

# Modification of Sainsbury's Legal Obligation to Permit 30% Non Food Sales

## KEY INFORMATION

**Ward** The Ferry

**Address**

1 Tom Johnston Road  
West Pitkerro Industrial Estate  
Dundee

**Applicant**

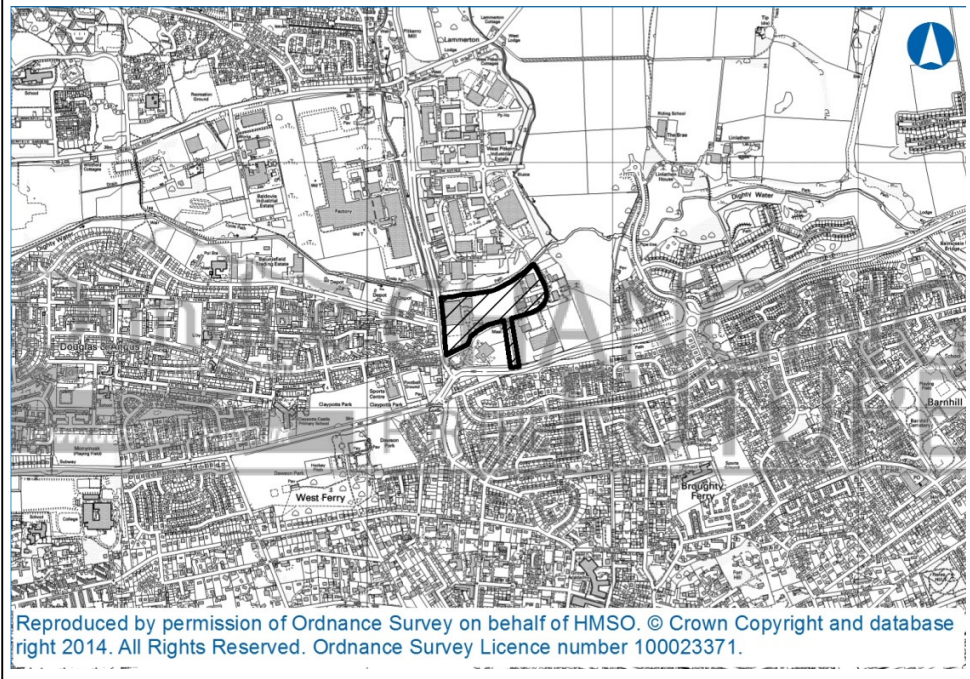
Sainsbury's Supermarkets Ltd  
c/o Agent

**Agent**

Turley  
FAO Katherine Pollock  
115 George Street  
Edinburgh EH2 4JN

**Registered** 24 April 2014

**Case Officer** Eve Young



## SUMMARY OF REPORT

### Report of Appointed Officer

- This application seeks consent to modify the terms of a Section 75 Agreement, now known as an Obligation, to reduce the percentage of the net sales floor area for the display and sale of food and other convenience goods from not less than 80% to not less than 70%. The proposed modification would not result in an increase in total floorspace.
- On 13 August 2012 the Development Management Committee approved Application 12/00295/MDPO to reduce the net sales floor area from 90% to not less than 80% but a further application 12/00296/MDPO to reduce the level to 70%, as detailed in this application, was refused at the same meeting.
- The applicant's consultants have carried out a revised Retail Assessment and Town Centre Health Check in respect of the Broughty Ferry District Centre in order to provide new information in support this application. They have advised that the store currently has 19.5% of its net floor space selling comparison goods and the application seeks 30%.
- They state that Broughty Ferry currently demonstrates a very low rate of vacancies and appears to be trading well with a wide range of specialised and individual stores providing a particular shopping experience.
- Broughty Ferry Community Council, Dundee Civic Trust and Broughty Ferry Traders Association have objected on the grounds that the proposal will adversely affect the retail centre of Broughty Ferry.

