

<b>NAME OF COMMITTEE</b>	<b>Council</b>
<b>DATE</b>	<b>12 February 2012</b>
<b>REPORT TITLE</b>	<b>Planning issues relating to the former Focus DIY Store, Tavistock Retail Park, Plymouth Road, Tavistock</b>
<b>Report of</b>	<b>The Head of Planning, Economy and Community</b>
<b>WARDS AFFECTED</b>	<b>Tavistock</b>

**Summary of report:**

This report formally updates members on the outcome of the High Court decision relating to the former Focus site, sets out an updated chronology of events and clarifies the current planning status of the site.

**Financial implications:**

There are no direct financial implications from this report which is for information only.

However, the previous report to Council on 15 May 2012 estimated the costs of the action to be in the region of £40-50,000. Although detailed costs are not yet known they are unlikely to exceed this amount. Up to date information on costs will be provided at the meeting.

**RECOMMENDATIONS:**

- (i) To note the High Court decision to refuse an extension of time to seek to quash planning permission 01575/2011 on the former Focus site.
- (ii) To note the latest chronology of events
- (iii) To note the current planning status of the site.

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**1. BACKGROUND**

- 1.1 On 17 April 2012 Council received a report from the Deputy Monitoring Officer which sought consent for the Council to pursue Judicial Review proceedings to quash a planning permission granted on the Focus-Do-it-all site in Tavistock.

The decision was deferred pending receipt of the Council's retail study. (Council Minute CM87 refers).

- 1.2 On 15 May 2012 Council received a further report setting out the initial conclusions from the retail study. As a consequence, Council decided to pursue High Court proceedings to seek to quash planning permission 01575/2011 on the site. (Council Minute CM 26 refers) However, as the 3 month time limit to take action had expired, it was necessary to apply for an extension of time in the first instance. Members will recall that as the Council cannot take action against itself, Cllr Sanders agreed to do so and Council also agreed to fully indemnify him in this respect.
- 1.3 On 22 January the judge refused an extension of time and therefore we are unable to seek to quash the permission. Consequently, this report formally updates Council on the decision, provides an updated chronology of events at Appendix "A" and sets out the current planning status of the site at this point in time.

## **2. HIGH COURT DECISION**

- 2.1 Following Council's decision, an application was made to the court in June 2012. In October 2012 a judge ordered a hearing to be held on 22 January. A different judge presided over the actual hearing and refused the extension of time. (It could be argued that the hearing was superfluous and unnecessary costs were incurred by the Council and Marchfield in this respect). Consequently, we are unable to pursue the case further through the courts. An Order has been received but a written transcript of the judge's reasons are still awaited.
- 2.2 To be clear, the judge has not determined the merits of the case at all. He has merely refused an extension of time for us to pursue the case further.
- 2.3 With regard to costs, we are liable for our own costs in pursuing the case and the judge has ordered that we are to pay Marchfield's costs of *"the filed acknowledgement of service and the hearing of the application, to be the subject of detailed assessment if not agreed."* We are not liable for any compensation, despite concerns to the contrary. Our actions specifically avoided the risk of this happening.

## **3. CURRENT PLANNING STATUS OF THE SITE**

- 3.1 The current planning status of the site is still unclear. Whilst we have been awaiting the High Court decision, locally the issue has been challenged elsewhere. A recent High Court decision has determined that in such situations a new planning history has not been created and, therefore, unrestricted retail use is not permitted on the site. (see R (Peel Land and Property Investments Plc) vs Hyndburn Borough Council and others [2012] EWHC).
- 3.2 In short, this has reversed the original case law which placed us in this position in the first place. Not surprisingly, Peel Land and Property Investments PLC are taking the matter to the Court of Appeal. The hearing is in June and the outcome is eagerly awaited in the planning world.

3.3 Marchfield Properties appealed for non-determination of their Certificate of Lawfulness for the Focus site. As a result of the Hyndburn case they have asked the Planning Inspectorate to postpone the appeal hearing until September when the outcome of the Hyndburn case will be finally determined. . The Council has agreed to this postponement as the Hyndburn case could be relevant to our own case and, were a decision to be made by the Inspectorate when this case is pending, would be at risk of challenge by either the Council or Marchfield Properties

3.4 It is important to emphasise that, in the meantime, the site still has permission for retail sales, albeit that conditions relating to a restriction on the sale of food are unclear. It could therefore re-open at any time if Marchfield are able to find a tenant. Further, anyone can submit an application for another Use Class at any time.

**4. LEGAL IMPLICATIONS**

4.1 To what extent the Hynburn decision will be relevant to our own case will not be clear until the Court of Appeal ruling is known. The postponement until September of the planning appeal will enable both parties to consider the judgement before presenting cases to the Inspectorate. In the event that the Appeal is dismissed then Marchfield Properties may not pursue their appeal. Conversely, if the appeal is allowed the Council will have to consider whether it is appropriate to resist the issue of a certificate. Either course of action will depend on how the decision of the Court Appeal can be properly applied to our case.

4.2 The report is presented to Council for information as a significant, corporate issue which warrants a formal report.

**5. FINANCIAL IMPLICATIONS**

5.1 There are no direct financial implications for this particular report which is for information only. However, the previous report to Council on 15 May 2012 estimated the costs of the action to be in the region of £40-50,000. Although detailed costs are not yet known they are unlikely to exceed this amount. Up to date information on costs will be provided at the meeting.

**6. RISK MANAGEMENT**

6.1 There are no risk implications as the report is for information only.

<b>Corporate priorities engaged:</b>	Community Life; Economy
<b>Statutory powers:</b>	Local Government Act 1972 s.222 Town & Country Planning Act 1990 Supreme Court Act 1981 – s. 31 and Civil Procedure Rules 1998 Part 54
<b>Considerations of equality and human rights:</b>	None
<b>Biodiversity considerations:</b>	This report engages no biodiversity implications

<b>Sustainability considerations:</b>	There are no implications in this report
<b>Crime and disorder implications:</b>	This report engages no crime and disorder implications
<b>Background papers:</b>	<p>Planning applications 01575/2011 dated 11 July 2011 and 9215/2006/TAV dated 2 April 2007. Correspondence held by the Development Management team, the Monitoring Officer and the Deputy Monitoring Officer save those items which are protected by legal professional privilege which are not discloseable to the public.</p> <p>Report to Council of the Deputy Monitoring Officer – 17 April 2012</p> <p>Report to Council of the Head of Planning, Economy and Community – 15 May 2012</p> <p>R (Peel Land and Property Investments Plc) vs Hyndburn Borough Council and others [2012] EWHC</p>
<b>Appendices attached:</b>	Appendix A – Updated Chronology of Events