



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 38

P824/19

OPINION OF LORD BURNS

In the Petition of

BRIDGES ANTONINE LLP

Petitioners

for

JUDICIAL REVIEW

Petitioners: Armstrong, QC; Shepherd & Wedderburn LLP
Respondents: Findlay QC, Dunlop; Ledingham Chalmers LLP
Interested Party: McLean, Sol Adv; Brodies LLP

1 May 2020

[1] The petitioners are Bridges Antonine LLP which owns the Antonine Shopping Centre in Cumbernauld Town Centre. The respondents are North Lanarkshire Council. On 14 June 2019 the respondents' planning committee granted an application for planning permission in principle by Promontoria Holding (177) BV (the interested party) for a major development on a site known as the Westway Retail Park and vacant land (the application). The application site is 18.7 hectares. It is about 1.8 miles from Cumbernauld Town Centre. The proposed development included a cinema and commercial, leisure, hotel,

food/beverage, retail (convenience and comparison), car showroom and business incubator uses. The consent included a condition that the permitted Class 1 Retail use would not exceed 1858 sq m gross of convenience floorspace and 4599 sq gross m of comparison floorspace. The petitioners seek review of the decision to grant the permission.

Previous history of the site.

[2] In 2004 outline planning permission had been granted for a production facility of 18,500 sq m and a retail warehouse park of 30,650 sq m for bulky goods, restricted to the sale of DIY, furniture, carpets, electrical, gardening and pet supplies. In a subsequent application in 2013, the condition restricting the comparison floorspace to the sale of bulky goods was lifted to allow the sale of comparison goods on the 30,650 sq m of floorspace. In 2015 the consents were further amended to allow convenience floorspace on 4 of the units within the retail park.

[3] By the time that the current application was submitted, 12,610 sq m of floorspace had been built, comprising 11 retail units of which 9,293 sq m had been let and 3,317 sq m of which was unlet. 18,085 sq m of the permitted retail floorspace had not been built.

[4] The current application, therefore, would add 1858 sq m of convenience floorspace and 4599 sq m of comparison floorspace to the existing 12,610 sq m already built on the site.

The Development Plan.

[6] The application required to be decided in accordance with the Development Plan, unless material considerations indicated otherwise (section 25 of the Town and Country Planning (Scotland) Act 1997).

The Strategic Development Plan

[7] The Clydeplan Strategic Development Plan (SDP) for the Glasgow City Region is dated July 2017. It creates a Vision and Spatial Development Strategy which sets out the type of place the city region should become. This identifies a Network of Strategic Centres (the Network) which includes Cumbernauld Town Centre. These are the hub of the city region's communities. They need to be "vibrant centres for living, culture entertainment, leisure, shopping, business and civic activity" (paragraph 6.1). The Vision and Spatial Development Strategy requires the Network to be protected and enhanced, with investment required to support their long term respective roles and functions (paragraph 6.4). The role and function and the challenges facing each such Strategic Centre are described in Schedule 2.

[8] Cumbernauld Town Centre's role and function as a strategic centre is defined in Schedule 2 as "retail, civic, community, employment, education and business". Its challenges include retail contraction and vacancy issues.

[9] Policy 4 relates specifically to the Network. It states that to support the Vision and Spatial Development Strategy all strategic development proposals should *inter alia*:

- "Protect and enhance the development of the network of strategic centres in line with their role and function, challenges and future actions set out in Schedule 2."
- and
- "Recognise that whilst the Network of Strategic Centres is the preferred location for strategic scale development, such proposals are subject to the sequential approach set out in Scottish Planning Policy and the assessment of impact on the other Strategic Centres in the network and town centres to ensure that there is no detrimental impact on their role and function."

[10] Diagram 10: Assessment of Development Proposals is designed to aid the consistent application and implementation of the SDP and is to be used by Local Authorities when assessing strategic scale development proposals and to determine whether such proposals comply with the policies, schedules and diagrams of the SDP. The application was of a strategic scale according to Schedule 14, being a retail development over 2500 sq m outwith the Network.

[11] Paragraph 10.7 states that “Strategic development proposals whose scale, location and development compatibility support the Vision and Spatial Development Strategy (Diagram 10: Box 1) will be deemed to accord with the SDP. Box 1 deals with the assessment of Development Proposals and asks whether the development proposal supports the Vision and Spatial Development Strategy and requires them to be considered against the related policies, schedules and diagrams. Any proposal which fails to meet the relevant criteria in Box 1 will be regarded as a departure from the SDP. In relation to the Network of Strategic Centres, Policy 4, Schedule 2 and Diagram 3 are the relevant provisions.