## RECOMMENDATION

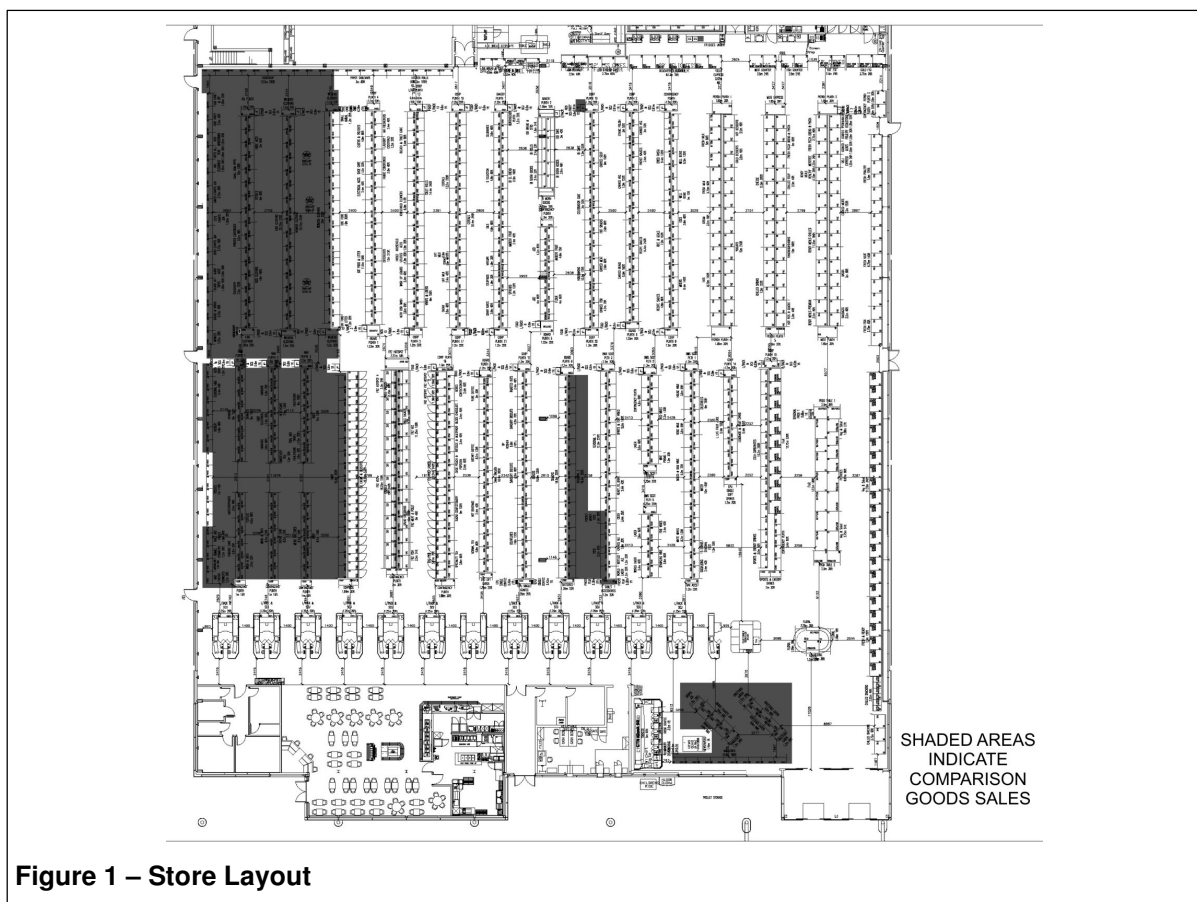
It is considered that the proposed amendment to the Planning Obligation would not result in a significant shift in the Policy approach set out in the Dundee Local Development Plan 2014 and taking into account all the relevant issues, the City Council's stated aims of maintaining the vitality and viability of the District Centres would continue to be served by the approval of this application. It is therefore recommended that the proposed modification is **APPROVED**.

## 1 DESCRIPTION OF PROPOSAL

- 1.1 To request that 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 80% 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 but no increase in total floorspace. 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 80% 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 SITE DESCRIPTION

- 2.1 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.



- 2.2 The applicant has provided a layout which shows that the store currently has 19.5% of the floor area for comparison goods comprising Health and Beauty, Clothing and General Merchandise including household goods.

