

**Delegated or Committee Planning Application Report and Report of handling as required by Schedule 2 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 relative to applications for Planning Permission or Planning Permission in Principle**

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<b>Reference No:</b>	11/00689/PPP
<b>Planning Hierarchy:</b>	Local
<b>Applicant:</b>	National Grid Property
<b>Proposal:</b>	Site for the erection of retail store (Class 1) with associated development including access, car parking and landscaping.
<b>Site Address:</b>	Land at former Gas Works Argyll Street/Hamilton Street, Dunoon, Argyll

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## **SUPPLEMENTARY REPORT 5**

### **1.0 Summary**

At the PPSL Committee on 23<sup>rd</sup> November 2011 (following a Hearing in the Queen's Hall, Dunoon on 9<sup>th</sup> November 2011), Members resolved to continue determination of this application for additional information on flood risk to be submitted for consideration. This aspect is addressed in Supplementary Report 4. The purpose of this further supplementary report is to confirm the receipt of further supporting information from the applicants in response to matters raised at the Hearing, in the press and from objectors.

This Supplementary No. 5 should be read in conjunction with other supplementary reports.

### **2.0 Additional Supporting Letter from National Grid.**

A letter of support (dated 19<sup>th</sup> December 2011) from National Grid was sent to Head of Governance and Law and the Chief Executive, following a letter of objection from National Grid (dated 9<sup>th</sup> December 2011) to the CWP application ref. 10/00222/PPP and subject of Supplementary Report 8 date 19<sup>th</sup> December 2011.

National Grid state that, "***the totality of this correspondence, together with enclosures, forms part of NGP's supporting case and would ask that its contents are drawn to the attention of the Planning Committee Members and, along with all other submitted information, are fully taken into account in the final determination of application 11/0689/PPP on December 21<sup>st</sup>.***"

#### ***Introduction***

*In addition to the matters raised in that letter regarding site ownership and the need to relocate existing businesses, National Grid Property (NGP) has also subsequently noted that the receipt for the application fee for the CWP application is partly made out to "George Street Property Holdings Limited". This name appears nowhere else on the CWP application documentation, but the Council is legally obliged to clarify the precise role of what appears to be yet another organisation or individual with a say in the deliverability of the site.*

*By comparison, NGP's resolve, commitment and resource to bring its site at Dunoon forward for redevelopment cannot be questioned. We agree with the Head of Planning and Regulatory Services that the NGP site is the most appropriate location for a new food store for the town. National Grid Property is a national company who manages a portfolio of occupied and surplus properties, and deals with historic contamination on such sites across the length and breadth of the UK on behalf of National Grid*

## **Background**

*The NGP application stands on its own merits as an entirely acceptable retail proposal having been rigorously assessed against National and Local Planning Policy and the views of specialist advisers, including statutory consultees. This is why it has been recommended for approval.*

*The CWP scheme (submitted 15 months before the NGP application) is, on the other hand, is completely contrary to such policy which is why it is recommended for refusal by officers for not one, but four separate reasons.*

*Any impact of the NG application upon the CWP scheme is entirely an operation of national and local planning policy and its submission merely reinforces the existing reasons for refusal which Council officers have never departed from.*

*There seems to be the suggestion that the CWP application would have been approved had the NGP scheme not be submitted. Similarly, the suggestion has been that the site is more attractive to retail operators and the public at large. The technical assessments and statements submitted in relation to both applications set out in the various reports of handling show this clearly not to be the case.*

*Faced with an incontrovertible case for refusal of their own application, CWP have reverted to a strategy of inundating the Council with erroneous objections to the NG proposal, including on the basis of flood risk, in an attempt to obfuscate and somehow turn policy on its head to enable the Council to reconsider, or overlook, the four sound reasons for refusal of its own application and refuse NGP's application.*

*In reality, the fate of the CWP application was sealed in the March 16<sup>th</sup> 2011 committee report, two months before the NGP scheme was ever submitted. CWP's team have tried, unsuccessfully, to persuade officers to recommend their application for approval for fifteen months since it was originally submitted in February 2010.*

