



An  
Bord  
Pleanála

## Inspector's Report ABP-310295-21

### Development

Demolition of the existing Lidl Licenced Discount Foodstore and construction of a new single level mono-pitched Licenced Discount Foodstore with ancillary infrastructure and associated site development works.

### Location

Fermoy Road, Brigown, Mitchelstown, Co. Cork.

### Planning Authority

Cork County Council

### Planning Authority Reg. Ref.

21/04517

### Applicant(s)

Lidl Ireland GmbH

### Type of Application

Permission

### Planning Authority Decision

Grant, subject to conditions

### Type of Appeal

First Party v Conditions

### Appellant(s)

Lidl Ireland GmbH

### Observer(s)

None

**Date of Site Inspection**

15<sup>th</sup> July 2021

**Inspector**

Hugh D. Morrison

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## 2.0 Site Location and Description

- 2.1. The site is located in Mitchelstown, to the south of the town centre. This site lies in a position between the Fermoy Road (R513), to the north-west, and Railway Road, to the east. The junction between the R513, which is continuous northwards through the town centre, and Fermoy Road (R665) / Brigown Road (L1418), lies to the north of the site. On the far side of the R513, there is a medical centre and two filling stations. Elsewhere, along Fermoy Road and along Railway Road, there is housing.
- 2.2. The site is amorphous, and it extends over an area of 1.089 hectares. This site presently accommodates an existing Lidl Licenced Discount Foodstore, which is sited in the eastern half of the site with car parking to the front in the western half. Access to the site is from the Fermoy Road via a short access road and a mini roundabout, which is designed to afford access in the future to lands to the south.

## 3.0 Proposed Development

- 3.1. The proposal would entail the demolition of the existing Lidl Licenced Discount Foodstore (1768 sqm gross floorspace and 1334 sqm net retail sales area) and the construction of a new single level mono-pitched Licenced Discount Foodstore with ancillary infrastructure and associated site development works (all totalling 2129 sqm gross floorspace and ranging in height equivalent from 1 to 2 storeys).
- 3.2. The proposed new single level Licenced Discount Foodstore (2129 sqm gross floorspace) development will consist of:

- A retail sales area with ancillary off-licence and bakery (total net retail sales area of 1424 sqm), entrance pod, public facilities (including lobby and toilets), staff facilities (including welfare lobbies, toilets, cloak/change rooms, staff canteen and meeting room), operational office, IT room, plant room, delivery area and storage (including cold storage);

Roof top photovoltaic solar panel array totalling 984 sqm;

Corporate signage consisting of 2 building mounted corporate internally illuminated signs, 3 display board and 1 free standing internally illuminated flag pole sign at entrance;

1 trolley bay covered structure with 8 bicycle parking spaces (63.02 sqm covered floor area); and

120 surface car parking spaces (6 disabled, 10 parent and child, 2 EV charging, and 102 regular).

- Primary vehicular and pedestrian access to the proposed new Licenced Discount Foodstore development will be maintained via the existing enhanced vehicular and pedestrian entrance onto the Fermoy Road.
- Secondary pedestrian access will be provided via a new dedicated pedestrian entrance onto the Fermoy Road.
- Boundary treatments, retaining walls, hard and soft landscaping, services (including 1 below ground attenuation tank) and all other ancillary and associated site development works above and below ground level.

## 4.0 Planning Authority Decision

### 4.1. Decision

Permission granted, subject to 29 conditions. The applicant has appealed Conditions Nos. 4, 18, and 19, and so they are reproduced below for ease of reference.

*4. The proposed development shall not be open to the public outside the hours 0800 to 2130 Monday to Saturday inclusive, nor outside the hours of 0900 to 2100 on Sundays or public holidays. Deliveries shall not take place before the 0700, from Monday to Saturday inclusive, nor before the hour of 0800 on Sundays and public holidays, nor after 2200 on any day.*

*Reason: In the interest of residential amenity and traffic safety.*

*18. Any damage to existing roadway shall be repaired/re-instated at developer's expense to the satisfaction of the Planning Authority.*

*Any damage caused to existing road surface by turning movements of delivery of material to site by haulage trucks shall be made good by applicant.*

*Reason: In the interest of road safety and orderly development.*

*19. Any damage to existing footpath shall be repaired/re-instated at developer's expense to the satisfaction of the Planning Authority.*

*Reason: In the interest of safety.*

## 4.2. Planning Authority Reports

### 4.2.1. Planning Reports

The case planner's report discusses the hours of opening. He notes that this subject was not raised by third parties and he notes, too, that, under permitted application 19/4069, they were conditioned. Condition No. 4 reproduces this condition.

