

SUBMISSIONS ON BEHALF OF JHAG LIMITED
(pursuant to Council's letter of 27.8.2010)

Summary

1. JHAG strongly opposes the suggestion of conjoinder of its application with those of Dawn Developments and/or Eddiston Opportunities. It does so for four main reasons:-

- (a) First, the current planning system places considerable emphasis upon swift and efficient decision making and fairness. There would have to be very good reasons to further delay JHAG's application, which is ready for determination, but there are none. There is no legal imperative to delay consideration of JHAG's application. The argument that determining JHAG's application will prejudice others is a false one.
- (b) Secondly, in so far as a comparative exercise requires to be undertaken that can be undertaken now on the basis of the information currently available.
- (c) Thirdly, unlike JHAG's, the other applications are not ready for determination and are unlikely to be so for some time and there is no good reason to wait for them. Indeed, it would be unfair so to do.
- (d) Lastly, whilst it is understood that the Committee is not going to consider the planning merits of each application, it can properly take notice of the fact that there are good planning reasons for considering the application now which relate to the development to be provided, the general location and the impact upon the planning system. If the area needs a new superstore (about which all are agreed) and needs the jobs, the sooner they are

provided the better if the Council considers permission should be granted.

(a) Reason 1 - the planning system

2. The Committee will be well aware of the substantial changes that have been recently introduced into the Scottish planning system. A prime reason for such changes has been to increase the speed and efficiency of the system – or, as to paragraph 6 of Scottish Planning Policy puts it, to "enable speedy decision making in ways which are transparent and demonstrably fair". This message is further reinforced in paragraph 22 with its reference to provision of "greater certainty and speed of decision making".
3. A system which, without good reason, does not determine planning applications which are ready to be determined is not one which is "speedy" or "demonstrably fair".
4. Paragraph 23 of SPP makes the point that the planning system operates in the public interest, and does not exist to protect the interests of one person or business against the activities of another.
5. It would be an abuse of the planning system (and demonstrably unfair) to delay one commercial application merely to let another commercial application catch up unless there was good reason in the public interest to do so.
6. There is no reason in law why such a delay has to occur – see the

attached Note from planning Counsel prepared in response to Dawn's legal challenge.

7. Dawn may suggest (as it has in legal proceedings) that a decision taken on JHAG's application would prejudice the outcome of theirs – e.g. on the basis that there is only need for one supermarket. But that is a demonstrably false point.

(a) First, as stated above, the planning system does not operate to protect private interests. If an application is capable of determination, it should be determined unless there is a good planning reason not to do so. The mere fact that there is another site emerging through the planning process does not, of itself, provide any good reason, let alone planning reason, for delaying the decision. That is not to say the possibility of other sites for a use should be ignored if the potential of other sites amounts to a material planning consideration, e.g. because a sequential test is being applied. But they have not been ignored. There is ample material before the Council to determine any sequential test, see further reason 2 below.

(b) Secondly, if such a suggestion were correct the planning system would be subject to interminable delays. It would apply to all forms of development – e.g. housing, wind turbines and all forms of commercial use that were not in accordance with the development plan. An application made for one site could be prejudiced/delayed by an application for another site for the same use. Such would afford unscrupulous developers a chance to catch up on rivals and/or introduce delay to frustrate option

agreements.

(c) Thirdly, there is no support for such an approach in either law or practice. On the contrary, in all forms of licensing applications it is commonly accepted that the first application in time should be determined first unless there is good reason to do otherwise notwithstanding that the grant of a first application may prejudice a second one.

8. Again, as Councillors will be aware, it is possible to appeal in the case of non-determination. (Which avenue of appeal provides further support for the argument that decisions should be taken speedily and need not await later applications.) However, in this case there is no reason for JHAG to have done so when the Council can perfectly lawfully take the decision.

(b) Reason 2 – a sequential test can now be carried out

9. It is acknowledged that there is a policy requirement regarding the sequential approach to site selection contained variously within Scottish Planning Policy (SPP), the Glasgow and Clyde Valley Joint Structure Plan (2008) and the South Lanarkshire Local Plan (2009).
10. However, in applying such a sequential approach, there is no reason why the Council needs to have the formal applications before it in order for proper consideration to be made of those alternative locations in comparison to the JHAG Ltd site. Such comparisons are regularly made by authorities in respect of retail developments up and down the country without formal applications in respect of other sites.
11. Both the Dawn Developments and Ediston Opportunities sites

have already been robustly assessed within the sequential assessment contained within the document 'Planning Statement in Response to Objections' submitted in April 2010 as part of the JHAG application.

12. More importantly, officers are now (and have been for some time) in a position fully and appropriately to advise the Committee as to any required comparative exercise. In order to do so they do not need to be in a position to determine an application in respect of such site. They can apply their professional expertise to sites with or without applications and advise accordingly.