### 3 POLICY BACKGROUND

- 3.1 The following plans and policies are considered to be of direct relevance:

**DUNDEE LOCAL DEVELOPMENT PLAN 2014**

Policy 23: Goods Range Restrictions

- 3.2 There are no other plans, policies and non-statutory statements that are considered to be of direct relevance.



Figure 2 - Photograph

### 4 SITE HISTORY

- 4.1 Planning permission was refused for an application for outline planning permission for a mixed use development including a food superstore on 27 May 1999 (Ref D23864).
- 4.2 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 5,671m<sup>2</sup> and the net sales area shall not exceed 3,344m<sup>2</sup>.
- 4.3 The above floorspace figures increased to 6,448m<sup>2</sup> gross area and 3,902m<sup>2</sup> 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.
- 4.4 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).
- 4.5 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 6,489m<sup>2</sup> with the net sales area remaining at 3,902m<sup>2</sup>.
- 4.6 A Section 75 Agreement was signed in respect of the outline planning permission which stated that "not less than 90% of the net sales floor area shall be allocated for the display and sale of food and other convenience goods".
- 4.7 This restriction on the operation of the store continued until May 2012. Two applications were submitted on behalf of the applicants to modify Clause 6(i) of the Section 75 obligation to vary the percentage sales areas as follows:
- a 12/00295/MDPO sought an amendment to the Section 75 to allow 80% of the net sales area to be allocated for the display and sale of food and other convenience goods and 12/00296/MDPO sought to vary the percentage for the same goods to 70%.

- b Application 12/00295/MDPO was approved by the Development Management Committee on 13 August 2012 but the second application 12/00296/MDPO was refused. As a result, Clause 6(i) of the Section 75 obligation was modified by a Minute of Agreement between the applicants and the City Council recorded in the Land Register on 28 November 2012.

4.8 The relevant terms of the revised Clause 6(i) are:

- a 6(i) not less than 80% 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.

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## 5 PUBLIC PARTICIPATION

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- 5.1 This is not a planning application and does not require to be notified to neighbouring properties. It was not advertised in the local press.
- 5.2 Three objections have been received from Broughty Ferry Community Council, Dundee Civic Trust and Broughty Ferry Traders Association on the grounds that the proposal will adversely affect the retail centre of Broughty Ferry. These objections will be considered in more detail later in this report.

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## 6 CONSULTATIONS

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- 6.1 There were no responses from consultees.

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## 7 DETERMINING ISSUES

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### CHANGES TO LEGISLATION

- 7.1 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.

- 7.2 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.

### APPLICANT'S CASE

- 7.3 Planning consultants acting on behalf of Sainsbury's Supermarkets Ltd have submitted a detailed statement in support of their clients' application. 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.

