

North Lanarkshire Council Report

Planning Committee

approval noting

Ref LB/GL

Date 20/08/20

Outcome of Judicial Review – Westway Retail Park planning application

From Pamela Humphries, Head of Planning and Regeneration

Email bowdenl@northlan.gov.uk

Telephone

Lorna Bowden, Planning &
Place Manager,
Tel: 07939 280460

Executive Summary

This report seeks to inform the Committee of the outcome of the judicial review in the Court of Session of the decision by the council to grant planning permission for planning application reference 18/01750/PPP for Cinema, Commercial Leisure, Hotel, Food/Beverage, Retail, Car Showroom and Business Incubator Uses with Associated Landscaping, Access, Parking and Infrastructure (In Principle) at Westway Retail Park, Cumbernauld. The Court found that the council failed to fulfil its statutory duty under the 1997 Act to determine the planning application in accordance with the relevant development plan policies. Accordingly the Court concluded that the Council, had erred in law in the determination of the application.

Recommendations

It is recommended that the committee notes the content of this report.

The Plan for North Lanarkshire

Priority Improve economic opportunities and outcomes

Ambition statement (25) Ensure intelligent use of data and information to support fully evidence based decision making and future planning

1. Background

- 1.1 At its meeting on 14 June 2019 the Planning Committee approved a planning application by Promontoria Ltd for an application to develop a range of commercial and leisure uses on 18.7 hectares of land at Westway Retail Park in Cumbernauld. This decision was challenged by Bridges Antonine LLP (the petitioners), the owners of the Antonine Shopping Centre in Cumbernauld Town Centre.

- 1.2 There are a number of extant planning permissions for this site which would allow the development of up to 18,000 square metres of comparison goods retail floorspace. This application proposed building 4,599 square metres of comparison goods retail floorspace. The view was taken, therefore, that irrespective of the outcome of the planning application there would continue to be permission for significant comparison floor space capable of being built out.
- 1.3 The grounds for the challenge were as follows:
- The Council had misapplied Strategic Development Plan Policy;
 - The council had used the extant permissions at the site as a fall-back position in order to justify granting permission, however, they had failed to have regard to the fact that there were no real prospects of these permissions being implemented;
 - The decision was unreasonable as there was not adequate evidence of the impact on Cumbernauld Town Centre; and
 - The decision was premature.
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2 Report

2.1. The petition was heard in the Outer House of the Court of Session by Lord Burns.

2.2 The judgement

2.2.1 Lord Burns dismissed the assertion that the decision was premature and focussed on the council's consideration of the proposal against Policy 4 of the Strategic Development Plan and its reliance on the extant planning permissions in its assessment of the likely impact of the proposal. i.e. that if built the extant permissions would cause greater harm to the Town Centre than the current proposal.

2.2.2 The current Strategic Development Plan identifies a network of strategic centres, including Cumbernauld Town Centre. These were to become "vibrant centres for living, culture entertainment, leisure, shopping, business and civic activity". It also states that all strategic developments within the network should protect and enhance the development of the network of strategic centres, and that these network locations should be preferred locations for developments subject to impact assessments to ensure there was no detrimental impact to other nearby network locations

2.2.3 There was no dispute that the proposals could not be accommodated in Cumbernauld Town Centre and no other sites were preferable to the proposed location. In order to assess the impact on the Town Centre the council requested a Retail Impact Assessment from the applicants in respect of the convenience aspects of the development only, estimating it would draw four per cent of footfall from the area. This was considered acceptable by the council.

2.2.4 Lord Burns, stated the phrase 'protect and enhance' cannot be read literally since few, if any, proposals would be capable of achieving such a high standard. It would be enough to show that a proposal would not do significant harm to the development of town centres in line with its retail role and function.

- 2.2.5 With regard to the manner in which the council had assessed the proposals, Lord Burns found that there are a number of ways of assessing impact as required by the Development Plan, however he did not consider that the council did so in a way which conformed to the relevant requirements of Policy 4 in the SDP. In using the extant permissions as a way to assess impact as required by that Policy, the council erred in a material way. This approach to assessing impact meant that the judgement found the Report to Committee, which the committee accepted and adopted, was materially flawed. The report stated that the application complied with the Development Plan on an erroneous basis. That renders the resolution and the decision which followed its reasoning unlawful.
- 2.2.5 Lord Burns concluded that had the deficiencies in the method of assessment of impact which was used been identified, the decision might have been different.
- 2.2.6 The application has now been referred back to the council to be re-examined in light of this opinion. The applicant has been asked if they wish the council to reassess the application and report it back to planning committee as to allow this to happen will require further information to be prepared and submitted by them. The applicant has also submitted a revised and amended application (ref: 20/00412/PPP) and this is a proposal that omits the comparison retail floorspace. They have asked that for now the original application is not determined whilst their client fully considers their options. The further application is still under consideration and the time periods for public comment have closed. As last time there is strong public support for the proposed development and in due course the application will itself be reported to committee. In view of the comments from Lord Burns and to address the impacts of the proposal on the town centre the applicant have updated their retail impact assessment to also include an assessment of the leisure element of the proposal and updated their planning statement. As indicated above the proposal has removed the comparison retail floorspace from the master plan and have modified their indicative layout for the development.

2.3 Conclusion

- 2.3.1 This is a complex planning policy related decision where the council's argument that it is entitled to exercise planning judgement has not been fully accepted by the Court. Legal opinion was sought on the likelihood of a positive outcome if the council were to challenge the judgement, however, the view was that there is only a 50/50 chance of such a challenge being successful. If the challenge were to fail the costs to the council would be substantial.
- 2.3.2 The application has now been referred back to the council for determination again. Whilst currently being held in abeyance at the applicants request when the application is reported back to committee it will be supported by additional information from the applicant including an updated Retail Impact Assessment and we are confident that if the reasoning for our decision making is more overt in the Report to Committee then the decision will be more robust if it were to be challenged again.
- 2.3.3 The Court has not yet made a ruling on expenses, however, it is likely that the council will be found liable for the costs incurred by the petitioners. We propose to contest that there should be a reduction in these costs as all of the points of challenge were not upheld.
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3. Equality and Diversity

3.1 Fairer Scotland Duty

There are no implications arising from this report.

3.2 Equality Impact Assessment

There are no equalities issues arising from this report.

4. Implications

4.1 Financial Impact

The costs of the review by the Court of Session and any costs awarded to the petitioners will have to be paid from the Planning and Place budget. The costs have yet to be finalised and are currently being negotiated

4.2 HR/Policy/Legislative Impact

It is not considered that the PPF will have an HR, Policy or Legislative Impact.

4.3 Environmental Impact

There are no environmental impacts associated with this report.

4.4 Risk Impact

There are currently no risks to the Council associated with this report. There is always a risk of challenge with Planning applications and we will minimise risk of any similar such challenges in future by taking account of this decision when assessing impact of proposal against relevant planning policy. Also that we have minimised council's exposure to further costs by deciding not to appeal the decision.

5. Measures of success

- 5.1 A more robust planning policy environment which provides more certainty for developers and investors in North Lanarkshire.
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6. Supporting documents

A copy of the decision of the court is available on request



Pamela Humphries

Head of Planning and Regeneration