

REPORT TO: DEVELOPMENT MANAGEMENT COMMITTEE - 13 AUGUST 2012

REPORT ON: SAINSBURY'S SUPERMARKETS LTD, 1 TOM JOHNSTON ROAD, DUNDEE - APPLICATION TO MODIFY S75 OBLIGATION TO REDUCE TO 70% THE NET SALES FLOOR AREA FOR FOOD AND OTHER CONVENIENCE GOODS (REF: 12/00296/MDPO)

REPORT BY: DIRECTOR OF CITY DEVELOPMENT

REPORT NO: 305-2012

1 PURPOSE OF REPORT

- 1.1 To request Committee determine an application to modify the terms of a Section 75 Agreement to reduce the percentage of the net sales floor area which can be allocated for the display and sale of food and other convenience goods from not less than 90% to not less than 70%. The proposed modification would result in an equivalent increase in the percentage of comparison ie non food sales floor area. Members should note that the current terminology for such an agreement is "a Section 75 obligation" and this report will use the current terminology hereafter.
- 1.2 Clause 6(i), the subject of this application is as follows:
- "not less than 90% of the net sales floor area shall be allocated for the display and sale of food and other convenience goods".
- 1.3 The application proposes that Clause 6(i) of the Obligation be modified as follows:
- "not less than 70% of the net sales floor area shall be allocated for the display and sale of food and other convenience goods".

2 RECOMMENDATION

- 2.1 It is recommended that the Committee refuses this request to vary the terms of the Obligation and that the Obligation is to continue to have effect without modification.

3 FINANCIAL IMPLICATIONS

- 3.1 There are no financial implications associated with this report.

4 BACKGROUND - PLANNING HISTORY

- 4.1 The site lies on the east side of Baldovie Road to the north of the Claypotts Junction on the A92 Arbroath Road in the north east of the City. There is a large industrial estate to the north and east with residential uses to the west and south.
- 4.2 Planning permission was refused for an application for outline planning permission for a mixed used development including a food superstore on 27 May 1999 (Ref: D23864).
- 4.3 A subsequent outline planning application was granted on 28 November 2000 for "the erection of a mixed use development including industrial units, retail food store (with in-store coffee shop), fast food restaurant, petrol filling station, car parking and formation of new access roads" (Ref: D24269). Conditions were applied to the

consent, with Condition 2 stating that the food store gross area shall not exceed 5,671m² and the net sales area shall not exceed 3,344m².

- 4.4 The above floorspace figures increased to 6,448m² gross area and 3,902m² net sales area through an amendment to the outline consent granted on 3 July 2001 (Ref: 01/30016/FUL). There were no conditions of relevance applied to this permission.
- 4.5 The approval of reserved matters in respect of the food store was granted on 28 March 2001 in relation to the larger floor space development (Ref: 99/24269/D).
- 4.6 A planning application to relocate the entrance lobby and reconfigure the car park was granted permission on 1 April 2008 (Ref: 08/00155/FUL). Condition 2 of the permission denoted an increase in the gross floor area to 6,489m² with the net sales area remaining at 3,902m².
- 4.7 A Section 75 Agreement was signed in respect of the outline planning permission and the relevant terms are:
- a 6(i) not less than 90% of the net sales floor area shall be allocated for the display and sale of food and other convenience goods; and
 - b 6(ii) the display and sale of comparison goods shall be permitted in the remaining net sales floor area, subject to the limitation that no single group of goods from the following list of groups (a) - (h) inclusive shall occupy more than 50% of the net sales floor area devoted to the display and sale of comparison goods, the said list being as follows:
 - books;
 - clothing and footwear;
 - furniture, floor coverings and household textiles;
 - radio, electrical and other durable goods;
 - hardware and DIY supplies;
 - chemist goods;
 - jewellery, silverware, watches and clocks; and
 - recreational and other miscellaneous goods.
- 4.8 A Retail Assessment (RA) and Broughty Ferry Town Centre Health Check(TCHC) were lodged with Dundee City Council in 2008 in support of an application on a non-statutory basis to modify the Section 75 Obligation and this was not granted.

5 CHANGES TO LEGISLATION

- 5.1 On 1 February 2011 new legislative provisions came into force whereby the Planning etc (Scotland) Act 2006 amended the 1997 Act by replacing the existing Section 75 with a new Section 75 and added new sections including Sections 75A, 75B and 75C which deal with Planning Obligations (the replaced version of Section 75 provided for "Planning Agreements"). Section 75A establishes a formal process whereby a person against whom a planning obligation is enforceable can apply to the planning

authority to have that obligation either modified or discharged. S75B provides for a right of appeal to Scottish Ministers where a planning authority either refuses the application or fails to determine it within 2 months. The Council considers that the new legislation is not retrospectively applicable and therefore only relates to S75 Planning Obligations concluded after 1 February 2011.