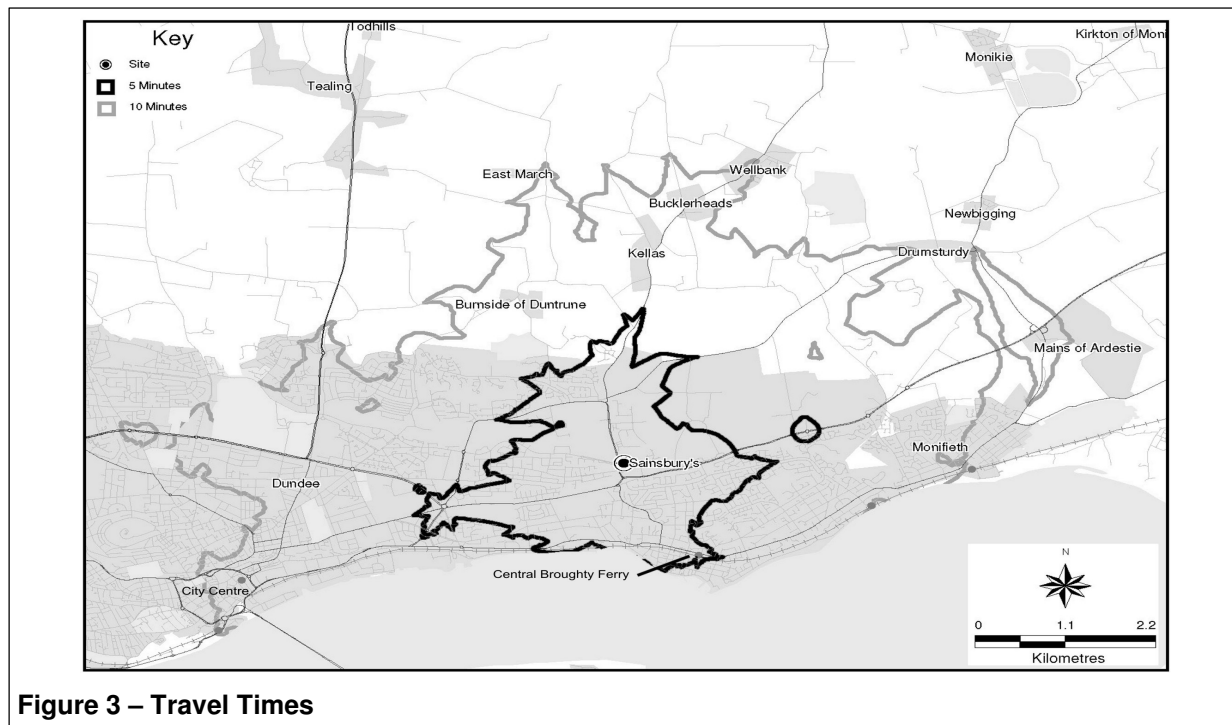


Figure 3 – Travel Times

- 7.4 The application includes a revised Retail Assessment (RA) dated April 2014 and a Broughty Ferry Town Centre Health Check (TCHC) based on desktop studies and a site visit to Broughty Ferry on 5 February 2014. 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. The supporting information seeks to address the concerns raised by the Council when an application for the same modification was refused by Committee in August 2012.

- 7.5 Similar studies were submitted with the two applications in 2012 and consultants have updated these to reflect the most accurate current position. The study area has remained the same as 2012 and is defined by a Primary Catchment Area (PCA) of a 0-5 minute drive time from the store and a Secondary Catchment Area (SCA) of a 5-10 minute drive time. The PCA includes Broughty Ferry Town Centre and Kingsway East Retail Park. The SCA extends as far as Albert Street District Centre and East Dock Street Retail Park.
- 7.6 The Retail Assessment notes that the proposed modification will not result in any increase in retail floorspace but that 391m<sup>2</sup> of the existing store will change from convenience goods to comparison goods as detailed above, to a maximum of 1,171m<sup>2</sup>. The report states that Sainsbury's does not seek to attract significant numbers of new customers but to improve the store for the benefit of the existing customers and enable appropriate competition with other foodstores in the City where the Council has permitted 30% of comparison floorspace. No change is proposed in the range of restricted goods as defined by the S75 obligation, which will allow sales of clothing, household goods, electrical items and seasonal items.
- 7.7 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. Asda at Kingsway East Retail Park is the main superstore within the PCA and the main competition to Sainsbury's store. The Tesco superstore at Kingsway West Retail Park is just outwith the SCA. Both superstores have a restriction of 30% on comparison goods as sought by Sainsbury's. However both are significantly larger and provide 1,628m<sup>2</sup> (Asda) and 1,793m<sup>2</sup> (Tesco) of comparison floorspace.
- 7.8 The Town Centre Health Check (TCHC) indicates that there is a diverse mix of uses and occupiers within the centre of Broughty Ferry. There are 131 units in total of which 120 are in retail or service uses (as defined by Experian GOAD). The percentage of convenience and comparison uses has been compared with the national average and notes that comparison uses dominate within the centre, occupying 42.5% of all units, which is above the national average (40.9%). Comparison uses in the centre primarily comprise specialist retailers including jewellers, florists, pet shop, furniture and homeware, chemists, gifts shops, high end clothing and a computer and electronics specialist. The agent considers that these figures indicate that the centre has not been materially affected by the change to the comparison goods floorspace permitted at the Sainsbury's store in 2012. The TCHC indicates services uses occupy 38.3% of units followed by convenience uses at 15.8% both above the national averages of 35.4% and 8.8% respectively. In addition to the retail and service used, there is a range of leisure, community and civic uses which attracts people to the centre and contributes to its vitality and viability.
- 7.9 At the time of the survey in February 2014, there were four vacant units in the centre. This 3.3 % rate is well below the national average vacancy rate of 12.6%. In 2012 the vacancy rate in Broughty Ferry was 4.4%, having been 3.8% in 2011 and 8% in 2007. The consultants note that the vacancy rate is one of the lowest they have recorded in Scotland. The report also notes that one of the vacant units is the Jolly's hotel, which Members will be aware is now open and being operated by JD Wetherspoons. The report records footfall in four locations throughout the centre between 11.55am and 1.00pm on Wednesday 5 February 2014 with projected averages of at least 300 pedestrians per hour passing sites on Brook Street and Gray Street.