(c) State of the rival applications

13. JHAG's application was made first and is (and has for at least 10 weeks been) ready for determination, whereas neither of the others are.
14. JHAG's Redwood Crescent Site remains unoccupied having been marketed unsuccessfully for 20 years and has the capacity to provide about 600 jobs. It has the capacity to provide a linked development with a garden centre. It is ready to be developed if permission is given.
15. In respect of the Dawn application, the Committee will be aware of Dawn Development's application on 21st June 2010 to the Court of Session, made with no warning to JHAG. That application prevented the Committee from determining the JHAG Ltd application at the planning committee meeting due on 22nd June on the basis that the Court was not then a position to determine the matter. (JHAG intend to robustly resist such

unwarranted interference with the planning process.) Within their Petition, Dawn Developments Ltd stated that their *"application is ready for determination within a very short time, perhaps a few weeks"* (para 12). Such statement was extremely "optimistic".

16. Dawn's application was not in fact ready for determination within the suggested very short timeframe and as of today's date it still requires the submission of further information in order for the planning officers to consider it further. Specifically, it is understood that information has been requested of Dawn Development Ltd by the Council in relation to Traffic Impact (in order to address issues raised by Transport Scotland in relation to traffic impact) and Retail Impact (information which was missing from the submitted RIA, the methodology of which is flawed and which fails to include key information such as an assessment of impact on East Kilbride town centre). We understand from the planning officer that the information has not been submitted and that once submitted further consultation with Transport Scotland will be necessary before the application is ready for determination. This is likely to take many months.
17. In respect of the Ediston Opportunities proposal, a planning application has only recently been submitted. This planning application is at the early stages of consideration and will have to follow the same procedures of consultation and consideration followed by the JHAG Ltd and Dawn Developments Ltd applications, which given the experience to date, is likely to take a minimum of 6 – 12 months from validation. Clearly therefore a significant period of time will have passed until it will be in a position to be determined.

(d) Good planning reason to determine now

18. There is a pressing need for the Council to avoid further delay in determining this application as it is important that, if its approved, this mixed use development occurs as soon as possible in order to bring forward the much needed investment and jobs which the Council needs and to claw back the trade which is currently being lost to superstores outwith the catchment area.
19. JHAG's site has lain undeveloped for 20 years. There is no other current realistic alternative. Dawn's site, however, it is understood remains the subject of interest from its neighbour, Burn Stewart, for expansion for industrial purposes. Hence an early decision on JHAG's application would not prejudice the development of the Dawn site for other purposes.

Tuesday, 31 August 2010

DAWN DEVELOPMENTS LIMITED v SOUTH LANARKSHIRE COUNCIL &
OTHERS

NOTE

1. Dawn Developments have issued proceedings to require South Lanarkshire Council determines its application for a supermarket at the same time as JHAG's application. I consider such proceedings are flawed.
2. It is important to distinguish between two matters – one substantive, one procedural – which are confused in Dawn's Petition.
3. First, as a matter of substantive law, Dawn's application is, in the circumstances, almost certainly a material consideration to be taken into account by SLC when considering JHAG's application. Not only is there a policy based requirement to apply a sequential test but there is also a requirement to provide justification for a decision contrary to the development plan and such justification is based, in part at least, on need.
4. There is no reason why any Council needs to have a formal application in front of it, let alone one advanced to the stage at which permission might be granted, before it can take into account the merits and demerits of an

alternative location. Such comparisons are regularly made by authorities in respect of supermarkets and many other forms of development.

5. Secondly, as a matter of procedure, the question arises whether both applications have to be considered at the same time. In my view, as a matter of law, that is clearly not the case. In certain circumstances, a planning authority might wish to do so but there is no requirement that it do so – i.e. it has a discretion what to do in such circumstances. None of the cases cited by Dawn support such a proposition as it advances, particularly in paragraph 8 of the Petition. The statutory framework provided by the planning legislation clearly leaves such decisions to the planning authority.
6. That the grant of permission to one may effectively preclude the grant of a similar permission to another is a product of the planning system (including in particular those provisions relating to allowing appeals for non-determination), not an instance of unlawful conduct.
7. Provided that South Lanarkshire lawfully determine whether or not both applications should be heard together, as it is clear they were attempting to do from the officer's report, it would be wrong to prevent them considering JHAG's application until Dawn's is ready. I understand it may not be ready for a number of months, and even then there is no certainty about any timetable.

8. Nor would such a procedural step be unfair as suggested at paragraph 10 of Dawn's application. Its objections, both as to the procedure and substance, are quite capable of being fairly considered by any Committee considering JHAG's application.
9. I would comment that the officer's report requires some amendment to ensure that it deals properly with the merits and demerits of the alternative sites (which includes others apart from Dawn's) to avoid a more substantive challenge. Apart from that the Council should be encouraged to stand by its current approach and to defend the Petition, which is, I understand, their position.

James Findlay,
Advocate.

Parliament House
Wednesday, 07 July 2010