- 5.2 On 14 November 2011, a further Statutory Instrument came into force which attempted to clarify the legal position by providing that a pre 1 February 2011 agreement is to have effect as if made under Section 75, as it existed after that date. However, we remain of the view that there are stateable legal arguments that could be advanced to challenge this legislation. If the Committee refuses this application, and the planning Obligation is to continue to have effect without modification, the applicants may seek to appeal to Scottish Ministers. It is therefore considered appropriate that, given the doubts regarding how the courts may interpret or treat the legislation, the Committee gives its views on the merits of this application without prejudice to any arguments on the legality of the legislation.

6 APPLICANTS CASE

- 6.1 Planning consultants acting on behalf of Sainsbury's Supermarkets Ltd have now submitted a detailed statement in support of their clients' application. This application is one of two applications which seek to vary this Section 75. The other application, to modify the terms of a Section 75 Obligation to reduce the percentage of the net sales floor area which can be allocated for the display and sale of food and other convenience goods to not less than 80% is also on this agenda.
- 6.2 The consultants have confirmed that whilst Scottish Enterprise signed the Obligation as owners of the site at that time, Sainsbury's has acquired all of the land covered by the Obligation which this application seeks to modify and there are no interested parties to be notified as required in the Regulations.
- 6.3 The application includes a revised Retail Assessment (RA) and Broughty Ferry Town Centre Health Check(TCHC) which reflect the latest and most accurate position. The Retail Assessment study seeks to determine whether an increase in comparison floor space at the Sainsbury's store would have an impact on other shopping provision and the Town Centre Health Check focuses on Broughty Ferry in particular.
- 6.4 The consultants indicate that the existing store currently operates a net floor space split of 80% convenience and 20% comparison goods and has been operating at these levels since January 2011 when a clothing range was introduced.
- 6.5 The TCHC indicates that Broughty Ferry District Centre has a strong vitality and vibrancy with a variety of multiple and independent convenience, comparison, leisure and service operators. The vacancy rate is lower than the national average. There is good access and high pedestrian rates. Less than half of the units sell comparison goods in competition with Sainsbury's. Broughty Ferry District Centre is very healthy in retailing term, indeed is healthier than in 2007 and the consultants consider that these findings show that the current operating split of 80%/20% has had no adverse affect on the District Centre. Accordingly, the proposed increase to 70%/30% would bring Sainsbury's into line with other similar supermarkets and would not have an adverse impact on the Centre.

- 6.6 The consultants note that the restrictive nature of the current Section 75 prevents the customers of the store from receiving the full comparison goods range that Sainsbury's can provide and prohibits the store from competing fairly with other supermarkets within Dundee, most of which are permitted to sell comparison goods from 30% of the sales area.
- 6.7 The RA provides an overview of the current trading characteristics of comparison retailing within a 10 minute drive of the store and an assessment of the likely impact on those retailers of an increase in comparison sales in the Sainsbury's store. The retail areas within such a catchment area include Broughty Ferry District Centre, Kingsway East Retail Park, Albert Street District Centre and East Dock Street Retail Park.
- 6.8 The catchment area has a population of approximately 75,000 people. The study compared the availability of goods with the amount spent by customers and identified that the catchment area cannot provide the range of goods sought by the customers who tend to visit the Retail Parks and the City Centre. Whilst there would be some impact on Broughty Ferry District Centre if Sainsbury's was allowed to increase the sales area for comparison goods, the most likely impact would be on traders in Kingsway East Retail Park and East Dock Street Retail Park.
- 6.9 Planning Obligations should comply with the following five tests in Circular 1/2010: Planning Agreements - necessity, planning purpose, relationship to the development, scale and kind, and reasonableness.
- 6.10 The applicant's consultants have tested the Obligation and conclude as follows:
- necessity - not relevant but any such restrictions should be the subject of a condition;
 - planning purpose - the restriction does not serve a planning purpose and not required at the time of granting planning permission;
 - relationship to the development - planning circumstances have changes and there is no evidence of harm to the vitality and viability of Broughty Ferry District Centre;
 - scale and kind - not relevant to this application;
 - reasonableness - restrictions are no longer reasonable or necessary as demonstrated by the submitted documentation.

The consultants conclude that there are grounds to modify the Obligation as detailed in the application.

7 OBSERVATIONS

- 7.1 In order to consider this application, it is necessary to recall the situation that prevailed when the original Sainsbury's application was approved in 2000. At that time, a number of previous proposals for a food supermarket at this location had either been refused or withdrawn, with one of the principle issues being the likely impact on the nearby Broughty Ferry District Centre. The local traders actively campaigned against the proposed development but Members were finally convinced of the acceptability of the proposals on the basis of a number of concessions agreed with Sainsbury's. These included a restriction on comparison goods, a restriction on

concession or franchise units and the provision of a bus service between the store and the District Centre to encourage joint shopping trips. It is noted that an off-peak bus service providing 6 trips per day, Monday to Saturday is provided.