*Suggestions that NGP has sought to "derail the CWP application" are therefore patently untrue.*

*Officers have been steadfast in their rejection of the CWP application and were never going to be able to reverse their recommendation to one of approval (and refusal for the NGP scheme) without flying completely in the face of national and local planning policy, a decision no Council, acting reasonably, or responsibly could be expected to arrive at on the basis of the facts before them. To do so, would be perverse, illogical and "ultra vires", leaving any such decisions at very serious risk of successful legal challenge.*

*The flood objections to the NGP scheme submitted by CWP have been shown to be entirely unsupportable as SEPA and Council officers, the impartial experts on such matters, have, for a third time, confirmed that they have no objection on the basis of flood risk.*

*Objections on flood risk cannot therefore be afforded any weight whatsoever in the formal determination of the NGP application. To do so, contrary to SEPA advice, would likewise be, illogical and manifestly unreasonable.*

*Similarly, there is no other sustainable or legally sound reason to refuse permission for the NGP scheme.*

## **Consideration of the NGP application to date**

*NGP considers that there has been a sufficient and robust level of scrutiny of its application and we respectfully request that it should be formally determined once and for all at Committee on December 21<sup>st</sup> in accordance with officers' recommendations.*

*The report of handling recommending the NGP application for approval, subject to conditions, was considered at committee for the first time on 21/9/11. It is worth noting that the CWP scheme has been considered by members several times already before this. Had the Council been able to approve the CWP application it would have done so by now.*

*The CWP application was considered at the same committee and both were deferred for a PAN 41 Hearing which took place on 9/11/11. It was resolved to continue with consideration of both applications. Most recently, on Nov 23<sup>rd</sup>, the timetable for submitting the additional information on flood risk was considered by committee and the information has now been submitted to both the Council's flood adviser and SEPA.*

*NGP has carefully considered the minutes of the various meetings which formally record the content of the debate on its application and provide a helpful audit trail of how the various motions which were arrived at. The key document is the minute of the PAN 41 Hearing on 9/11/11, in particular the debate surrounding whether a competent motion could be brought to refuse the NGP application on the basis of the information before the Council at that time. The meeting was adjourned for fifteen minutes in order that Members of the planning committee could take advice from officers in private regarding the legality of bringing forward a competent motion to refuse the NGP application. The minutes of the meeting record the outcome of that debate and confirm that such an amendment could not be brought as it "could lead to legal challenge".*

*Having requested additional information in respect of flood risk only, it is clear that the Council had sufficient information on all other matters to enable them to make a decision on the NGP scheme at the Hearing.*

*Moreover, having recorded in the minutes that a competent motion to refuse could not be brought for fear of legal challenge, it follows, as a matter of procedure, that this advice must still stand unless there is a material change in circumstances. In particular, a different conclusion can only legally be reached at committee on December 21<sup>st</sup> if the new flood information gives rise to new issues which cannot be resolved to the satisfaction of the Council's flood adviser or SEPA.*

*Having confirmed, for a third time, that they are both happy from a flood perspective, it is clear that there are no sustainable grounds for refusal of the NGP application.*

### ***Timing of the NGP application***

*It has been suggested that the NGP application has been "rushed" or is in some way "premature".*

*The reality is that the application has been in gestation for some time, formal pre-application consultation with the Council having started January this year. Before this, NGP has made its retail intentions well known through representations to the Council's emerging Development Plan. Likewise, NGP has made its intention to submit a planning application for a new food store on the former gasworks site abundantly clear in the various representations submitted on the CWP application.*

*In response to a query from Mr Alan Reid, MP for Argyll and Bute in August 2010 enquiring about the intentions for the former gasworks site, NGP yet again confirmed its intention to submit a planning application for a new food store as far back as August 25<sup>th</sup> 2010.*

*For these reasons, there can be no possible objection to the NGP application on the basis of prematurity.*

### **Proposed conditions**

*During the debate on the NGP at the PAN Hearing on 9/11/11, it was asserted that the 28 conditions proposed to be attached to the NGP application, should it be approved, were excessive for a scheme which has been advertised as a “minor departure from the development plan. In the NGP team’s experience, this is in no way excessive or unusual for a scheme of the type proposed and this was corroborated by officers during the hearing itself.*

