal. The Inspector reached the clear and unequivocal conclusion that the LM Site was sequentially preferable to the WSCP site for the reasons given by the Inspector in his DL. As a matter of principle, it was incumbent on the Council to apply the conclusion consistently to its own assessment or, alternatively, if purporting to reach a different conclusion, to provide adequate reasons for doing so (*North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137; *Dunster Properties Ltd v First Secretary of State* [2007] EWCA Civ 236; (2007) P&CR 515). The Council failed in this regard because the Planning Committee was significantly misdirected and misled by the Officer's Report to Committee which suggested that the Inspector's conclusion that "the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site" (DL, para.32) "is not fully reasoned." The Inspector's decision was fully reasoned and there was no logical or rational basis for directing members to the contrary.

<sup>8</sup> See letter to Council dated 23 April 2014

<sup>9</sup> As explained in the witness statement of Mr Bushell dated 23.10.14

## 17.2 Ground 2: The LM Scheme as a Functional Part of the Town Centre

In considering and assessing the retail impact of the WSCP scheme on the town centre, the Council singularly failed to take into account or apply the Inspector's conclusion at DL paras 42-44 that the LM scheme should be treated as one which would function as part of Malton town centre once completed. The Council consequently failed to recognise that the LM scheme ought to be treated as having an overall positive impact of 24% in terms of drawing trade to the town centre. The Council and its advisers ignored this conclusion of the Inspector and/or failed to apply this conclusion as a matter of consistency. Alternatively, if they had been purporting to depart from the Inspector's conclusion, they failed to provide any reasons for doing so (see *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137; *Dunster Properties Ltd v First Secretary of State* [2007] EWCA Civ 236; (2007) P&CR 515). Accordingly, the assessment of the retail impact of the WSCP scheme on the town centre was flawed by this glaring omission in the analysis. Thus in treating the LM scheme for all purposes as purely an "edge-of-centre" scheme the Council seriously misapplied the Inspector's contrary finding, or failed to provide reasons for departing from it.

## 17.3 Ground 3: Misdirection on Planned Investment

Further or alternatively, the Council committee members were also misdirected about what would happen on the LM Site if the WSCP were granted planning permission. The Claimant had identified to the Council that the Claimant would not bring forward the LM scheme if the WSCP proposals were approved and this would result in a significant impact on the town centre and subsequently confirmed that the Claimant would not proceed with the LM Scheme if the WSCP proposals were approved<sup>10</sup>. The Officers misdirected the Committee that the Claimant's statement "should be treated with a degree of caution" on the basis that Booths had stated that whilst they were "very concerned", Booths had not explicitly stated that they would not proceed with a store on the LM Site were the WSCP proposals to be approved. The Council officers suggested that on this basis there was no reason to suppose that further investment in comparison shopping would not follow the development of a Booths store which would act as a catalyst. Leaving aside the fact that there was no basis for belittling or sidelining Booths' own concern in this way, this direction fundamentally failed to appreciate the difference between what Booths (as putative occupier) might wish to do and what the Claimant (as developer) would be able to do in such a situation. The Claimant's decision that it would not proceed was based on the viability of the LM scheme as a whole, regardless of Booths' intentions. The Council officers either ignored, or simply misdirected both themselves and the Committee about, the impact of the WSCP scheme threatening both the economics of any potential agreement with Booths, but also in any event rendering the investment in construction of the LM scheme by the Claimant (with both its convenience and comparison shopping units) simply unviable.

## 17.4 Ground 4: Legal error that Impact on LM Scheme not a material consideration

Further or alternatively, the Council was misdirected in any event that the trading impact of the proposed store at WSCP on the LM scheme was not a material planning consideration at all. This misdirection was given on the basis that the LM scheme was not "in-centre"<sup>11</sup>. This was a serious misapplication of the Inspector's conclusion that the LM scheme should in fact be treated as a part of the town centre (as set out in Ground 2 above), as well as the fact that it had been common ground at the LM inquiry that the grant of planning permission for the WSCP scheme would make it more difficult for an operator to be found for the LM scheme. Moreover, even if the LM scheme were not treated as in-centre for these purposes (inconsistently with the approach of the Inspector), there was no basis for alleging that the impact on the LM scheme was an immaterial planning consideration. The LM scheme represented consented development that the Inspector had identified was of positive benefit to

<sup>10</sup> See Claimant's letter to the Council dated 23 April 2014

<sup>11</sup> See Committee Report at para 6.77 and England and Lyle Letter dated 9 April 2014 'Retail Impact'

Malton town centre. The potential adverse impact on such a development affecting its viability was self-evidently a material planning consideration which the Council should have been directed to take into account, but were erroneously directed that it was not material and therefore failed to do so.

17.5 Ground 5: Failure to Comply with Environmental Impact Assessment Duty

Further or alternatively, the Council failed to comply with its obligations under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("EIA Regulations") to consider whether or not the development being considered in 2014 should have been the subject of an Environmental Statement, despite the fact that the WSCP scheme was a Schedule 2 development which exceeds the screening threshold of 0.5 hectares for "urban development projects". The Council had previously issued a negative screening opinion in 2011 based on the assessment of the WSCP development as it then stood. That was at a time when the application was expressly being considered by the Council on the basis that there was only room for one retail supermarket scheme in Malton town centre and without the benefit of the Inspector's findings identified above. At that time when the decision not to require an EIA was made, there was therefore no real prospect of any cumulative impact arising from the WSCP scheme, taken with the LM scheme, so as to affect the Council's screening opinion nor any impact arising on investment in the town centre represented by the LM scheme. By contrast, by the time that the Council came to reconsider the WSCP proposal in 2014, the LM scheme had been granted planning permission on appeal and the Council itself had acknowledged that this change of circumstances required it to redetermine the planning application. Notwithstanding this, there was a complete failure to reconsider the out-of-date screening opinion and, in particular, whether or not any cumulative impacts of the proposals, or the effect on inward investment to the town centre caused by the WSCP scheme required an Environmental Statement. Given that the Council itself was recognising that there was no capacity for the scale of this combined convenience and comparison shopping floorspace until 2023, and the potential conflict with Policy SP7 of the Local Plan Strategy, it is obvious that such impacts should have been treated as potentially significant impacts justifying an Environmental Statement for the benefit of the public and proper decision-making.

17.6 Ground 6: Statutory Duty towards Conservation Areas

Finally, the Council failed to apply its specific statutory duty under s.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. Indeed, the Officer's Report to Committee only advised members on the existence of s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 regarding the special duty in respect of listed buildings, but no such advice was provided regarding the effect s.72 of the Act which relates specifically to effects on Conservation Areas notwithstanding that the WSCP lies within the setting of a Conservation Area and concerns about the effects of the proposal on the Conservation Area were being identified. This is conspicuously unbalanced given that the Council had previously sought to refuse the LM scheme on heritage impact grounds and FME had gone to considerable lengths to ensure that the design of its proposal preserved the heritage assets in the area.

**Background Facts**

LM Site and WSCP Applications

18. As noted above, the LM Site Application was submitted to the Council on 10 May 2011. The WSCP Application was submitted subsequently in August 2011. In light of the Council's ownership of the WSCP site and the consequential conflict of interest, the Council decided that both applications should be managed by planning officers