### 4.2.2. Other Technical Reports

- TII: No observations.
- IAA: No observations.
- Cork County Council:
  - Public Lighting: No objection, subject to conditions.
  - Area Engineer: No objection, subject to conditions.
  - Environment: No objection, subject to conditions.

## 5.0 Planning History

### Site

- 03/6459: Construction of discount food store: Permitted.
- 06/4347: Off-licence sales area: Permitted.
- 13/4147: Construction of front extension (107 sqm gross floor area) + 3 overhead illuminated billboard signs: Permitted.
- 16/6427: Demolition of existing licenced discount food store (1768 gross and 1334 net) and construction of replacement licenced discount food store (2624 gross and 1424 net): Permitted at PL04.248147.

Condition No. 3 addressed hours of opening as follows:

*The proposed development shall not be open to the public outside the hours 0900 to 2200 Monday to Saturday inclusive, nor outside the hours of 1000 to 1900 on Sundays or public holidays. Deliveries shall not take place before the 0730, from*

*Monday to Saturday inclusive, nor before the hour of 0800 on Sundays and public holidays, nor after 2200 on any day.*

*Reason: In the interest of residential amenity and traffic safety.*

- 19/4069: Revisions to 16/4069 re. building design (2206 gross and 1420 net) and site layout, i.e. re-siting of building to position adjacent to the northern boundary: Permitted.

Hours of opening were conditioned as follows:

*The proposed development shall not be open to the public outside the hours 0800 to 2130 Monday to Saturday inclusive, nor outside the hours of 0900 to 2100 on Sundays or public holidays. Deliveries shall not take place before the 0700, from Monday to Saturday inclusive, nor before the hour of 0800 on Sundays and public holidays, nor after 2200 on any day.*

*Reason: In the interest of residential amenity and traffic safety.*

Adjoining site to the south

- 07/8268: 70 dwelling houses: Permitted.
- 12/6353: Extend duration of 07/8268: Permitted.

## 6.0 Policy and Context

### 6.1. Development Plan

Under the Fermoy Municipal District Local Area Plan 2017 (LAP), the site is shown as lying outside the town centre/retail core but within the development boundary around Mitchelstown and in an existing built-up area. To the south of the site are lands zoned residential through which a proposed relief road would run.

Under Objective ZU 3-1 of the Cork County Development Plan 2014 – 2020 (CDP), the Planning Authority undertakes to “Normally encourage through the LAP’s development that supports in general the primary land use of the surrounding built-up area. Development that does not support, or threatens the vitality or integrity of, the primary use of these existing built-up areas will be resisted.”

## 6.2. National Policy

Retail Planning Guidelines

## 6.3. Natural Heritage Designations

Lower River Suir SAC (002137)

## 6.4. EIA Screening

Under Item 10(b)(iv) of Part 2 of Schedule 5 to Article 93 of the Planning and Development Regulations, 2001 – 2021, where urban development would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere, the need for a mandatory EIA arises. The proposal is for the development of a site with an area of 1.089 hectares in an existing built-up area. Accordingly, it does not attract the need for a mandatory EIA. Furthermore, as this proposal would fall below the relevant threshold, I conclude that, based on its nature, size, and location, there is no real likelihood of significant effects upon the environment and so the preparation of an EIAR is not required.

## 7.0 The Appeal

### 7.1. Grounds of Appeal

The appeal is against three of the conditions attached to the Planning Authority's permission only. The applicant, therefore, requests that the Board consider this appeal under Section 139(1)(c) of the Planning and Development Act 2000 - 2021 only, i.e. not on a *de novo* basis.