[12] Accordingly, in order to comply with the SDP, Policy 4 required the application to “protect and enhance” the development of Cumbernauld Town Centre in line with its role and function and the challenges. Further, since Cumbernauld Town Centre was the preferred location for such a development, the application was subject to the sequential approach and to the assessment of impact on Cumbernauld Town Centre “to ensure that there is no detrimental impact on its role and function”. There was no dispute in the present case that the proposals could not be accommodated in Cumbernauld Town Centre and no other sites were preferable to Westway, according to the sequential approach.

The Local Plan

[13] The North Lanarkshire Local Plan was adopted in September 2012. At that time there was in force a Structure Plan which contained strategic policies. I was not provided with a copy of the Structure Plan or given any information about any relevant policies therein.

[14] Section 4.1 sets out retail and town centre issues. The first notes that town centres are the focus for a number of activities including shopping and that it is important for sustainable growth that the retail role of town centres is reinforced by Policies in the Local Plan. The second issue notes that town centres need to provide a wider range of activities. The centres in North Lanarkshire have difficulty in competing for retail catchment expenditure as a result of competition between centres in the area and with bigger centres within a 50 km radius. Therefore it is important for sustainable growth that North Lanarkshire commercial locations are encouraged to diversify and their environs are enhanced to improve their competitive position. The relevant policies are RTC 1 to 3.

[15] RTC 1 states that the respondents will protect the Network of Centres as the continuing focus of retail, leisure, civic and community uses. In Group A of the Network are the town centres including Cumbernauld. Group B are commercial centres. The first of these is retail parks of which Westway is one. Their catchment and role is described as "edge and out of centre locations for comparison retail or leisure".

[16] RTC2 states that the respondents will continue to develop a series of Town Centre Action Plans. Cumbernauld is said to have "Renewal and Safeguarding Priorities".

[17] RTC3 deals with the assessment of development outside the Centre Network and requires that such development is assessed sequentially for location and impact on the RTC

1 network. Since Westway lies within the Network, this policy is not engaged. However, it also states in the last sentence on page 46 that “In addition, all proposals for retail and leisure developments in excess of 2,500 sq m gross outside a defined town centre require to be supported by a full Retail Assessment”.

[18] DSP 1 deals with potential additions to planned land supplies in a number of land uses including retailing. If above 2000 sq m comparison or 1000 sq m convenience outside RTC 1 town centres, they need to be justified in terms of supply and demand against the criterion of impact on the town centres. If they are not so justified, they are Development Plan departures and require to be justified in terms of both need and benefit under Structure Plan Strategic Policy 10. As stated above, I was not taken to that document which is superseded by the SDP.

[19] DSP 2 provides that potential additions to planned land supplies in the form of new development may be granted if consistent with safeguarding the vitality and viability of the RTC1A centre network by supporting their diversification and improving their environment.

The Council's approach.

[20] The Report to Committee (6/2 of process) analysed the application and assessed it against the relevant policies. It was accepted by the respondents that the Planning Committee's consideration of the policy framework, as it applied to the application, was as detailed in the Report (Answer 7).

[21] The respondents had agreed with the interested party that a retail impact assessment (RIA) would be carried out on the proposed convenience floorspace only in order to assess

the effect of the proposals on Cumbernauld Town Centre. It was considered that no assessment or “re-assessment” of the impact of the comparison floorspace was required.

When the RIA was carried out, it found that the proposals would draw about 4% of convenience expenditure from Cumbernauld Town Centre. That was considered to be acceptable and would not cause any significant harm.

[22] The justification for such an approach was twofold. First, the site already had the benefit of permission for a total of 30,675 sq m retail floorspace. As stated above, 12,610 sq m of that had been built but 3,317 sq m was unlet. The proposal would in effect restrict the floorspace to 18,968 sq m, made up of the 12,610 sq m already built and the additional 6,358 sq m applied for in the application. Secondly, the Local Plan identified the site as a commercial centre for “comparison retail or leisure” (RTC 1) which was to be protected. Accordingly, the principle of large scale comparison retailing at the site, in excess of what was being proposed, was established. The leisure elements were supported by the Local Plan and Cumbernauld Town Centre had no leisure role according to Schedule 2 of the SDP.

