



An
Bord
Pleanála

Inspector's Report 02.248761

Development	Revision to condition no. 9 of previously permitted development reg. ref. 14/107 and ABP ref. PL02.243518
Location	Supervalu, south of Kells Road, Lisaniskey, Co. Cavan
Planning Authority	Cavan County Council.
Planning Authority Reg. Ref.	17/74
Applicant(s)	Parkside Gemon Development Ltd (Supervalu Kingscourt)
Type of Application	Retention
Planning Authority Decision	To grant.
Type of Appeal	Third party.
Appellant(s)	1. John O'Reilly
Observers	1. D. K. & S. O'Reilly 2. Izzy Ltd.
Date of Site Inspection	12 th September 2017
Inspector	Deirdre MacGabhann.

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1.0 Site Location and Description

- 1.1. The appeal site lies c.500m to the southwest of Main Street, Kingscourt, Co. Cavan. It is situated to the south of the R164 a regional road between Kingscourt and Kells. The site comprises an existing SuperValu retail store, with car parking to the front (east) of the retail building. A service yard lies to the south of the retail building (see photographs). Access to the site is via a junction with the R164 to the north east of the retail development.
- 1.2. The appellant's landholding lies to the west of the appeal site. It also fronts the R164. It lies at a higher elevation than the appeal site and is separated from it by a mature hedge. It comprises a vacant site, with a partially made up internal roadway. To the south east of the applicant's landholding and to the east of the appeal site is commercial development (see photographs).

2.0 Proposed Development

- 2.1. The purpose of the proposed development, for retention, is to regularise and clarify the operating hours of the supermarket.
- 2.2. Condition no. 9 of the Board's permission under PL02.243518 stated:

'9. The hours of operation of the store, including periods of delivery, shall be restricted to between 0800 hours and 2000 hours Monday to Friday and 1200 hours and 1800 hours on Sundays and Bank Holidays. Reason: In the interest of residential amenity.'
- 2.3. The applicant states that the application is brought forward as the wording of the Board's condition is ambiguous and unworkable, for the following reasons:
 - Supermarket trips are spread throughout the week, with often a focus on evening and weekend shopping. It is necessary, therefore, for modern supermarkets to operate later into the evening and throughout the day at weekends. The condition is overly restricted in respect of operating hours on weekday evenings and on Sunday mornings.
 - Condition no. 9 makes no reference to Saturday trading.

- Efficient operation of a modern supermarket requires flexibility with regard to servicing as deliveries originate from a central distribution hub co-ordinated across a national network of stores. Deliveries to the site are co-ordinated between SuperValu's national distribution centre and store management in Kingscourt. To facilitate scheduling with wider stores in the north east it is necessary to maintain flexibility with regard to deliveries to SuperValu Kingscourt. Acknowledging the need to protect residential amenity, the applicant is satisfied to accept a condition requiring the submission of a Servicing Management Plan to the planning authority for agreement.

2.4. The applicant requests that Condition no. 9 be amended to read:

9. (i) *The operating hours of the store shall be restricted to between 0700 hours and 2100 hours Monday to Saturday and 0900 hours and 1900 hours on Sundays and Bank Holidays.*
- (ii) *A Management Plan for deliveries to the store shall be submitted to and agreed in writing with the planning authority.*

Reason: In the interest of residential amenity.

3.0 Planning Authority Decision

Decision

3.1. The planning authority decided to grant retention for the development subject to three no. conditions:

- Condition no. 1 – Development to accord with the plans submitted.
- Condition no. 2 - Operating hours to be restricted to between 0700 hours and 2100 hours Monday to Saturday and 0900 hours to 1900 hours on Sundays and bank holidays.
- Condition no. 3 - Within one month the applicant is required to submit and agree a management plan for deliveries to the planning authority.

Planning Authority Reports

3.2. The Planning Report of the 25th April 2017 refers to zoning in respect of the site, its planning history and technical reports (no observations were made on the application). The report acknowledges that the condition, as worded by the Board, is unworkable and states that the supermarket is currently operating as follows:

- Monday to Wednesday, 8am to 8pm.
- Thursday to Friday, 8am to 9pm.
- Saturday 8am to 8pm.
- Sunday, 10am to 7pm.

3.3. The Planning Officer states that the operating hour raise no concerns from a planning perspective (no residential dwellings in the immediate vicinity of the site). It recommends granting permission for the development subject to conditions.

Technical Reports

3.4. The following technical reports are on file:

- Area Engineer (15th March 2017) – No objections.

