



Appeal Decision

Site Visit made on 8 December 2020

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 13 September 2021

Appeal Ref: APP/M0933/W/20/3256717

Sainsbury's Supermarket Ltd, Mint Bridge, Shap Road, Kendal LA9 6DL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Sainsbury's Supermarkets Ltd against South Lakeland District Council.
- The application Ref: SL/2019/0969 is dated 13 November 2019.
- The application sought planning permission for *Erection of food store (Class A1), petrol filling station and associated parking and servicing facilities* without complying with a condition attached to planning permission Ref: SL/2018/0456, dated 27 June 2019.
- The condition in dispute is No 22 which states that: *There shall be no deliveries arriving or leaving the site (including the emptying of waste containers), delivery or service vehicle movements within the site or any external movement of goods or roll cages outside the hours of 06.00 - 23.00*
- The reason given for the condition is: *To protect the amenity of neighbouring occupiers.*

Decision

1. The appeal is allowed and planning permission is granted for erection of food store (Class A1), petrol filling station and associated parking and servicing facilities, in accordance with the application Ref: SL/2019/0969, dated 13 November 2019, without compliance with condition number 22 previously imposed on planning permission Ref: SL/2018/0456 dated 27 June 2019 and subject to the conditions set out in the schedule attached.

Application for Costs

2. An application for costs was made by Sainsbury's Supermarkets Ltd against South Lakeland District Council. This application is the subject of a separate Decision.

Preliminary Matters

3. The appeal was submitted on the basis of the failure of the Council to determine the application within the prescribed timescale. The Council has submitted a statement of case which sets out its main concerns relating to the application. These form the basis of the main issues of the appeal.
4. There are differences in the description of the proposal within the submitted evidence. The application form states it is for the removal / variation of condition 22 pursuant to permission SL/2018/0456. Whereas the Council's statement and the appellant's appeal form states it is for the removal of Condition 22 (Delivery hours) attached to planning permission SL/2013/1120.

5. Application ref: SL/2018/0456¹ was a previous application under section 73 of the Town and Country Planning Act 1990 (the Act) for the variation of the conditions imposed on the original application ref: SL/2013/1120². The appeal has the potential to create a new permission. Therefore, for the avoidance of doubt, I have used the description of the original act of development, but used the subsequently varied application reference, condition and reason for condition in the heading above.
6. Whilst the evidence before me refers to the 'removal' of condition 22, the proposal concerns a change to the store's delivery hours and there are no plans to change the current waste servicing arrangements which will remain restricted to 06.00-23.00 daily. Consequently, I have determined the appeal on the basis that it is to 'vary' condition 22 and focused my considerations of the appeal on the proposed change to the delivery hours.
7. During the determination of the appeal a revised version of the National Planning Policy Framework (the Framework) was published on 20 July 2021. Both main parties have been given the opportunity to comment on this change. My decision is made in the context of the revised Framework.

Background and Main Issues

8. The appeal site, a Sainsbury's Supermarket, is located just off Shap Road about 1.3km north of Kendal Town Centre. The development was granted permission under the terms of application ref: SL/2013/1120 in January 2015 and the store has been in operation since September 2018.
9. The original permission included condition 22 which stated, *There shall be no deliveries arriving or leaving the site (including the emptying of waste containers), delivery or service vehicle movements within the site or any external movement of goods or roll cages between the outside the hours of 06.00 - 23.00 hours Monday to Saturday and 09.00 - 18.00 hours on Sundays and Bank Holidays*. This was justified to protect the amenity of neighbouring occupiers. The application was accompanied by a section 106 Planning Obligation (s106), dated 22 January 2015 which was agreed and jointly signed by the Council, Cumbria County Council, The Trustees of the Kendal Rugby Union Football Club and Morbaine Limited.
10. This permission was then varied by application ref: SL/2018/0456 in June 2019. The new decision notice issued included a variation to condition 22 which stated, *There shall be no deliveries arriving or leaving the site (including the emptying of waste containers), delivery or service vehicle movements within the site or any external movement of goods or roll cages outside the hours of 06.00 - 23.00*. Again this was justified to protect the amenity of neighbouring occupiers. The application included a supplemental deed of variation of the s106, dated 4 April 2019 which was agreed and jointly signed by the Council, Cumbria County Council, BAE Systems Pension Funds Trustees Limited and Sainsbury's Supermarkets Limited.