[23] The policies in the SDP were examined at paragraphs 8.2 to 8.4. The two bullet points of Policy 4 set out above were quoted in part. In relation to the first, in view of the existing comparison floorspace permissions and the RIA of convenience floorspace showing limited impact on Cumbernauld Town Centre, it was considered that there would be no “significant impact on its role and function, challenges and future actions”. In relation to the second, it was noted that the sequential test carried out had concluded that no suitable alternative sites were available and the RIA had concluded that the convenience element would not have a significant impact on strategic centres. It was concluded that the proposal

was “in accordance with Policy 4 and therefore compliant with the strategic vision of the SDP”.

[24] The Local Plan policies were then examined. The proposal was found to comply with RTC 1B1 which aimed to protect commercial centres and the retail and leisure uses were in line with those set out in the policy. There was no sequentially preferable site.

[25] It was considered that DSP 1 required the proposal to be justified in terms of its impact on town centres. Because of the modest impact of the convenience element and the existence of extant permissions for comparison and Class 1 retail floorspace in excess of what is proposed, “further re-assessment of retail impact would not be required”.

[26] Policy DSP 2 deals with the location of development. The zoning of the site had established that shops, food and drink and leisure were generally appropriate at this location. It conformed to DSP 3 and 4 which are not of relevance to the challenge made here.

[27] It was considered that Policy RTC 3A required the proposal to be justified in terms of location and impact on the centre network, although this policy only applies to commercial developments outside the centre network. It satisfied the sequential test and the RIA had found no significant impact from the convenience element. The existence of extant permissions for comparison and convenience floorspace meant that it was “not considered appropriate to require further retail impact assessments or revisit impacts of the proposed retail floorspace on the town centre network” (paragraph 8.12). There was no reference to the last sentence of this policy quoted at paragraph 17 above.

[28] The proposed modified Local Plan (the North Lanarkshire Local Development Plan) was also considered. It was pointed out that only limited weight could be given to this

given the stage that it was at. However, it was concluded that the proposal appeared to be in accordance with the policies in that Plan.

[29] In the conclusions of the Report it was stated that:

“In conclusion, the proposal is considered to be in accordance with the SDP and the adopted Local Plan. It should also be noted that a key element in the consideration of the current proposals related to the nature of previous extant consents and approvals on site. These have established the principle of large scale comparison retailing at the site (in excess of what is now being proposed) and also 3 units of Hot food uses. Convenience retailing has also been previously consented at the site, again in excess of the floorspace being sought in this proposal.”

[30] In granting the application the respondents set out the reasoned justification for their decision as follows:

“The proposal accords with the Strategic Development Plan and is considered acceptable when assessed against the Council’s adopted Local Plan. With regards to the proposed retail elements, this proposal is for significantly less comparison retail floor space that has consent at this location and the unrestricted class1 retail is also less that has previously been consented for the site. As such there would be no requirement to reassess impacts on the vitality and viability of the town centre network. The site has been demonstrated as being suitable for the remaining uses proposed.”

The petitioner’s challenge.

[31] Mr Armstrong advanced submissions on a number of fronts.

The Development Plan

[32] The first was in relation to the respondent’s consideration of the Development Plan. This was a carefully crafted and considered statement of policy aimed to inform the approach which will be taken by planning authorities, unless there is good reason to depart from it (*Tesco Stores Ltd v Dundee City Council* [2012] SC (UKSC) 278 at paragraph 18). The true interpretation of the policies is a matter of law. The respondents had misinterpreted

and misapplied the SDP Policy 4. That required assessment of the proposals in order to discover whether they protected and enhanced the development of the network of strategic centres in line with their role and function, challenges and future actions. It also required assessment of the impact on the network to ensure no detrimental impact. No proper assessment as required had been carried out. It was not sufficient merely to rely on extant permissions and the results of the RIA relating only to convenience floorspace. No assessment of the impact of the comparison floorspace had been undertaken in 2013.