Third Party Observations

3.5. There are no observations on file in response to the application

4.0 Leave to Appeal

4.1. In June 2017, the Board granted the appellant leave to appeal in respect of the planning authority's decision to grant retention for the proposed development. In their decision to grant leave to appeal, the Board considered that it had been shown that:

- i. the development, for which permission was granted, would differ materially from that set out in the application for permission, by reason of condition no. 3, imposed by the planning authority, and
- ii. the condition would materially affect the applicant's enjoyment of the land adjoining the appeal site.

5.0 Planning History

Appeal Site

- 5.1. A number of planning applications have been brought forward in respect of the appeal site. These are summarised in the Planning Officer's report. Of relevance to this appeal is the parent permission granted by the Board under PL02.243518 (PA ref. 14/107). This comprised permission for a SuperValu supermarket with ancillary off licence (1,394sqm gross floor area, 929sqm net retail sales area), 83 no. car park spaces, service yard, plant, building mounted and free standing signage, bicycle parking, hard and soft landscaping, boundary treatment and upgrading of the access to the site. Permission was granted by the Board on the grounds that the sequential test had been satisfactorily carried out and that there was no town centre site immediately available for development.
- 5.2. The permission was subject to 20 conditions, including the following:
- Condition no. 9 restricted the hours of operation of the store to 0800 hours and 2000 hours, Monday to Friday, and 1200 hours and 1800 hours, Sundays and Bank Holidays.
 - Condition no. 11 – Details of all plant and machinery to serve the development to be agreed in writing with the planning authority prior to commencement of development
 - Condition no. 12 – Required operational phase of the development to comply with standard noise controls.

Adjoining Lands

- 5.3. Under PA ref. 08/876 (Ashcroft development), permission was granted by the planning authority for the erection of 12 no. semi-detached two and a half storey dwellings, apartment block containing 3 no. units on land to the north of the appeal site (appellant's landholding). Houses are separated from the appeal site by an internal access road (Appendix A, applicant's response to appeal). Under PA ref. 14/61 the planning authority decided to grant an extension of the duration of above permission to 22nd September 2019.

6.0 Policy Context

6.1. Development Plan

- 6.1.1. The appeal site lies within the administrative area of the Cavan County Development Plan 2014 to 2020. The site lies on land zoned for commercial development. The objective of the zone is stated to be *'Identifies areas developed and suitable for commercial development such as hotel, community, car parking, tourism and recreation. These are out of town core sites and so are not suitable for retail or town core commercial uses'*.
- 6.1.2. Land to the west of the appeal site, the appellant's landholding, is zoned for *'proposed residential'*. The objective of the zone includes *'To provide for residential development and to protect and improve residential amenity'*.

7.0 The Appeal

Grounds of Appeal

- 7.1. The third party appeal sets out a number of arguments against the planning authority's decision to grant permission. A number of the matters raised relate to the retail development previously granted permission, namely:
- Noise from plant and machinery, from pressed metal parapet (echo) and smell from extractor fans along west side of building.
 - Danger to occupants of building posed by snow on roof of building (risk of collapse).
 - Impact of development on views from Ashcroft development.
 - Condition of ditch/bank between landholdings (falling in, danger to residents/children).
 - Safety of new junction layout at access to site.
 - Sale of alcohol on the SuperValu site.
 - Dumping of waste from site during construction of supermarket.
 - Lack of compliance with the terms of the permission granted under PL02.243518.

- Impact of retail store on town centre.

7.2. In respect of the proposed development, the appellant makes the following arguments:

- The development will impact on the enjoyment of family homes, as a result of extended operating hours and noise from night time deliveries (Ashcroft development, Cavan County Council 02/52, 05/343, 08/7876 and 14/61). Deliveries should be restricted to between 9am and 5.30pm Monday to Friday.
- Opening of store not permitted on a Saturday under PL03.243518.
- The Planning Officer's report takes no account of the Ashcroft development (12 residential units, on the adjoining land).
- The development will impact on the sale price of properties.
- The delivery times were not indicated on the site notice or planning application form.
- Site notice not in place on site during the first 5 weeks of the application for permission.
- Development is situated outside of the town centre. No other retail outlet trades after 5.30pm or before 9.00am or at weekends in the area.
- Ashcroft is a totally residential development and should enjoy all the amenities of a residential area.
- The appellant is seeking financial compensation under section 190, Part III, section 34, subsection 4(c)(e)(h) and (q), as a consequence of the impact of the development

7.3. The appellant's appeal includes the following attachments:

- Correspondence with the Department of Environment, Community and Local Government with respect to the SuperValu development, granted under PL02.243518.
- Correspondence with the Board, with respect to (i) PL02.243518 and, (ii) leave to appeal the permission granted for the proposed development.