- 7.2 The applicant's case is that Broughty Ferry District Centre is trading well, with low vacancy rates and the proposed changes to floorspace split from the current ratio of 90/10 to either 80/20 as detailed in this application or 70/30 as proposed in the associated application. It is recognised that the other supermarkets operate with an agreed 70/30 split but as detailed above, the relationship between the Sainsbury's foodstore and Broughty Ferry is considered to be a special case which requires careful consideration of the impact of any proposed change in the Obligation covering % floorspace for comparison goods.
- 7.3 The Council's assessment of this application with regard to the tests required by Circular 1.2010 is as follows:

a Necessity

The Circular is written for the benefit of planning authorities that are considering whether, in order for planning permission to be granted, a planning obligation is required. However, this is an application to modify an existing planning obligation and there is no option to impose a planning condition. Accordingly, a planning obligation remains necessary in this regard in order to control the percentage of floor area for the display and sale of food and other convenience goods. It is concluded that the necessity test is satisfied.

b Planning Purpose

The Obligation should serve a planning purpose. The Dundee Local Plan Review 2005 contains specific policies to both encourage a wide range of appropriate retailing and to protect the vitality and viability of Town Centres and District Centres in the delivery of retailing and other services. Where retail units have been permitted in Retail Parks or outwith the retail centres, restrictions have been placed on the range of goods which can be sold and the percentage of floor space which can be used for the display and sale of such goods. Accordingly, planning permissions have been the subject of specific conditions or Section 75 legal Obligations to enforce such restrictions. It is concluded that the planning purpose test is satisfied.

c Relationship

The Circular requires that the Obligation should "relate directly to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area". The effect of the obligation is to restrict the manner in which the store may be operated and an unrestricted consent, a planning condition or a Section 75 Obligation to allow a larger percentage of non food floor space was perceived by the planning authority to be a barrier to planning permission being granted.

This store is located close to the District Centre on the main route into and out of Dundee serving the catchment population for both. It is not located in one of the retail parks which provide a range of non food units. The Council considers that this close relationship differs from the circumstances which apply to the

other supermarkets in the City. The proposed increase in the relative floor space between food and non food from the approved 90/10 split to 70/30 as detailed in this application, has the potential to damage Broughty Ferry District Centre. Whilst the consultants acting for the applicant have submitted reports which indicate that the Centre may be currently in a relatively healthy position, this is relatively recent and it remains vulnerable to pressures. The close relationship which was recognised in the original Obligation and was the reason for the imposition of these restrictions still remains and for this reason the Obligation meets the relationship test.

d Scale and Kind

The Council concurs that the test is not relevant to this application.

e Reasonableness

The Circular requires that the obligation should be reasonable in the particular circumstances of the case. The applicant entered into the obligation in 2000 in full knowledge of the details and developed a store which operates successfully. The application has not been submitted on the basis that the applicant's business is suffering loss or falling sales as a result of the restrictions. The application is submitted on the basis that the customer is unable to access the full range of goods that Sainsbury's can provide. The Council considers that an increase of 20% in the comparison floor space at this stage would represent a significant increase in the area allocated to such goods. In a period when consumer and retailer confidence remains low it is considered that such an increase could potentially have a significant detrimental impact on the District Centre and would be unacceptable given the relationship between the foodstore and the District Centre which has been recognised since 2000.

- 7.4 Having taken into account all the relevant matters, the Council considers that refusal of this application would be reasonable.

8 CONCLUSION

- 8.1 The terms of the current Section 75 Obligation are not consistent with the Obligations which have been concluded with many other developers because of the close relationship between this food store and Broughty Ferry District Centre. The applicant's submitted studies suggest that at this particular time, Broughty Ferry District Centre appears to be trading well and is currently displaying the vitality and viability which the City Council has sought to protect by the application of the policies in the Dundee Local Plan Review 2005.

- 8.2 In a period when consumer and retailer confidence remains low, there is concern that Broughty Ferry District Centre could be vulnerable to changes which could undo the apparent recent improvement in its vitality and viability. The Council considers that an increase of 20% in the comparison floor space within this store, at this stage, would represent a significant increase in the area allocated to such goods which could undermine the vitality and viability of the District Centre and would be unacceptable. Members are advised that an application has also been made to modify the terms of the current Section 75 Obligation to increase the comparison floor space by 10% and that application is considered elsewhere on this agenda.

- 8.3 It is considered that taking into account all the relevant issues above, the City Council's stated aims of maintaining the vitality and viability of the Broughty Ferry District Centre are not served by approval of the proposed modifications to the Section 75 Obligation and that the planning Obligation should continue to have effect without modification.

9 POLICY IMPLICATIONS

- 9.1 This Report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues.

10 CONSULTATIONS

- 10.1 The Chief Executive, the Director of Corporate Services and Head of Democratic and Legal Services have been consulted and are in agreement with the contents of this report.

11 BACKGROUND PAPERS

- 11.1 Section 75 Agreement - 16 November 2000.
- 11.2 Dundee Local Plan 2005.
- 11.3 The Planning etc (Scotland) Act 2006.
- 11.4 Circular 1/2010: Planning Agreements.

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