*Evidence supporting this can quickly and easily be found in the Tesco Stores decision at Campbeltown Creamery which was granted permission by Argyll and Bute Council on July 14<sup>th</sup> 2011 under reference 10/00239/PP. This application for a food store was advertised as a “minor departure” from the Structure Plan and was approved by Committee subject to 24 conditions.*

*There is therefore clearly nothing remarkable or otherwise unusual about the proposed number of conditions to be attached to the NGP application, should it be granted permission.*

*NGP notes that the SEPA and the Council’s Flood Risk Assessors responses to the Tesco application are recorded in the committee report as “no objection subject to conditions”.*

### **Flooding**

*There has been much objection about flooding directed towards the NGP planning application.*

*It should be noted that this has not emanated from Council officers or SEPA who are the impartial experts on such technical matters. Both have confirmed, on three occasions that they have no objection to the planning application subject to conditions, the same perfectly standard approach adopted in respect of the Campbeltown Tesco application which was ratified by Planning Committee Members.*

*Instead, these objections have been submitted by Kaya Consulting who, as the Council will be aware, are part of the CWP application technical team. The motivation for the objection is explained above and it is important that any letters from Kaya are seen in their correct context and not given undue credence or weighted above that of recognised regulators.*

*As a direct result of repeated Kaya objections, NGP has been asked to provide further information in relation to flood risk, despite SEPA and the Council’s flood risk adviser being satisfied with the application, subject to conditions. Had these independent bodies considered that NGP had not adequately dealt with this matter, then their response would have been one of objection or to ask for further clarification in accordance with standard procedures.*

*Specifically, NGP have been asked to demonstrate that one of the conditions being suggested by the impartial experts on flooding is capable of being complied with, in effect being required to provide detailed information at the “in principle” application stage to test that the advice of the flood experts may be relied upon. NGP notes the statement in the minutes of the hearing which records that one of the Planning Committee remarked upon this “unusual” situation.*

*NGP continues to put its faith in due process and to rely on the strength of technical arguments and the advice of impartial specialist consultees to ensure that its application gets a fair hearing. Being asked to provide additional information by a Council during determination of a planning application is not therefore unusual. What is unusual is where the views of an objector with a vested interest in a competing site are apparently being afforded more weight in the assessment of technical matters than those of impartial technical experts, including statutory consultees and regulators.*

*Nonetheless, NGP has, at considerable cost, undertaken the additional work requested of it to assist the Council and has demonstrated beyond any doubt that there is no case to answer on flood risk. It is nonetheless entitled to ask why an identical and standard SEPA response of “no objection subject to conditions” accepted in the Campbeltown Tesco application case, is apparently insufficient in the context of NGP’s application at Dunoon.*

*To seek to apply a higher “burden of proof” to the NGP application compared to other retail proposals would be viewed as inconsistent and regarded as a matter of serious concern.*

*An assessment of own CWP’s own application documentation (as relates to the use of conditions) has also proved instructive. In sharp contrast to their representations on the NGP application, the original letter dated 29/01/10 submitted by James Barr as part of the CWP application advocates dealing with a range of matters on their own scheme by condition rather than providing additional detail at the in- principle stage.*

### **Highways**

*CWP have also sought to cast doubt over the level of car parking provided as part of the NGP scheme.*

*These objections are also baseless and NGP can do no better than reiterate the formal response of the Council’s Area Roads Manager who confirmed, “The site is easily accessible by a range of transport modes. Car parking levels comply with national Parking Standards and cycle parking will be provided. “Roads have no objection subject to conditions.”*

### **Petrol filling station**

*It has been suggested by CWP’s advisers that store operators “require” a petrol filling station (PFS) as part of any new food store operation in Dunoon. This is an obvious attempt to try to “scope out” the sequentially preferable NGP site on the basis of size and so circumvent national and local retail planning policy in favour of the non policy compliant CWP scheme.*