¹ Variation of conditions 2 (approved plans), 19 (hours of operation), 20 (hours of operation for petrol filling station), 22 (hours of delivery), 26 (hard and soft landscape) and approval of conditions 16 (external lighting), 17 (external lighting for petrol filling station), 18 (noise assessment), 23 (use of carpark), 30 (acoustic fence) and 33 (electric vehicle charging points) attached to planning permission SL/2013/1120 (Erection of foodstore (Class A1), petrol filling station and associated parking and servicing facilities). Granted permission on 27 June 2019.

² Erection of foodstore (Use Class A1), petrol filling station and associated parking and servicing facilities. Granted permission on 26 January 2015.

11. The appellant now seeks to vary condition 22 to enable unrestricted deliveries to the store. In addition, the appellant is of the opinion that the outstanding matters relating to the s106 can be dealt with by the imposition of appropriately worded conditions as part of the permission. Therefore, a further s106 or deed of variation has not been submitted as part of the application.
12. The Council considers that the variation of condition 22 is acceptable in principle, subject to a further assessment for a temporary period to verify the noise impacts of the proposal on nearby residents in accordance with a methodology. However, the Council submits that, as granting the application would create a new planning permission, a further s106 or deed of variation is required.
13. In the context of the above, the main issues are:
 - The effect that varying condition 22 in respect of delivery hours would have on the living conditions of nearby residents, with regard to noise and disturbance; and,
 - Whether a further s106 or deed of variation is necessary and, if not, whether the outstanding obligations can be addressed by the imposition of appropriately worded conditions.

Reasons

Living conditions of nearby residents

14. The service yard where deliveries are received is located in the north west corner of the appeal site and accessed solely via Mint Bridge Road. In the immediately surrounding area there is a mix of industrial and commercial uses that also use Mint Bridge Road for access. The yard is enclosed by a combination of metal palisade fencing, timber fencing and the walls of the store.
15. The closest residential properties to the service yard and its access are four houses which are set back from the highway at the junction of Mint Bridge Road and Shap Road; and houses on Finley Close, to the south of the store car park.
16. The original permission and subsequent variation required that there would be no night time traffic associated with the store and I am aware that no changes to the wider context of the store have occurred. The proposed variation of condition 22 would allow store deliveries to occur at any time and would encroach into the acoustically most sensitive period of the day. As such, there is the potential for harmful effects to the living conditions of nearby residents arising from vehicles travelling to and from the service yard along Shap Road and Mint Bridge Road and additional activity within the service yard during the night-time.
17. Nevertheless, the stated purpose of the variation is to allow more flexibility for the appellant to fulfil their commercial obligations and provide a high level of customer service. It is not to increase the number of deliveries to the store or for them to be received throughout the night. I am also mindful that the Lakeland Business Park and Kendal Nutricare Ltd, which are also accessed via Mint Bridge Road, have no similar delivery restrictions in place.

18. Furthermore, the substantial distance between the service yard and the closest residential properties, combined with the presence of other buildings and uses in the immediate locale, would mitigate any direct and harmful effects to the living conditions of nearby residents as a result of any additional activity within the service yard.
19. The Noise Assessment submitted by the appellant³, the findings of which I have no reason to dispute, predicts that noise levels from store deliveries between 23.00 – 06.00 would be below the existing background noise levels and would have a low impact on nearby residential noise receptors. In addition, noise intrusion from HGV movements along Mint Bridge Road and activity within the service yard would be similarly low.
20. I also note that the main parties have agreed a revision to the wording of condition 22 to include a temporary period of six months to allow a full and proper assessment of the noise data including the production of a verification report, with a further period of two months to allow the Council opportunity to assess the submitted data. Subject to the outcome of the assessment, the condition allows for either the adoption of the revised hours or a reversion to the original hours as agreed as part of application ref: SL/2018/0456.
21. Taking all of the above into account, I find that varying condition 22 in respect of delivery hours would not have a harmful effect on the living conditions of nearby residents, with regard to noise and disturbance.
22. The Council has not cited any policies within its development plan which are relevant to this main issue. I have therefore assessed it against the provisions within the Framework. The proposal would accord with paragraphs 130 and 185 of the Framework in so far as they aim to create places which promote health and well-being, with a high standard of amenity for existing and future users; and avoid noise giving rise to significant adverse impacts on health and the quality of life.

