



Appeal Decision

Site visit made on 11 November 2013

by David Harmston FRICS DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 13 November 2013

Appeal Ref: APP/Q1445/A/13/2195989

Sainsbury's Supermarkets Limited, 93 Lewes Road, Brighton BN2 3QA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant 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 Limited against the decision of Brighton & Hove City Council.
- The application (Ref BN/82/0515) was granted on 4 November 1983.
- The development permitted is the erection of a retail store and ancillary facilities.
- The conditions in dispute are Nos 14 and 15. These state:

'Condition 14. No part of the retail store should be open for trade during the hours of 2200 to 0700 Monday to Saturday and at no time on Sunday.'

'Condition 15. No deliveries shall be made to the retail store during the hours of 2200 to 0700 Monday to Saturday and at no time on Sunday.'

- The reason given for both conditions is: *'To protect the amenities of the residents in the area.'*
- On 15 July 1993 (application ref:- 92/0916/FP) planning permission was granted on appeal¹ for the continuation of the use of the retail store without complying with the above conditions but subject to all the other conditions imposed on the original grant of planning permission and subject to three new conditions as follows:

'1. The retail store shall only be open for trade between the hours of 0700 and 2200 Mondays to Saturdays and between 1000 and 1600 hours on Sundays.'

'2. No deliveries shall be made to the retail store during the hours of 2100 to 0700 Mondays to Saturdays and a maximum of two deliveries only shall be made to the store between the hours of 1000 and 1600 on Sundays.'

'3. No roll pallets shall be used in the delivery yard on Sundays.'

- The proposal now (Ref:- BH2012/01521, dated 17 May 2012) was described on the application form as *'Relaxation of Conditions 14 and 15 of BN/82/0515 granted 4.11.83 proposed now to read: 'no part of the retail store should be open for trade and no deliveries made during the hours of 2200 to 0700 on any day.'*
- Permission for the relaxation of the conditions in the form applied for was refused permission by the Council on 5 October 2012 for the following reason: *'The increase in the delivery hours and the increase in the number of delivery vehicles would have an unacceptable detrimental impact on the amenity of residents of nearby properties contrary to policies QD27 and SU10 of the issue decision notice.'*

¹ Appeal Ref:- T/APP/N1405/A/92/215090/P5

Decision

1. The appeal is allowed and planning permission is granted for the continuation of the use of the retail store at Sainsbury's Supermarkets Limited, 93 Lewes Road, Brighton BN2 3QA without complying with conditions 14 and 15 set out in planning permission Ref No:- BN/82/0515, granted on 4 November 1983 by the Brighton Borough Council and condition 2 of the planning permission granted on appeal under reference T/APP/N1405/A/92/215090/P5 (application ref:- 92/0916/FP), dated 15 July 1993, but subject to all the other conditions imposed therein in both permissions, insofar as the same are still subsisting and capable of taking effect, and subject to the following new conditions:
 1. No deliveries shall be made to the store between 2100hrs and 0700hrs on Mondays to Saturdays or at any time on Sundays and Public Holidays except between 0900hrs and 1700hrs. On Sundays and Public Holidays there shall be no more than four deliveries to the store within the hours hereby permitted.
 2. The delivery hours to the store and the restriction on the maximum number of deliveries to take place on Sundays and Public Holidays by virtue of the terms of the above condition shall be for a temporary period of 12 months from the date of this decision. Thereafter the restrictions on the delivery hours on all days, and the restriction on the maximum number of deliveries to take place on Sundays and Public Holidays, shall revert to those permitted by virtue of Condition 2 of the planning permission granted on appeal under reference T/APP/N1405/92/215090/P5 (Application Ref:- 92/0916/FP), dated 15 July 1993.