- Copy of correspondence with Enforcement Section, Cavan County Council, again with respect to PL02.243518.
- Extracts from the Planning Inspector's report under PL02. 243518.
- Four discs containing:
 - Videos of the appeal site during construction of the retail unit.
 - Photographs of the shared site boundary during construction.
 - A video showing movement of soils from the appeal site to agricultural land, off-site, during construction of the retail unit.
 - Videos of delivery vehicles loading/unloading in the service yard during the operation of the retail unit.
 - Videos of traffic movements at the entrance to the site and on the public road.
 - A video of noise arising from vents in the western elevation of the retail unit.

8.0 Responses to the Appeal

Planning Authority Response

8.1. The planning authority make the following comments on the appeal:

- The agreement of a delivery plan would take into account residential amenities of nearby properties and hours could be agreed. Alternatively, the Board could impose a condition restricting delivery times to appropriate hours to protect residential amenities. In this regard, condition no. 9 of the grant of permission stated operating hours, including deliveries. If deliveries are occurring outside of these hours, this is a matter for enforcement and non-compliance.
- It is respectfully suggested that condition no. 9 omitted reference to Saturdays in error. It would be normal practice for stores to open on Saturdays, subject to limiting hours and deliveries to protect residential amenity.

- Other issues raised in the appeal (extractor fans, roof materials, unstable embankment, road junction on Kells Road, sale of alcohol and dumping of construction materials) are not pertinent to the current application.
- Request the Board to uphold their decision. Agree with the appellant that amenity of adjoining residents (current and future) needs to be adequately protected.

Applicant Response

8.2. The applicant makes the following additional comments in response to the appeal:

- Leave to appeal should not have been granted by the Board as the matters raised by the appellant had been considered by the planning authority and the matters addressed by conditions are appropriate matters to be addressed through planning conditions (section 34, Planning and Development Act, 2000, as amended).
- The current appeal should be dismissed under section 138(1)(b) of the Planning and Development Act 2000 (as amended), as the appellant's motivation for the appeal is to secure compensation. The material nature and extent of the proposed development was fully disclosed at application stage. All of the issues raised by the appellant were addressed under PL02.243518, including the impact on adjoining residential amenities.
- The omission of Saturday from condition no. 9 was clearly an error and not to preclude opening on a Saturday.
- There has been no 'middle of the night' activity. It is unclear from the appellant's submission (DVD) what is being claimed in terms of activity on site and whether any noise exceeds the stated levels in condition no. 12 of the parent permission.
- The claim for compensation by the appellant is without any basis.
- The reconciliation of early morning delivery hours and the protection of residential amenity is a recurring and commonplace theme in all planning applications for retail developments with supermarkets in urban areas.

- There is a level difference of c.4m between the ground floor of the existing SuperValu and permitted houses, a clearance distance of c.22m-27m is achieved between the supermarket and permitted houses, the service yard does not directly adjoin the western boundary of the site but is setback within the supermarket site and there is a mature hedgerow separating the developments. Houses are also proposed to be setback within the residential site including a grass verge/planting, an internal road and front gardens and car parking.
- The current application has been made in a very transparent manner with the intention of bringing clarity to the applicant and planning authority, in the face of objections of objections for non-compliance with the permitted hours of operation.
- The appellant has not provided any substantive reasons why the planning authority should interfere with business operations of SuperValu Kingscourt when such restrictions do not apply in any other town.
- The County Development Plan zones the site for 'commercial', which supports the nature of the supermarket use on the site.
- Condition no. 12 of the parent permission deals comprehensively with noise. Any issues regarding compliance are matters for enforcement.
- Any issues regarding the design of the development, traffic hazard at the main junction into the site, sale of alcohol and dumping of material are not matters that are relevant to the current application.
- The condition of the boundary between the two landholdings is a civil matter and is not relevant to the subject application.

Observations

8.3. There are two observations on file.

D. K. and S. O'Reilly

8.4. It re-iterates matters raised by the appellant and makes the following additional comments (it is also accompanied by a disc showing the embankment between the

appeal site and appellant's property, views of the retail unit from the pavement alongside it and noise from extractor fans):

- The SuperValu Shop cannot open on a Sunday morning because of the amount of vehicular and pedestrian traffic coming and going to mass (no cycle lane from the town centre to the site).
- No noise impact assessment on extended hours.

