21 March 2012

PRESS SUMMARY

Tesco Stores Limited (Appellants) v Dundee City Council (Respondents) (Scotland) [2012] UKSC 13
On appeal from: [2011] CSIH 9

JUSTICES: Lord Hope, Deputy President; Lord Brown; Lord Kerr; Lord Dyson; Lord Reed

BACKGROUND TO THE APPEALS

On 18 January 2010, Dundee Council granted planning permission for the construction of an Asda superstore on a site at Myrekirk Road, Dundee. The Appellants operate a supermarket at a site on South Road, Dundee, some 800m from the proposed Asda site.

Scottish Executive policy guidance states that, subject to material considerations indicating otherwise, proposed sites should be considered in the following descending order of preference: (a) town centre, (b) edge of town, (c) other commercial centres identified in the development plan and (d) out of centre locations that can be accessed by various transport modes ("the sequential test"). Effect is given to the sequential test by the policies set out in the statutory 'development plan', comprising the structure plan and the local plan.

In considering Asda's application, the Council noted that the proposed site was out of town and fell therefore in the least desirable category. There was an available site at Methven Road in the Lochee district of Dundee, but the Council discounted it as being too small for the proposed store. There was no other available site within categories (a), (b) or (c) that would have been suitable. The Council accepted that the proposal failed to comply with the sequential test, but given that (i) it did not undermine the core land use strategies of the development plan; and (ii) it had a number of other planning, economic and social benefits, permission was granted.

Tesco applied for judicial review of the Council's decision arguing that it had improperly interpreted and applied the development plan and that it had failed to consider its own policy in respect of the Lochee district. The petition was dismissed by the Lord Ordinary and a reclaiming motion against his interlocutor was refused by the Inner House. Tesco now appeals to this court.

JUDGMENT

The Supreme Court dismisses the appeal. The lead judgment is given by Lord Reed, with whom the other justices agree. Lord Hope adds a brief concurring judgment.

REASONS FOR THE JUDGMENT

The Appellants contended that the Respondents had misinterpreted a criterion in one of the policies set out in the structure plan, and its equivalent in the local plan. The requirement in the policy reads as follows:

In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 sq m gross will only be acceptable where it can be established that:

- *no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres […]* **[13]**.

The Appellants submitted that if there was a dispute about the meaning of a policy in the development plan it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and had failed properly to understand the policy **[13]**. In the present case, the Respondents' Director had interpreted "suitable" as meaning "suitable for the development proposed by the applicant". But "suitable" meant "suitable

for meeting identified deficiencies in retail provision in the area". As no such deficiency had been identified, it was inappropriate to undertake the sequential approach and the Respondents had proceeded on an erroneous basis. They had failed to identify correctly the extent of the conflict between the proposal and the development plan and their assessment of whether other material considerations justified a departure from the plan was inherently flawed **[13]**. They had compounded their error by treating the proposed development as definitive when assessing whether a "suitable" site was available **[14]**.

In response, the Respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. The planning authority would only make an error of law if it attached a meaning to the words of the policy document which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The Respondents had considered that the proposal failed to accord with the second and third criteria. In those circumstances, they had correctly concluded that the proposal was contrary to the policies in question. **[15]**. So far as concerned the assessment of "suitable" sites, Asda's retail statement had reflected a degree of flexibility: it considered smaller sites and sites which could accommodate only food retailing, whereas its application was also for non-food retailing **[16]**.

The Supreme Court considers that, in this area of public administration as in others, policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean **[18-19, 35]**.

In the present case, the question what the word "suitable" means cannot be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed **[21]**. Moreover, where, as here, it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations **[22]**.

The Supreme Court considers that the Respondents were correct to proceed on the basis that the word "suitable" meant "suitable for the development proposed by the applicant", subject to the qualification that flexibility and realism must be shown by developers **[24, 28, 37-38]**. The Supreme Court makes this finding for the following reasons: (1) this is the natural reading of the policies **[25]**; (2) the interpretation favoured by the Appellants conflates the first and third criteria of the policies in question **[26]**; and (3) the policies were intended to implement the guidance given in National Planning Policy Guidance 8, which focuses upon the availability of sites which might accommodate the proposed development, rather than upon addressing an identified deficiency in shopping provision **[27]**.

In the present case, it is apparent that a flexible approach was adopted **[30]**. An error in interpreting the policies would be material only if there was a real possibility that the determination might have been different. The Court is not persuaded that in the present case there was any such possibility **[31]**.

References in square brackets are to paragraphs in the judgment.