Further s106 or deed of variation and conditions

23. The Council declares that the s106 contains obligations that are not time-restricted and which it considers necessary to ensure that the operation of the development does not give rise to harmful effects, be they economic, social or environmental, beyond the site.
24. Legal advice provided to the Council on behalf of Cumbria County Council (the County Council) dated 8 February 2021 highlights that 'there are obligations within the s106 Agreement (as varied) which are yet to be discharged.' It goes on to affirm that 'this s106 Agreement will not bind the second variation permission, if granted, and as such a second deed of variation will be required to enable our client to enforce any breaches of the obligations within the s106 Agreement.'
25. Having regard to case law⁴, it is correct that if the permission was granted without a further s106 or deed of variation, the appellant could implement the new permission free of the planning obligations attached to the previous permissions. Indeed, the supplemental s106 states at clause 9.1.2, 'Nothing in

³ WYG. Proposed Variation of Store Deliveries at Sainsbury's, Shap Road, Kendal Noise Assessment. Dated November 2019.

⁴ Norfolk Homes Limited v North Norfolk District Council & another [2020] EWHC 2265 (QB).

this Deed shall prohibit or limit the right to develop any part of the Development Site in accordance with a planning permission (other than the Section 73 Permission) granted (whether or not on appeal) before or after the date of this Deed.’ A similar clause was included at 7.1.2 of the original s106.

26. Nevertheless, no robust commentary has been submitted by the Council or included within the legal advice provided on behalf of the County Council that confirms which obligations are yet to be discharged for a further s106 or deed of variation to be necessary. More importantly, nor has any detailed or persuasive justification been presented as to why any identified subsisting obligations could not reasonably be covered by appropriately worded conditions which would still allow any breaches to be enforced.
27. From the evidence before me, the only subsisting obligations relate to the maintenance of the Information Boards (clause 1.6); and the annual review of the Travel Plan through submission of the Annual Performance Report and supply to the County Council of travel survey information (clauses 1.10 and 1.11). Of these, it is highlighted by the appellant that clauses 5.1 and 5.3 of the supplemental deed of variation of the s106 actually render the original obligations for implementation of modified travel plans as no longer binding and/or discharged. The effect being that the obligation requires an annual review and the submission of information, but not compliance with any revisions resulting from it.
28. Paragraph 55 of the Framework states that planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition. In addition, Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 as confirmed in paragraph 57 of the Framework, advises that planning obligations must only be sought where they meet all of the following tests: a) necessary to make the development acceptable in planning terms; b) directly related to the development; and c) fairly and reasonably related in scale and kind to the development.
29. Given the nature and detail of the subsisting obligations, I see no reason why it is necessary for these matters to be part of a further s106 or deed of variation, or why it would not be legally correct or possible to address them by way of conditions, subject to them meeting the tests as set out in paragraph 56 of the Framework. Having regard to the suggested conditions and the parties’ comments, I am of the opinion that conditions 35 and 36 as stated in the schedule attached are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.
30. In taking this approach, the development could be implemented under the new planning permission free of the planning obligations, but nevertheless subject to the stated conditions which would adequately enforce any breaches. Moreover, this would reinstate a requirement for the appellant to comply with any modified travel plans.
31. To conclude on this issue, from the evidence before me, a further s106 or deed of variation is not necessary and the outstanding obligations can be addressed by the imposition of appropriately worded conditions. This approach would comply with paragraphs 55 and 56 of the Framework relating to the imposition of planning conditions and obligations.