Izzy Limited

8.5. The observer makes the following points:

- The development has already had a catastrophic effect on the Town Centre retail core (reducing footfall, 6 no. businesses have ceased trading, increase in vacant units) and that any extension of hours would make this worse (restriction on hours would allow small shops to survive). It could also lead to further applications for retail units in the area with further implications for the town centre and jeopardise master plan area 5 in the County Development Plan.
- The conditions imposed by the Board under PL02.243518 were in the interest of the common good. The development has been trading for over nine months in flagrant breach of these conditions (including further extended opening hours at Christmas 2016).
- Public notices were inadequate.
- No connectivity to town core (no continuous path) and therefore the development cannot add to the viability and vitality of the town centre.
- The town centre has no car park and cannot, therefore, compete with an out of town development with huge car park.
- The out of town retail development should never have been granted and was in breach of both County and National retail strategy. The original application was rejected by the Board's Inspector and over turned by the Board. The reasons and considerations given by the Board were flawed and have been proven to be wrong, the application itself contained many errors and falsehoods making it difficult to understand why it was granted.

9.0 Further Correspondence

- 9.1. On the 15th August 2017 the Board advised that applicant, in responses to their comments on the validity of the appeal and request that it be dismissed, that it was satisfied that the appeal complied with the criteria as set out in section 127 of the Act, as amended.
- 9.2. On the 16th August 2017 the Board sought comments from the parties to the appeal on the applicant's response to the appeal and the submission by Izzy Limited, with all responses to be received by the 5th September 2017.
- 9.3. Four responses were submitted, by the planning authority, the applicant, D. K. and S. O'Reilly and the appellant, John O'Reilly. No new matters were generally raised in the submissions. However, John O'Reilly provides video material of lorries manoeuvring within the delivery yard of the appeal site, night time deliveries and roadside parking along the R164 near the SuperValu store, during mass times. He also raises issues in respect of Kingscourt Community Enterprise building to the southwest of the appeal e.g. traffic movements at junction of site access road and R164, right of way from Community Centre to car park and delivery yard, implementation of conditions of permission PL02.243518. However, these matters lie outside the scope of the appeal, which is confined to the hours of operation of the existing, permitted retail development.

10.0 Assessment

- 10.1. I have read the appeal file, reviewed the statutory development plan for the site and I have carried out an inspection of it and the adjoining development. I consider that the key issues arising in respect of the proposed development relate to:
 - (a) The impact of the proposed extension of opening hours on residential amenity and the retail core of the town,
 - (b) The impact on residential amenity of delivery vehicles operating outside of these hours,
 - (c) The appropriateness of controlling the hours of delivery by way of condition requiring a management plan to be agreed with the planning authority,

(d) Site notices, and

(e) Compensation.

10.2. In addition to the above, submissions are made in respect of (a) the principle of the retail development on the appeal site and the impact it has had on the town centre and (b) matters relating to the construction and operation of the existing retail development on the site. These are all matters which have been previously determined and which, therefore, lie outside the scope of this appeal.

Impact of Extended Opening Hours on Residential Amenity and Retail Core

10.3. Condition no. 9 of the Board's previous grant of permission (under PL02.243518) restricted hours of operation of the store to between 0800 hours and 2000 hours Monday to Friday and 1200 hours and 1800 hours on Sunday and Bank Holiday.

10.4. In the first instance, I would accept that the lack of reference to trading hours on Saturday was an error, as it is standard practice for retail outlets to open on a Saturday.

10.5. The applicant seeks an extension of the opening hours, allowing it to operate between 0700 hours and 2100 hours Monday to Saturday and 0900 hours to 1900 on Sundays and Bank Holidays.

10.6. The appeal site lies to the south of Kells Road, in an area characterised by a mix of land uses. It is generally removed from existing residential development in the vicinity of the site. However, its western boundary directly adjoins land which is zoned 'proposed residential' and the site has the benefit of planning permission for a residential development. Policies of the County Development Plan in respect of land zoned 'proposed residential' seek to provide for residential development and to protect and improve residential amenity. Within this context, I consider that in the Board's consideration of the proposed development, the amenity of the land to west of the site should be safeguarded.

10.7. In the Board's assessment of the previous application for the retail development, under PL02.243518, the Inspector considered that the development would not, subject to conditions, detract from the amenity of the proposed residential development on land to the south of the site. The conditions referred to by the

Inspector were in respect of controlling the location of plant and machinery, noise and restrictions on vehicle delivery times.

10.8. In their decision to grant permission, the Board required:

- a. Details of the location of all plant and machinery to be agreed in writing with the planning authority (condition no. 11),
- b. Noise to be controlled at nearby sensitive receptors to comply with standard noise emission limits (condition no. 12 of the permission), and
- c. Hours of operation of the development to be restricted to between 0800 hours and 2000 hours, Monday to Friday, and 1200 hours and 1800 hours on Sundays, to include periods of delivery.