Preliminary Matters

2. There is a complex planning history surrounding the development and its delivery hours, amongst other matters. The store was originally granted planning permission in November 1983 (Ref BN/82/0515) with conditions imposed thereon controlling its opening hours and permitted delivery times. In 1992 permission was sought to vary two of the conditions of the original permission to allow for Sunday trading and to extend the permitted delivery hours (Ref 92/0916/FP). This was refused and, following a public inquiry, an appeal against that decision was allowed and the conditions of the original permission varied to allow for Sunday trading with a restriction on the store's opening hours as well as the times during which deliveries to it could be made.
3. The application to which this appeal relates was made in the form of a submission for the removal or variation of conditions following a grant of planning permission. The description of the development applied for relates specifically to two of the conditions imposed on the original grant of planning permission for the store in 1983. The Council's decision notice refers to the development applied for as being for a variation of condition No 2 of the permission granted on appeal in July 1993 which itself permitted the continued use of the store without compliance with Conditions 14 and 15 of the 1983 permission, subject to new (replacement) conditions.
4. In the Design and Access Statement the appellant states that *'This application seeks to vary condition 2 of permission 92/0916/FP to allow 4 deliveries to the foodstore between 9am and 5pm on Sundays and Bank Holidays for a*

temporary period of 12 months. Notwithstanding, I consider that it is necessary to consider the terms of both conditions 14 and 15 of the original 1983 permission as well as condition 2 of the 1993 appeal decision in relation to the delivery times and numbers if a variation thereto is to be granted. I have therefore determined this appeal on this basis. I have used the term 'Public Holidays' rather than 'Bank Holidays' throughout as this is a more appropriate description.

Main Issue

5. The main issue in this appeal is whether the extended hours during which deliveries to the store could take place, and the additional number of deliveries, both on Sundays and Public Holidays only, would unacceptably harm the living conditions of the nearby residents through the generation of undue noise and disturbance on those days.

Reasons

6. The appeal site comprises a large supermarket located in central Brighton with customer car parking provided on the ground floor. Access for delivery vehicles is at the rear of the building via a ramped driveway leading upwards from Hollingdean Road to a large, gated service yard. The area surrounding the site is mixed in character and land use with dwellings, shops, public houses and other forms of commercially used property all within the vicinity. The main line railway station is not far distant to the south-west and Lewes Road, to which the site has its main access, is a very busy traffic route leading northwards out of the City. The neighbourhood to the site is one of vibrancy and a high level of activity with heavy traffic in the surrounding roads.
7. There are no physical changes proposed to the store or its means of access for deliveries. The removal of the conditions in dispute and their replacement in the manner suggested would have the effect of allowing deliveries to the store to take place over a slightly greater timeslot on Sundays and Public Holidays adding one hour for such a process at the beginning and end of the day. Deliveries could therefore take place from 0900hrs to 1700hrs as opposed to between 1000hrs and 1600hrs as occurs now in accordance with the conditions imposed on the 1993 permission. Additionally the number of deliveries taking place throughout this period would be increased from two to four. There would be no changes to the permitted delivery restrictions on Mondays to Saturdays.
8. The residential properties most likely to be affected by any noise generated by the movements of delivery vehicles to and from the store are those situated in Hollingdean Road and D'Aubigny Road. These are situated to the rear of the store, to the north-east and south-west of the ramped service access. The appellant commissioned and submitted a Noise Assessment with the application and this has been updated in association with the appeal. This draws on the guidance set out in the National Planning Policy Framework (the 'Framework') and includes assessments based on BS 4142 (*Rating Industrial Noise Affecting Mixed Residential Areas 1997*) and BS 8233: 1999 (*Sound Insulation and Noise Reduction for Buildings – Code of Practice*).