- 7.10 The Retail Assessment considers the relevant policies in the Dundee Local Development Plan. Policy 23: "Goods Range Restrictions" requires that 70% of the floorspace of foodstores should be for the sale of comparison goods. This application complies with this policy. Policy 24: "Location of New Retail Developments" sets out requirements for new or expanded retail developments. The agents conclude that the proposal does not propose new or extended floorspace but provides supporting evidence of compliance with this policy for the sake of completeness. They conclude that the evidence from the RA and the study of Broughty Ferry Town Centre demonstrates that the centre will not be prejudiced by approval of this application due to its vitality and viability and the limited overlap in the goods to be sold. It considers that the centre provides limited choice of household, electrical items or clothing at a low to medium price range which will require residents to travel to other superstores and retail parts to access range and choice in such goods.
- 7.11 Approval of this application could reduce residents' needs to travel to other stores. The RA considers that the proposed expansion of comparison floorspace would have an impact on other retailers of 4%, only part of which may be drawn from Broughty Ferry. The most likely impact will be on Kingsway East Retail Park and Gallagher Retail Park. In order to err on the side of caution, the method used by the consultants to assess the potential impact of the proposed change does not include any inflow of expenditure from tourists or visitors to the area. However, it is thought that this could equate to between 5-10% of retailers' turnover in Broughty Ferry.
- 7.12 The RA concludes that the proposal is not anticipated to have an adverse impact on the district centre for these reasons.

### **OBJECTIONS**

- 7.13 Broughty Ferry Community Council (BFCC) objects on the grounds that the proposal will have a negative effect on the retail district centre of Broughty Ferry and will not enhance its vitality and viability as required by the recently adopted Dundee Local Development Plan (DLDP). The DLDP confirms in para 8.12 that District Centres should be "developed in a manner that maintains and enhances their viability as sustainable shopping locations". As the District Centre includes a number of shops which sell comparison goods they add to the quality of the centre as a whole and are integral to its vitality and viability.
- 7.14 BFCC considers that the terms of Policy 23: Goods Range Restrictions should be an upper limit to be decided on the circumstances of each individual case. The justification to be equal with other stores should have no bearing on this decision which should be based on the impact on Broughty Ferry. The applicant's own report confirms there will be a negative impact which will be small but this is based on a model of retail impact which may produce an under-estimate. As there is no evidence that the proposed relaxation will enhance the vitality of Broughty Ferry, it should be refused. BFCC also considers the proposal will detract from the vitality and viability of Broughty Ferry as proposed by Policy 21- "District Centre Retail Frontages".
- 7.15 Dundee Civic Trust objects on the grounds that the case for the original agreement, to protect the viability of traditional retail centres, is even stronger in the current economic climate, with major concerns throughout the UK about vacant shops and the future role of traditional high streets. Approval of this proposal will weaken prospects for a lively shopping centre in Broughty Ferry which is in the interests of the community.
- 7.16 Broughty Ferry Traders Association has objected to the application on the grounds that the 30% restriction in Policy 23: Goods Range Restrictions is an upper limit and approval would, in this case, have a "substantial impact on the number of shops in the retail frontage in Brook Street and hence the range and quality of the retail offer which is at the core of the viability

and vitality of Broughty Ferry as a District Shopping Centre.” The Association considers this to also be in breach of Policy 21: District Centres Retail Frontage and the intent of the retailing policies in the Dundee Local Development Plan.