[33] The Report at paragraph 8.3 applied the wrong test. The first bullet point of Policy 4 was directed to protecting and enhancing the development of the network of Strategic Centres rather than whether there would be no “significant impact” on their role and function. The third bullet point required the respondents to ensure that there would be no detrimental impact on the role and function of Cumbernauld Town Centre. This element of the Policy was not quoted in the Report at paragraph 8.3. The Policy requires an informed choice to be made as to whether a proposal would “protect and enhance” and in the knowledge of the impact it would have on Cumbernauld Town Centre.

[34] Extant permissions might be a material consideration to be taken into account if a proposal did not comply with the Development Plan but could not provide a proper basis for concluding that the proposal complied with Policy 4. This was a proposal which aspired to creating a “regional retail and leisure destination” allowing the existing Park to be expanded upon and repositioned so that it appealed to people locally and beyond (Planning Statement 6/8 of process paragraphs 1.3 and 1.4). No account had been taken of this aspiration or of the significant element of leisure floorspace which would assist to elevate Westway into a Regional Centre to the prejudice of Cumbernauld Town Centre.

[35] The respondents had also misinterpreted and misapplied the Local Plan. Contrary to DSP 1B, there had been no demand assessment of the impact on Cumbernauld Town Centre. It had been granted despite the requirement of DSP 2 that new development should safeguard the vitality and viability of Cumbernauld Town Centre. In Answer 14 the respondents admit that they “did not have regard to and did not need to have regard to previous assessments”. There was no previous assessment of comparison floorspace. While RTC 1 was aimed at protecting the network of centres of which Westway was a part, there was no policy support for promoting Westway in the hierarchy. The Report failed to address and comply with the need for a full impact assessment as required by RTC 3.

[36] Mr Armstrong also pointed out the respondent’s Strategy and Policy Team in their Observation Response (6/11 of process) pointed out that the proposal was a strategic one since it exceeded the 2500 sq m threshold in the SDP and would need to be assessed against Policy 4. It was considered that it might be acceptable under the Local Plan but subject to assessment for impact in terms of RTC 3A. This Response was not referred to in the Report to Committee. In addition, the respondents’ responses to the examination of the Local Plan (6/12 of process) which emphasised the need for assessment of proposals above the floorspace thresholds were contrary to the stance taken by them in this application.

[37] The respondent’s decision failed to interpret the Development Plan properly and failed to have proper regard to the policies therein (*City of Edinburgh Council v Secretary of State for Scotland* [1998] SC (HL) 33 at pages 44-45). The court’s role was a limited one and should not encroach on matters of legitimate planning judgement *Tesco Stores* (cited above at paragraph 19). However, this was a failure to comply with the clear terms of the Development Plan.

The Fall Back Position

[38] The second ground of challenge was that the respondents had used the extant permissions as a “fall back” position in order to justify the granting of this application. However, they had failed to have regard to the fact that the extant permissions had no real prospects of being implemented to any greater extent than that which was already built. They had failed to consider the differences and similarities between the proposal and the extant permissions. The existence of the extant permissions was not a material consideration justifying the grant of permission, if proper regard was had to these matters (*Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 at paragraphs 22-27 and 35).

Perversity

[39] Thirdly, Mr Armstrong argued that the decision was unreasonable and perverse. The respondents did not have the required evidence of impact on Cumbernauld Town Centre despite the terms of the Development Plan and the respondents’ position in their submissions to the Examination of the Local Plan and the views of the Strategy and Policy Team. Further, condition 4 attached to the permission sought to ensure that the development did not impact on town centres above those levels predicted by the RIA. That assessment only dealt with convenience floorspace. The petitioners were prejudiced by the grant of permission and no proper reasons had been given.

Prematurity

[40] Fourthly, it was argued that the granting of consent was premature. The emerging

Local Plan was considered in the Report but it failed to address the issue of prematurity. The petitioners had advanced submissions to the respondent objecting to the application by letter of 7 February 2019 (6/3 of process). It was pointed out that the emerging plan proposed to alter the retail hierarchy by designating Westway as a “Strategic Town, Town or Large Centre” thus placing it on a sequential par with Cumbernauld Town Centre. The petitioners intended to make representations during the next consultation period to the effect that the Local Plan ought to protect the existing town centres. The issue of prematurity was a material consideration which the respondents failed to take into account.

The Respondents’ submissions.