10.9. The proposed extension of opening hours, would clearly conflict with the required hours of operation, which were imposed in order to safeguard residential amenity. Further, the development that is removed from the town centre, where retail uses are concentrated, and directly adjoins land zoned for residential development. I would consider, therefore, that it is inappropriate to substantially extend the opening hours of the development beyond those previously determined by the Board.

10.10. Notwithstanding this, at the time of site inspection and based on the appellants' submission (video of early morning loading), it is evident that there is little noise emanating from the western side of the retail development, with most vehicle and pedestrian movements occurring to the east of the site in the main car park.

10.11. Within this context, I do not consider that a modest extension of operating hours would significantly impact on the residential amenity of the adjoining land, zoned for residential development, or from the amenity of residential development in the wider area.

10.12. The appeal site lies c.500m Main Street and is, therefore, somewhat removed from the retail core. However, the application for retail development was granted by the Board on the basis of the need to provide suitable food store shopping at an appropriate scale for the town and having regard to the sequential test carried out that indicated the non-availability of a suitable alternative location. Within this context, it would also seem appropriate to provide some flexibility to extend operating hours in response to market demand.

10.13. I would recommend, therefore, in order to clarify the condition and protect residential amenity on adjoining lands and in the wider area, that operating hours are modified as follows:

- 0700 hours to 2100 hours Monday to Friday.
- 0800 hours to 2000 hours Saturday.
- 1000 hours to 2000 hours Sunday.

The impact of delivery vehicles operating outside of core hours/Control by condition

10.14. The delivery yard for the existing retail development lies to the south west of the appeal site and directly adjoins land zoned for residential development. There were no service vehicles loading or unloading at the time of site inspection. Material presented by the applicant shows delivery vehicles manoeuvring in the yard, being loaded up and departing from the site. Noisy operations appear to arise from turning movements e.g. reversing warnings, gear changes etc. Given the proximity of the yard to the residentially zoned land, I would not consider it appropriate or necessary that delivery vehicles be facilitated to operate substantially outside of the extended trading hours of the store. The applicant has not indicated the extent of delivery vehicles likely to be arriving or departing from the store outside of core hours or the time of such deliveries. Given that such movements could adversely impact on third parties I do not consider that it is a matter that can be controlled by condition. Therefore, in the absence of detailed information, I consider that the Board should, restrict deliveries to the core opening hours of the store.

Site Notices

10.15. Statutory notices in respect of the development refer to the clarification and amendment of operating hours. The notices have been adjudicated upon and accepted by the planning authority. Further, the Board has granted leave to the appellant to appeal the decision made by the planning authority (under section 37(6) of the Planning and Development Act, 2000, as amended), an appeal has been lodged and the appeal has attracted two further observations. I consider therefore that the purpose of the public notices, and provisions of section 37(6) of the Planning and Development Act, 2000 (as amended), have been served. Whilst I accept that the site notices did not specifically refer to the delivery times, the public notices do

give a brief description of the development and alert third parties to it. The notices are, therefore, consistent with the guidelines for public notices set out in the governments Development Management Standards.

Compensation

10.16. Section 190 of the Planning and Development, Act, 2000 (as amended) provides for the payment of compensation, if in granting permission under Part III of the Act (control of development), the value of a person's interest in land has been reduced. In this instance, I do not consider that the proposed development would seriously impact on the amenity of the adjoining land zoned for residential, or on the amenity of the residential development granted planning permission on the site. I do not consider, therefore, that the proposed development would impact on the value of the adjoining landholding.

11.0 Appropriate Assessment

11.1. Having regard to the nature of the proposed development, which is confined to alterations to the operating hours of an existing development, it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans and projects on a European site.

12.0 Recommendation

12.1. Having regard to my comments above, I recommend that retention be granted (extension of operating hours) and that condition no. 9 of the parent permission is modified, as set out below.

13.0 Reasons and Considerations

13.1. Having regard to the location of the proposed development, in an area of generally mixed land uses, and to the layout of the development where most traffic movements lie to the east of the existing retail building, it is considered that, subject to compliance with the condition set out below, the proposed development is acceptable, and would not detract from the amenity of land zoned for residential development in the immediate vicinity of the appeal site, or in the wider area, or from

the retail vitality of the town centre. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

14.0 **Conditions**

The hours of operation of the store, including periods of delivery, shall be restricted to the following:

- Monday to Friday 0700 hours to 2100 hours
- Saturdays 0800 hours to 2000 hours
- Sundays and Bank Holidays 1000 hours to 2000 hours.

Reason: In the interest of residential amenity.

Deirdre MacGabhann
Senior Planning Inspector

17th October 2017