### **OBSERVATIONS**

- 7.17 Proposals to discharge, modify or enter into Planning Obligations should comply with the following five tests in Circular 3/2012: Planning Obligations and Good Neighbour Agreements - necessity, planning purpose, relationship to the development, scale and kind, and reasonableness.
- 7.18 The Council's assessment of this application with regard to the tests required by Circular 3/2012 is as follows:
- a Necessity
- 7.19 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
- 7.20 The Obligation should serve a planning purpose. The Dundee Local Development Plan 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. This approach is supported at a regional level by Tayplan Strategic Development Plan and at national level by the Scottish Planning Policy 2010 and the Draft Scottish Planning Policy as well as the National Review of Town Centres External Advisory Group Report: Community and Enterprise in Scotland's Town Centres. 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 Planning Obligations to enforce such restrictions. It is concluded that the planning purpose test is satisfied.
- c Relationship
- 7.21 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.
- 7.22 This store is located close to the District Centre on a 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 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

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

e Reasonableness

7.24 The Circular requires that the obligation should be reasonable in the particular circumstances of the case.

7.25 The applicant entered into the obligation in 2000 in full knowledge of the details and developed a store which operates successfully. There has been a change in the legislation which allows an application to modify or discharge the terms of the obligation.

7.26 In order to consider this application, it is necessary to recall the situation that prevailed when the original Sainsbury's application was approved by Committee 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 principal 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 currently in operation.

7.27 The application has not been submitted because 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 customers of the store are unable to access the full range of goods that Sainsbury's can provide and the consultant contends that those customers will shop further afield in Dundee in larger superstores and retail parks. The Council has to consider whether a change in the proportion of convenience to comparison goods floorspace from 80/20 to 70/30, in addition to the 10% change in proportions which was approved in 2012, would represent a significant change which would be likely to have an adverse impact on the vitality and viability of the Broughty Ferry District Centre.

7.28 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 80/20 to 70/30 will have limited impact. An application to approve such an increase was refused by the Development Management Committee in 2012, amid concerns that such a significant increase, at that stage, could potentially have a significant detrimental impact on the District Centre. As a result, the applicants have carried out further studies to support their case following the approval of the increase from 90/10 to 80/20.

7.29 Three objections have been received from the Broughty Ferry Community Council, Dundee Civic Trust and Broughty Ferry Traders Association on the grounds that they consider that the increase will have an adverse impact on the District Centre and should be refused.

7.30 However, despite the difficult trading conditions experienced by other retail centres, Broughty Ferry currently demonstrates a very low rate of vacancies and appears to be trading well with a wide range of specialised and individual stores providing a particular shopping experience to residents and visitors. The application does not propose an increase in floorspace, but a change in the proportion of floorspace allocated to different goods. The increase in comparison goods will be matched by a decrease in convenience goods which may also have an equivalent beneficial impact on other food shops in Broughty Ferry. Customers can travel to other larger superstores and retail parks within 10 minutes

drive of this store and an even wider choice of stores beyond that limit. Given the ease of travel, even by public transport, customers are able to access a wide range of shops within the city of Dundee and it is considered that this proposal will have a minimal impact on Broughty Ferry taking into consideration all of the relevant factors.

- 7.31 **It is concluded from the foregoing that the Council considers that approval of this application would be reasonable.**

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## **8 CONCLUSION**

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- 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 Broughty Ferry District Centre continues 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 successive local plans.
- 8.2 It is considered that the proposed amendment to the Planning Obligation would not result in a significant shift in the Policy approach set out in the Dundee Local Development Plan 2014 and approval of this application will not result in significant trade being drawn from the District Centre.
- 8.3 It is concluded that taking into account all the relevant issues above, the City Council's stated aims of maintaining the vitality and viability of the District Centre would continue to be served by the approval of this application.

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## **9 RECOMMENDATION**

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- 9.1 It is recommended that the proposed modification be GRANTED.