[41] Mr Findlay submitted that the petitioner’s challenge was in reality one to the merits of an exercise of legitimate planning judgement with which the court should not interfere. The application of the various policies in the Development Plan relevant to the application and the weight to be attached to those policies involved planning judgement (*Hopkins Homes Ltd v Suffolk Coastal DC* [2017] UKSC 37 at paragraphs 22-26). The criteria set out in the relevant policies were designed to operate in the real world and with regard to the history of the site in question. The application of policy and freedom to exercise planning judgement as the policy requires or allows is a matter for the planning authority, subject only to review on *Wednesbury* principles (*Braintree v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610 paragraphs 16-17).

[42] Officers’ Reports required to be sufficiently clear, focussed and concise and enable the committee to understand the important issues and material considerations. They should be construed in a reasonably flexible and common sense way having regard to the fact that

they are aimed at those who are well aware of the facts and issues. They should not be treated in the same way as a statute. There was no material and distinct error in the advice given and accepted (*Mansell* cited above at paragraph 38).

The extant permissions

[42] The petitioner's challenge to the approach taken to the policies in the Development Plan amounted only to criticism of planning judgement. That was whether, and to what extent, the extant permissions affected the application of the policies which required assessment of impact and hence what form of assessment was required.

[42] The existence of permission for significantly greater comparison and convenience floorspace was a material consideration. The principle of unrestricted comparison retailing was established on this site. It was a matter of judgement whether or not, in all the circumstances, retail impact assessment was required of the comparison element of the application. The respondents had considered that matter and had agreed that the applicants should assess convenience impact only. There had been no misinterpretation of policy. The approach taken was one which the respondents were entitled to take.

The Fall Back Position

[43] It was not the case that the application was granted in order to avoid greater harm from the extant permissions. The respondents did not use them to justify the granting of the application (*South Buckinghamshire District Council v Secretary of State for the Environment, Transport and the Regions* [1999] PLCR 72). The extant consents obviated the need for further assessment of the comparison element. There was no need to address the question of a "real

prospect" of implementation. The 2013 permission had been granted as being in accordance with the Local Plan of 2012. Reference was made to the Report to Committee dated 29 May 2013 (7/3 of process).

The Strategic Development Plan

[44] The Report to Committee analysed the relevant policies in the SDP and gave reasons why the proposal complied with them. It explained why an assessment of impact of the convenience element only was required. The sequential test was satisfied. There was prior approval for comparison floorspace significantly in excess of that proposed. The SDP did not suggest that there is conflict with the Local Plan policies relating to Westway. The petitioner's comments in objecting to the application had been taken into account.

[45] Any criticism that the leisure elements of the proposal were not taken into account fails to recognise that Cumbernauld Town Centre is not identified as having a leisure role or function whereas the Local Plan identifies Westway as an appropriate location for such a use.

The Local Plan

[46] The policies of the Local Plan supported comparison retail and leisure uses on the site (RTC 1B and RTC 2). The application did not propose any addition to planned land supplies (DSP 1B and DSP 2B). It restricted the comparison and convenience floorspace already allowed. In any event, impact was assessed. The requirements of the last sentence of RTC 3 were satisfied. All the relevant policies were examined in the Report to Committee at paragraphs 8.5 to 8.12. The respondents had properly applied these policies in the

context of a site allocated for particular purposes in the Plan and with extant permissions which allowed for significantly more floorspace.

The Emerging Local Plan and Prematurity

[47] As the Report indicated at paragraph 8.13, the emerging plan was considered but limited weight was given to it. The proposal was considered to conform to the Development Plan. There was no proper basis to delay a decision to see if it would conform to the emerging Local Plan. The proposals did not have the effect of upgrading the status of the site to a town centre. It remains a centre for retail and leisure only.

The submissions of the Interested Party

[48] Mr McLean adopted Mr Findlay's submissions. He submitted that the respondent had assessed the proposal not only by having regard to the extant permissions but also through the site's designation in the Local Plan which established the principle of large scale comparison retailing there. That was a matter of legitimate planning judgement challengeable only if *Wednesbury* unreasonable. He also contended that the way in which the proposal was assessed included the finding that the sequential test was met. There was considerable community support for the proposal to which the respondents had regard.