9. The Assessment identifies the dwellings in D'Aubigny Road and Hollingdean Road as being the most sensitive locations for noise disturbance emanating from the delivery operations to the store. In these positions, background noise is dominated by the ambient noise levels generated by traffic using Lewes Road and other local traffic movements. In respect of internal noise levels from delivery events, the Assessment concludes that the noise level would be at or below the good target level of 30db at all sensitive receptors with windows opened or closed and within L_{Amax} levels under the same conditions. In a worst case scenario for the delivery event within the service yard during the proposed hours with the existing background noise level at LA₉₀ at the nearest residential receptors, the one hour average noise levels would be at least 10db below the background noise level during the same period.
10. This evidence is robust and is worthy of attracting substantial weight in this appeal. No counter evidence has been advanced to refute it and I can therefore conclude that the extended delivery hours sought, which in themselves would add only one hour to each side of the previously permitted delivery hours, would have no material effect on the living conditions of the adjoining residents in terms of disturbance by noise intrusion. Further, the increase in the number of vehicles would have very little impact as the two additional trips would be spread throughout the day and, based on the findings of the Noise Assessment; in themselves they would cause no significant nuisance in any event.
11. The appellant operates a communications system for delivery vehicles whereby an 'early warning' is given to the store of the impending arrival of vehicles so that the security gates can be opened and preparations made thereby reducing or eliminating altogether the need for vehicles to wait on the road or the ramp. Other measures, such as the switching off of refrigeration units fitted to the lorries prior to entering the yard, have been put in place to reduce noise emissions.
12. I have seen and considered the representations that have been made by local residents in relation to this proposal. These include concerns regarding air pollution. In this respect the situation that would arise with a change in the hours that deliveries could take place would be unlikely to change to any material extent as the number of deliveries that would take place to the store in total over a given period of time would not necessarily increase if the condition were to be modified in the manner proposed. For instance, there is no restriction on the number of deliveries to the store that could take place on Mondays to Saturdays within the permitted hours.
13. It is reasonable to assume that if the current restriction to a maximum of two deliveries in number on Sundays and Public Holidays (during the permitted hours) were to remain in place, then, to compensate, more deliveries would be likely to take place at other times as the overall demand for delivered goods to the store is not likely to be determined by the times at which they can take place. The total air pollution thus created, in these circumstances, would be unchanged.
14. I note the objections made concerning the traffic generated in association with the home delivery service which has been introduced since the store first opened. However, that is not a matter at issue in this appeal which relates

only to the number and times of deliveries to the store on Sundays and Public Holidays and not the delivery of goods from the store. Various points have been made about the history of the store's operations and the fact that its design and access arrangements are now out of date. I consider that there is weight in the points made in this vein. However, I am only able to consider the proposal to amend the disputed condition on its merits and the suggestions that have been made to alter the store's fabric, such as by an improvement to the delivery bays, are not matters that I can consider.

15. In my conclusion the two additional hours during which deliveries to the store could take place, and the two additional deliveries, would have very little, if any, negative impact on the living conditions of the adjoining residents based on the findings of the Noise Assessment and all the other information before me. Policy QD27 of the Brighton & Hove Local Plan seeks to ensure that all developments will not be the cause of material nuisance and loss of amenity to residents. Policy SU10 refers specifically to noise nuisance requiring new developments to minimise their impact in such respect with the use of attenuation measures where appropriate. These policies are consistent with the guidance set out at paragraph 123 of the Framework. For the reasons I have given I do not consider that the modest changes to the original condition as proposed would have any unacceptable impacts on the living conditions or amenities of the local residents and there would therefore be no material conflict with either the local plan or the Framework.
16. As originally submitted this application did not seek a 12 month trial period for the testing of the revised conditions although it was referred to in the Design and Access Statement accompanying the application. The Council's suggested revised conditions include reference to a 12 month trial period as does the appellant's statement, but in a different form. Paragraph 111 of Circular 11/95 (*The Use of Conditions in Planning Permissions*) advises that some uses may be 'potentially detrimental' to existing uses nearby, but there is insufficient evidence to be sure of their effects. In these circumstances it might be appropriate to grant a temporary permission in order to give the development a trial run, having regard to the test of reasonableness.
17. In replacing the original conditions in dispute I have considered the tests and advice set out in Circular 11/95 together with all the material considerations relevant to the main issue. I have allowed for the enhanced hours during which deliveries to the store can take place together with the increase in the number of deliveries from two to four. The Council has suggested a 'trial period' condition for 12 months and the appellant has accepted this in principle in a revised form. This was promoted in order that it could be demonstrated that the additional deliveries, and the times at which they could take place, would comply with the noise level targets set out in the Noise Assessment.
18. In relation to the trial period, the appellant suggests that an appropriate wording to be incorporated within the new, single condition would be to the effect that, after the trial period has elapsed, the revised delivery times should be allowed to continue unless the Council gives written notice to the contrary prior to the expiration of the 12 month period. This form of wording would place the onus for action on the Council and I consider that it is more appropriate for the appellant to demonstrate that the terms of the Noise Assessment have been adhered to during the 12 month period. If that proves

to be the case then a further application could be made for the continuation of the use with the revised delivery arrangements without a restriction on its time period having regard to all the material considerations relevant at that time. That would be a matter for the Council to determine in due course and is not prejudged by this decision.

19. I have afforded weight in the planning balance to all the points made in relation to this proposal. Nothing, however, overrides my conclusions above and the reasons for them.

David Harmston

Inspector