Other Matters

32. I have given consideration to the representations made by interested parties. The principle of the development was accepted by the Council in granting the original planning permission. No substantive evidence has been presented which confirms that the removal of condition 22 would have a harmful effect on the safe and efficient movement of vehicular traffic in the area and no objections to the proposal were received from the Highway Authority. No evidence has been submitted which verifies that the proposal would result in an increase in vehicle pollution or light pollution at or near to the site.
33. Each application and appeal must be determined on its individual planning merits. A generalised concern of the proposal setting a precedent does not justify withholding planning permission in this instance. Furthermore, the suggested revised condition ensures that if harmful effects to the living conditions of nearby residents are identified, the delivery times would revert back to the existing time restrictions.
34. I note the representation regarding the right of the local government to make its own decisions regarding planning matters and the alleged threat to local democracy posed by large corporations. However, the applicant has a legal right of appeal under section 78 of the Act, which is required to be determined by an Inspector appointed by the Secretary of State.
35. Having examined the evidence before me, these other matters, individually or collectively, do not alter my conclusions on the main issues.

Conditions

36. The main parties have suggested revised wording for condition 22. The appellant has offered wording for the additional conditions relating to the outstanding matters of the Travel Plan and Information Boards were I minded to allow the appeal. The Council suggested some minor rewording to these, upon which the appellant had no comments. I have considered the suggested conditions and parties' comments in light of the advice set out in both the Framework and the Planning Practice Guidance (the Guidance).
37. The Guidance advises that in granting permission under section 73, new conditions may be imposed provided that they do not materially alter the development that was subject to the original permission and are conditions that could have been imposed on that original permission. Also, because the original permission ensues, it is likely to be unreasonable to impose more onerous conditions on the new permission⁵.
38. The additional conditions relating to the Information Boards and Travel Plan (conditions 35 and 36) do not materially alter the development and, if the matters had not been included in the original s106, are conditions that could have been reasonably imposed on the original permission. They are also not more onerous.
39. The Guidance also states that for the purpose of clarity, decision notices for the grant of planning permission under section 73 should set out all of the

⁵ Planning Practice Guidance, Paragraph: 040 Reference ID: 21a-040-20190723.

conditions imposed on the new permission, and restate the conditions imposed on earlier permissions that continue to have effect⁶.

40. In this respect, I have had regard to the conditions as stated in the decision notice for application ref: SL/2018/0456 and the draft decision letter included in the Council's statement of case. I have maintained the numbering sequence as stated in the original and subsequent permissions and included the additional conditions 35 and 36.
41. As suggested by the Council, I have removed condition 10 as its requirements are addressed under the additional condition 36.

Conclusion

42. For the reasons given above, I conclude that the appeal should be allowed. A new planning permission is granted subject to the schedule of conditions listed.

F Cullen

INSPECTOR

Schedule of Conditions

- 1) No longer required as development commenced.
- 2) The development hereby permitted shall be carried out in accordance with the following approved drawings:
 - Location plan Drwg No 6549/100A
 - Site Layout Drwg No 6549//023R
 - Food store elevations Drwg No 6549/026D
 - PFS elevations Drwg No 6549/028C
 - Detailed Landscape Proposals Drwg Nos 2436/3 Rev C and 2436/4 Rev C
 - Southern Boundary Elevation Drwg No 6549/034A
 - Boundary Sections Drwg No 6549/033
 - Acoustic Fence details Southern Drwg No 6549/035
 - Planning and Retail Statement by WYG
 - Transportation Statement by Turner Lowe
 - Air Quality Statement by Turner Lowe
 - Flood Risk Assessment by FRC Report No 2014-006 Rev C
 - Preliminary Risk Assessment by DTS Raeburn
 - Noise Survey by Hepworth Acoustics Report 2201.1v2
 - Tree Survey by Rosetta Landscape Design
 - Aboricultural Impact Assessment by Rosetta Landscape Design
 - Aboricultural Method Assessment by Rosetta Landscape Design
 - PFS Environmental Risk Assessment

⁶ Planning Practice Guidance, Paragraph: 040 Reference ID: 21a-040-20190723.

- 3) The total gross internal retail floor space of the food store hereby permitted shall not exceed 7,774 square metres.