Discussion and Decision

[49] The respondents recognised that the application raised questions of policy under both the SDP and the Local Plan. It was recognised that those policies required an assessment of the impact of the proposal on town centres and Cumbernauld Town Centre in

particular. In order to address the issue of impact, a particular approach was taken in the Report to Committee. The impact of the comparison aspect of the proposal was assessed by looking, first, to the extant consents which allowed significantly more comparison floorspace to be built than the 4,599 sq m applied for. Secondly, the Local Plan allocated this site for comparison shopping in a Commercial Centre identified in RTC 1B as a retail park, with the additional uses of leisure and food and drink. There was no identification of the site as one for convenience shopping. Nevertheless, convenience uses had already been approved in the extant permissions, again in excess of what was being asked for in the application. The respondent required a RIA on that element which showed a modest impact and one far below what could be regarded as detrimental on Cumbernauld Town Centre. Having considered the relevant policies in the Development Plan, it was concluded that the application complied with them.

[50] The SDP post-dated the Local Plan by 5 years. Its policies were considered in the Report. Policy 4 was considered to be complied with because of the extant permissions there were no sequentially preferable sites and the impact of the convenience floorspace on Cumbernauld Town Centre was modest (paragraph 8.3 to 8.4).

[51] As set out at paragraphs 7 to 11 above, the Visual and Spatial Development Strategy of the SDP gives prominence to the status of town centres in the Network. Policy 4 lays down two relevant requirements which all strategic development proposals require to meet. First, their development is to be protected and enhanced “in line with their role and function, challenges and future actions”. The particular challenges facing Cumbernauld Town Centre are retail contraction and vacancy issues. I accept Mr Findlay’s submission that 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.

[52] Secondly, the Network is the preferred location for strategic scale development such as the proposal in question (over 2,500 sq m of retail development, if outwith the Network: Schedule 14). That is subject to the sequential approach which the proposal met. But it is also subject to the assessment of impact on town centres “to ensure that there is no detrimental impact on their role and function”.

[53] When assessment of impact of a particular proposal is required by the Development Plan, there are, no doubt, a number of different ways in which that assessment can legitimately be carried out by a Planning Authority in the exercise of its judgement. As long as the method used is capable of properly assessing the impact of the proposal before it, in accordance with the relevant policy, the court cannot interfere in a judicial review.

[54] The respondents did consider the issue of assessment of impact in the way I have set out. They did so in the context of the relevant policies which were identified in the Report. But I do not consider that they did so in a way which conformed to the two relevant requirements of Policy 4 in the SDP. In using the extant permissions as a way to assess impact as required by that Policy, they erred in a material way. That is because the existence of permission for comparison floorspace on a greater scale than that applied for did not inform the respondent whether the 4,599 sq m applied for would “protect and enhance” the development of the retail role and function of Cumbernauld Town Centre. Nor could it tell them that no detrimental impact would be caused to its role and function.

[55] The existence of the extant permissions was capable of no more than demonstrating that the impact of the proposal would be less than that already consented. Cumbernauld Town Centre in its retailing role had challenges of vacancy issues and contracting retailing. These had been recently identified in the SDP of 2017 which made assessment a crucial element of the policy. The existence of extant permission does not show that the development of the retail role of Cumbernauld Town Centre will be protected and enhanced by the proposal. It was for significantly more comparison floorspace that the threshold set out in the SDP of 2,500 sq m beyond which assessment is required (schedule 14). The selection of that threshold indicates that any proposal for more than 2,500 sq m is seen to be at least capable of having a detrimental impact and must therefore be assessed. To use extant permissions as an assessment tool for demonstrating protection and enhancement of the development of Cumbernauld Town Centre's retail role and function and for demonstrating a lack of detriment to that role and function does not fulfil the requirements of Policy 4. It is not capable of doing what the Policy requires. While the accepted fact that the remaining unbuilt floorspace was unlikely to be built was prayed in aid in connection with the argument on the fall back position, it is also relevant in this context. That is because it demonstrates the lack of usefulness of the extant permission as a predictor of impact.

[56] Furthermore, the Report did not set out other limitations of the use of the extant permissions. First, it is repeatedly stated in the Report to Committee and in the Reasoned Justification that there is no requirement for any "re-assessment" of impact because of the extant permissions. However, the Report to Committee of May 2013 recommended the lifting of the restriction of bulky goods only so that comparison goods generally could be sold over the 30,675 sq m. It shows that no assessment of the impact of the sale of

comparison goods was undertaken (see 7/3 of process paragraphs 3.1 and 8.7). No evidence was placed before me that any assessment had been carried out on the comparison element in the past. It was not accurate, therefore, to give the impression that some form of assessment of impact of the comparison floorspace already consented had been carried out in the past. The same error appears in the respondent's Answer 14 where it is said that "Officers did not have regard to and did not need to refer to previous retail assessments".