- Condition No. 4

The existing Lidl licenced discount foodstore has operated on the application site within Mitchelstown since 2005. Its hours of opening have been/continue to be 0800 to 2200 on Mondays to Saturdays and 0900 to 2100 on Sundays and public holidays. Customer shopping patterns have been shaped by these hours.



Under Condition No. 4, the closing time on Mondays to Saturdays would contract to 2130. This closing time would disrupt existing customer shopping patterns and it would be likely to compress shopping trips into a shorter period of time with implications for traffic volumes.

None of the Planning Authority's consultees requested the above contraction in opening hours.

CDP advice on opening hours relates to the evening economy in town centres, whereas the site is in an edge of town centre location. The applicant requests that a continuity in closing times be granted to its redevelopment proposal, as such continuity would not impact upon or detract from the amenity, traffic safety, vitality or character of the site's locality. Indeed, this request is important to ensure the maintenance of the social and economic benefits that accrue to customers and staff from the existing closing time.

The Retail Planning Guidelines emphasis the importance of competition and they warn against the use of the planning system to inhibit competition. Clearly, effective competition is linked to customers being able to access a choice of retailers: Condition No. 4 would limit such access and thus the exercise of choice.

- Condition No. 18

The wording of Condition No. 18 is vague rather than clear and precise, e.g. the use of the word "any" as in "any damage". It thus risks non-compliance.

The Planning Authority intends that damage to the existing roadway be repaired/re-instated at the developer's expense and yet Condition No. 29 requires payment of a Section 48 development contribution towards, amongst other things, expenses incurred by the Planning Authority in providing roads, pedestrian facilities, and traffic calming measures, and in refurbishing, upgrading, enlarging, or replacing roads, and any ancillary matters.

The Planning Authority's above cited intention has the character of a special development contribution and yet it lacks specificity, i.e. Which roadway? The nature and extent of what works? Furthermore, no attempt has been made to

apportion costs between existing and proposed development in recognition that any works would be of wider benefit than to solely the applicant.

Condition No. 18 amounts to double payment and so it should be omitted. Without prejudice to this primary request, if the Board is minded to retain the condition, then the applicant requests that it do so on the basis of the following revised wording, i.e. the additional underlined words:

*Any damage to existing roadway as direct result of implementation of the development shall be repaired/re-instated at developer's expense to the satisfaction of the Planning Authority.*

*Any damage caused to existing road surface of Fermoy Road/Cork Road at the entrance to the development site by turning movements of delivery of material to site by haulage trucks shall be made good by applicant.*

*Reason: In the interest of road safety and orderly development.*

- Condition No. 19

Under the proposal a new public footpath would be provided to the north-east of the vehicular entrance to the site off Fermoy Road/Cork Road and the existing public footpath to the south-west would be retained. Alterations to the vehicular entrance would tie-in with the existing public footpath.

Condition No. 19 is critiqued for essentially the same reasons as those set out above in relation to Condition No. 18.

The applicant requests the omission of Condition No. 19. Without prejudice to this primary request, if the Board is minded to retain the condition, then the applicant requests that it do so on the basis of the following revised wording, i.e. the additional underlined words:

*Any damage to existing footpath as direct result of implementation of the development shall be repaired/re-instated at developer's expense to the satisfaction of the Planning Authority.*

*Reason: In the interest of safety.*

## 7.2. Planning Authority Response

None

### 7.3. **Observations**

None

### 7.4. **Further Responses**

None

## 8.0 **Assessment**

8.1. I have reviewed the applicant's appeal in the light of the wider proposal. I consider that, insofar as this appeal relates to 3 discrete conditions, it is capable of being assessed/determined under Section 139(1)(c) of the Planning and Development Act 2000 – 2021 (hereafter referred to as the Act). In these circumstances, the need for a *de novo* assessment of the application does not arise.

8.2. In the light of the foregoing paragraph, I have reviewed the appeal, under relevant provisions of the Act, the Retail Planning Guidelines, the Cork County Development Plan 2014 – 2020 (CDP), the Fermoy Municipal District Local Area Plan 2017 (LAP), and the planning history of the site. Accordingly, I consider that this appeal should be assessed under the following headings:

- (i) Condition 4,
- (ii) Condition 18, and
- (iii) Condition 19.