*However, the need to include a PFS in any retail proposals is simply not borne out by NGP’s discussions with food store operators who have confirmed that they are happy to trade from the NG site, should it be granted planning permission.*

*None has mentioned the lack of a PFS as a constraint to developing the site. Had this not been the case, then operators would have committed unconditionally to the CWP site long*

*before now. There is no policy requirement to include a PFS in a new food store proposal and, if approved, the NGP application will enable the existing two local suppliers of petrol to remain unaffected.*

*This is supported by Tesco and Sainsbury and Tesco opening former Somerfield Stores in Stewarton, Muirend, Burnside and Saltcoats, none of which have PFSs. Asda have also recently converted 40 former Focus stores, also without PFSs.*

## **Section 75**

*NGP fully expects to make a contribution to the town centre under policy LP RET1 as part of a section 75 agreement, should it be granted planning permission for a new food store in Dunoon.*

*The Council does not have any specific formula or supplementary planning guidance for devising the level of contribution under this policy, officers having confirmed that it will be based upon the impacts of the retail proposal and benchmarking with Campbeltown Tesco.*

*The ability to seek a section 75 agreement is contained in the Act and the ground rules are set out in circular 01/2010. A section 75 contribution cannot amount to the “buying of permission” and the circular makes clear that contributions must satisfy all of the following tests:*

- necessary to make the proposed development acceptable in planning terms;*
- serve a planning purpose;*
- relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area*
- fairly and reasonably relate in scale and kind to the proposed development and be;*
- reasonable in all other respects*

*It follows that offers of excessive contributions which attempt to exert undue influence over policy considerations would offend these principles and be clearly “ultra vires”.*

*Although recommended for refusal, CWP have proposed a contribution of £200,000 to the town centre as part of their application. It was suggested during the debate at the PAN 41 Hearing that this should represent the “benchmark” for retail proposals in Dunoon, the clear inference being that the lesser figure put forward by officers for the NGP scheme is in some way insufficient.*

*This is clearly not the case as the proposed CWP contribution:-*

- 1. has not been agreed with officers as their application is recommended for refusal; and*
- 2. officers consider it to be excessive when assessed against comparable schemes.*

*In the interests of probity, it would not be not appropriate for NGP to enter into a “bidding war” with CWP regarding the appropriate level of section 75 contribution. The Council are the proper arbiters in respect of such matters and any contribution must be based upon the ground rules set out in circular 5/2005 and the advice of officers based upon adopted policy, rather than be dictated by those behind a rival scheme who are seeking to distract attention away from four sound reasons for refusal.*

## **Other Matters**

*At the hearing National Grid's connection with Dunoon and its community was brought into question. The attached letter (**appendix 1**) from The President of the Old Mens' Club in nearby Macarthur Street is self explanatory and demonstrates the Company's ongoing commitment to this important community hub over a period of many years. CWP on the other hand have no such connection.*

*We would submit that the community support which CWP claim exists for their site relates to the desire for a new food store in Dunoon generally. CWP have already acknowledged that the two proposals are comparable with the exception of the petrol filling station and number of car parking spaces.*

*The negative representations submitted in response to the NGP application follow a concerted effort by CWP, via an internet campaign, to seek to discredit the credentials of the NGP site, despite the fact that it is wholly supported by planning policy. Significantly however, neither local traders nor the Community Council have objected to the proposal at the NGP site.*

*In terms of retail impact, there is a variance in approach between agents acting on behalf of CWP and agents acting on behalf of NGP. Briefly stated, given that the proposals are of a similar scale, quantitative impacts are broadly the same although the better location and relationship of the NGP site relative to the town centre simply cannot be undermined. The CWP site will impact more upon the town centre.*

### **3.0 RECOMMENDATION**

It is recommended that Members note the content of this supplementary report and supporting letter from NGP as a material consideration in their determination of the application.

It is recommended that planning permission be approved as per the original report.

**Author: Brian Close 01369 708604**

**Contact Point: David Eaglesham 01369 708608**

**Angus J Gilmour  
Head of Planning & Regulatory Services**

**20<sup>th</sup> December 2011**