[57] Secondly, it is plain from the terms of the Report of May 2013 that "no strategic issues" were raised by the application for the lifting of restrictions (paragraph 5.1). It was therefore considered that the application could be assessed in terms of the Local Plan policies only. That was not the case with the proposal advanced in 2019 which required to be assessed against strategic issues in the SDP of 2017 and Policy 4 in particular. The respondent's Strategy and Policy Team pointed out that the proposal was a strategic one which must meet the requirements of Policy 4. The respondents appear to have failed to take account of the fact that the extant permissions were granted against a different strategic policy background which was apparently less demanding than the SDP.

[58] Thirdly, the author of the report of May 2013 voiced a concern that there might be a perception that "if approved, the modification of conditions will be accepted without measuring impact on the town centre" and that, in a reference to DSP 2B of the Local Plan, "it is difficult to argue that this proposal will improve the environment or diversification of the town centre". However, because of the support in the Local Plan for more open comparison trading on the site, the application was not viewed as "an addition to the land supply technically requiring assessment through formal Retail Impact Assessment". This was a reference to DSP 1 and DSP 2. However, the author made no reference to the

requirement for assessment contained in RTC 3. These are all material and relevant considerations which serve to undermine the use of the extant permissions as an assessment tool. The respondents did not take them into account.

[59] The other arm of the assessment tool used by the respondents was the reliance on the support in the Local Plan for the proposals. It is correct that the site is identified as a Commercial Centre for comparison retailing and leisure uses. But the Local Plan Policies required a full retail assessment of “all proposals for retail and leisure development in excess of 2,500 sq m gross outside a defined town centre” (RTC 3). Thus the Local Plan, like the SDP, indicates that proposals for more than 2,500 sq m comparison floorspace have the potential for causing detriment to Cumbernauld Town Centre. There is no reference in the Report to this requirement at paragraph 8.12. The Local Plan gives support in principle to comparison retailing and leisure uses on the application site. It does not give support for applications for comparison floorspace of the size requested without assessment.

[60] For these reasons, the Report to Committee, which the committee accepted and adopted, was materially flawed. It found that the application complied with the Development Plan on an erroneous basis. That renders the resolution and the decision which followed its reasoning unlawful. Had the deficiencies in the method of assessment of impact which was used been identified, the decision might have been different (see *Mansell* cited above paragraph 42). I therefore find that the petitioner is correct in contending that the respondents failed properly to interpret and apply the key policies in the Development Plan.

[61] I do not accept that the respondents erred in applying a fall-back position to this application. The extant permissions were not used as a justification to grant the permission

sought on the basis that the extant permissions would create greater harm to Cumbernauld Town Centre. They were used instead as a means to predict the likely impact and effect of the application if granted. However the agreed position that the unbuilt portion of the extant permissions would not materialise was a relevant consideration in the usefulness of the extant permissions as a means of assessment.

[62] I do accept, however, that the reasons advanced by the respondents for the grant of permission were perverse and inadequate. It is perverse to use as a justification for granting permission a method of assessment which is incapable of meeting the requirements of the relevant policies. To do so is also to give inadequate reasons.

[63] I do not accept that the decision to grant should be struck down because it is premature. The emerging Local Plan was considered in the Report but it was stated that little weight could be attached to it. It did not pre-empt that document since the proposal would not have the effect of elevating the site to town centre status.

[64] I find that the respondents failed to fulfil their statutory duties under the 1997 Act; that they erred in law; that they failed to give proper reasons; and that they acted unreasonably. Although both the respondents and the interested party have a plea in law to the effect that I should not reduce the decision even if I find in favour of the petitioners, I decline to do so. There are no exceptional circumstances here which would justify exercising my discretion in such a way. The decision is materially flawed and the petitioners are prejudiced thereby. The respondents should re-examine the application in the light of this opinion (see *Bolton MBC v Secretary of State for the Environment and Manchester Authority* [1991] 61 P. & C. R. 343 at p353). I will therefore sustain the petitioner's pleas in law and grant reduction of the decision and resolution of the respondents dated 17 June

2019. I shall repel the pleas in law of the respondents and the interested party. I shall reserve meantime all questions of expenses.