The total retail sales area of the food store hereby permitted (excluding check-outs, the concourse/lobby areas, customer's toilets and any internal cafe) shall not exceed 4,667 square metres. Regardless of how the sales area is split between convenience and comparison goods (see maximum limits below) the net sales area should never be exceeded.

The total retail sales area devoted to the sale and display of convenience goods (including non-durable household goods) shall not exceed 80% of the net sales area or 3,735 square metres.

The total retail sales area devoted to the sale and display of comparison goods shall not exceed 35% of the net sales area or 1,635 square metres.

- 4) The development hereby approved shall be completed in accordance with the Construction Method Statement received 8th July 2015. The approved Construction Method Statement shall be adhered to throughout the construction period.
- 5) Not required as development is complete.
- 6) The development hereby approved shall be completed in accordance with the construction drainage scheme ref. 'Details of Scheme for Prevent Run-Of-Debris Into River Kent' received 9th June 2015.
- 7) The mitigation measures on the junctions/highway as set out in the S278 Agreement (dated 9th of October 2015) shall be fully complete once the commuted sum is paid in full and the site entrance junction is completed in accordance with the approved details. Both of these requirements must be met before the retail superstore hereby granted is first brought into use.
- 8) The development hereby approved shall not be occupied until the highways works (which includes the site entrance junction and the commuted sum) as contained in the Section 278 Agreement (dated 9th October 2015) have been fully completed/paid.
- 9) Discharged under application SL/2018/0610.
- 10) No longer required as covered by condition 36.
- 11) The development hereby approved shall not be occupied until the surface water drainage scheme has been completed in accordance with MJM Consulting Engineers Drawing No 5977 S(52)-01 Rev C. The drainage scheme shall be maintained for the lifetime of the development in accordance with the Surface Water Drainage Maintenance Plan – March 2016 by MJM Consulting Engineers.
- 12) The development hereby approved shall not be occupied until the foul water drainage scheme has been completed in accordance with MJM Consulting Engineers Drawing No 5977 S(52)-01 Rev C. The drainage scheme shall be maintained for the lifetime of the development in accordance with the

Surface Water Drainage Maintenance Plan – March 2016 by MJM Consulting Engineers.

- 13) Prior to being discharged into any watercourse, surface water sewer or soak away system, all surface water drainage from the development hereby permitted shall be passed through the oil interceptor detailed on Surface Water Drainage Maintenance Plan – March 2016 by MJM Consulting Engineers. The approved interceptor shall be installed prior to the development hereby approved being brought into use and retained thereafter.
- 14) The development hereby approved shall not be occupied until the surface water underground tanks have been completed in accordance with MJM Consulting Engineers Drawing No 5977 S(52)-01 Rev C and retained as such thereafter.
- 15) No longer required as development completed.
- 16) The development hereby approved shall be completed in accordance with the external lighting scheme ref. External Lighting received 29th May 2018. The lighting shall be maintained in accordance with the approved scheme at all times thereafter and express planning permission shall be obtained for the installation of any additional lighting.
- 17) The development hereby approved shall be completed in accordance with the external lighting scheme ref. PFS External Lighting received 20th July 2018. The lighting shall be maintained in accordance with the approved scheme at all times thereafter and express planning permission shall be obtained for the installation of any additional lighting.
- 18) The fixed plant shall be installed in accordance with the details contained in Drawing No. MC5532 E5 and Noise Report No. P17-226-R01-V1 prepared by Hepworth Acoustics Ltd and maintained in accordance with the approved scheme at all times thereafter. No additional fixed plant shall be installed at the site without the express planning permission of the Local Planning Authority. The approved fixed plant shall be maintained in accordance with the approved scheme at all times thereafter and express planning permission shall be obtained for the installation of any additional fixed plant.
- 19) The hours of operation of the superstore shall be restricted to 07.00-23.00 hours Monday to Saturday and six hours within the period 10.00-17.00 hours on Sundays.
- 20) The hours of operation of the petrol station shall be restricted to 07.00-23.00 hours Monday to Saturday and to 09.00-18.00 hours on Sundays.
- 21) Deliveries and delivery vehicles shall be managed in accordance with the Delivery (Serving) Operational Plan received 10th June 2015. The Delivery (Serving) Operational Plan received 10th June 2015 shall be adhered for the lifetime of the development hereby approved.
- 22) For a period of 6 months from the granting of this permission, there shall be no restriction on the hours of delivery to the supermarket (excluding the

emptying of waste containers, which shall remain restricted to 06.00-23.00 daily). Prior to the expiration of this six month period, a Verification Noise Report to confirm the noise levels associated with night-time deliveries shall be submitted to and approved in writing by the Local Planning Authority. If the Local Planning Authority confirms, within 2 months from the submission of the Noise Verification Report, that the verified noise levels are not acceptable, the permissible hours for delivery vehicles (including the emptying of waste containers), to arrive at or leave the site shall revert to 06.00-23.00 daily.

- 23) The car park shall not be used for any other purpose (other than parking for staff) between 23.30 hours and 06.30 hours unless otherwise agreed in writing with the Local Planning Authority. During the hours of 23.30 hours and 06.30 hours the car park shall be managed in accordance with the Car Parking Management Plan received 29th May 2018. The management plan shall be maintained for the lifetime of the development.
- 24) The approved parking layout and turning areas shall be constructed, marked out and made available for use and shall be retained as such thereafter. The parking spaces shall be used solely for the benefit of the occupants and visitors of the development hereby approved and for no other purpose.
- 25) Discharged under application SL/2018/0610.
- 26) All hard and soft landscape works shall be carried out in accordance with the approved details. Any trees/shrubs which are removed, die, become severely damaged or diseased within five years of their planting shall be replaced in the next planting season with trees/shrubs of similar size and species to those originally required to be planted unless the Local Planning Authority gives written consent to any variation.
- 27) The development hereby approved shall be completed in accordance with the Scheme For The Protection Of Trees received 10th June 2015. The approved scheme shall be adhered to throughout the construction period.
- 28) Not required as development is complete.
- 29) No retained tree shall be cut down, uprooted, destroyed, pruned, cut or damaged in any manner within 5 years from the date of commencement of the development hereby approved, other than in accordance with the approved plans and particulars, without the prior written approval of the Local Planning Authority. If any retained tree is cut down, uprooted, destroyed or dies another tree shall be planted, in a location to be agreed in writing by the Local Planning Authority, within the next available planting season and that tree shall be of a size and species that is first agreed in writing by the Local Planning Authority.
- 30) The acoustic fence erected in accordance with Dwg No 6549/035 shall be retained for the operational lifetime of the Petrol Filling Station.
- 31) The development hereby permitted shall be constructed entirely of materials detailed in the document ref. Materials received 9th February 2017.

- 32) The development hereby approved shall be completed in accordance with the Biodiversity Plan received 9th February 2017. The approved works shall be implemented prior to occupation of the development hereby approved and retained as such thereafter.
- 33) Prior to occupation of the development hereby permitted, the electrical vehicle charging points detailed in the document ref. Electric Charging Points received 29th May 2018 and Site Plan – Drawing No. 6549-023 Rev. R received 29th May 2018 shall be installed and retained as such for public use thereafter.
- 34) Not required as development is complete.
- 35) The information boards currently erected at the property, as detailed in the photo schedule dated the 25/08/2021, shall be retained and maintained as installed, unless otherwise agreed in writing with the Local Planning Authority.
- 36) An annual review of the effectiveness of the Travel Plan shall be undertaken by the operator(s) until September 2023 (that being five years from first operation). The operator(s) shall submit an Annual Performance Report to the County Council together with any available survey information and any modified Travel Plan arising from the recommendations contained within the Annual Performance Report within three months of the expiry of each anniversary. Any modifications arising from revised Travel Plans, as agreed with the County Council, shall be implemented by the operator of the store in accordance with any timescales set out in the revised Travel Plans. Information from any surveys undertaken as part of the implementation/ review of the Travel Plan shall be provided upon request where required to inform the assessment by the County Council.

End of Schedule of Conditions