#### **(i) Condition 4**

8.3. Condition 4 addresses the opening hours of the new foodstore on the site to the public and for the purpose of deliveries.

8.4. The applicant draws attention to the existing openings hours, which are as follows:

- 0800 to 2200 on Mondays to Saturdays, and
- 0900 to 2100 on Sundays and public holidays.

8.5. The site has been the subject of previous applications for a new foodstore. In each case conditions addressing opening hours have been attached and, in each case,

the accompanying reason stated, "In the interest of residential amenity and traffic safety." These conditions are summarised below.

Under 16/6427 & PL04.248147:

- 0900 to 2200 on Mondays to Saturdays (deliveries 0730 to 2200), and
- 1000 to 1900 on Sundays and public holidays (deliveries 0800 to 2200).

Under 19/4069:

- 0800 to 2130 on Mondays to Saturdays (deliveries 0700 to 2200), and
- 0900 to 2100 on Sundays and public holidays (deliveries 0800 to 2200).

- 8.6. Under the current application the hours conditioned for 19/4069 have been replicated in Condition 4.
- 8.7. The applicant in appealing condition 4 takes exception to the contraction in the closing time by half an hour, from the existing 2200 to the proposed 2130, on Mondays to Saturdays. It contends that the loss of this half an hour would disrupt existing customer shopping patterns and it would be likely to compress shopping trips into a shorter period of time with implications for traffic volumes. It notes that no consultees requested this contraction, and that consistency of closing time would ensure that existing social and economic benefits that accrue to the town from this time would be maintained. It also notes that the Retail Planning Guidelines acknowledge the value of competition between retailers, which is contingent on customers having a choice of shops that open at comparable times.
- 8.8. I note that the existing foodstore on the site remains open to the public until 2200 on Mondays to Saturdays and that under 16/6427 & PL04.248147 this was to remain the case. I note, too, that under 19/4069 the contraction to 2130 was introduced. I have reviewed this application: The case planner refers to the condition addressing opening hours attached to 16/6427 & PL04.248147 and he states that a similar condition should be attached. He drafts one with a 2200 closing time on Mondays to Saturdays, which the senior executive planner revises to 21.30 without explanation.
- 8.9. The principal difference between 16/6427 & PL04.248147, on the one hand, and 19/4069 and the current application, on the other hand, is that the new foodstore would be sited would not be sited towards the eastern boundary of the site, but the

northern one. Accordingly, dwelling houses to the north would correspond with the new foodstore rather than the accompanying car park and dwelling houses with the east would correspond with the accompanying car park rather than the new foodstore. These changes may mean that some dwelling houses experience slightly more or slightly less illumination and vehicular noise from the site than hitherto. The effect of the half an hour in question would not be significant in this respect.

- 8.10. During my site visit, I observed that Mitchelstown is served by 3 other major food retailers: Aldi, Supervalu, and Tesco. Aldi is located on the Dublin Road to the north of the town centre. It is open to the public until 2200 on Mondays to Fridays and until 2100 on Saturdays. Supervalu is located on Upper Cork Street in the town centre. It is open until 2000 on Mondays, Tuesdays, Wednesdays and Saturdays and until 2100 on Thursdays and Fridays. Tesco is located on Brigown Road in the south-eastern corner of the town centre. It is open until 2200 on Mondays to Saturdays.
- 8.11. If the new Lidl foodstore closes at 2130 on Mondays to Saturdays, then its hours of opening to the public would fail to match those of its competitors Aldi and Tesco. The applicant's concern that competition and consumer choice would not thereby be promoted is thus borne out. Given the negligible impact upon residential amenity of the half an hour in question, I do not consider that the earlier closing time can be justified and so the applicant's appeal with respect to Condition 4 should be upheld.
- 8.12. I conclude that a closing time of 2200 would be appropriate.

### **(ii) Condition 18**

- 8.13. Condition 18 states the following:

*Any damage to existing roadway shall be repaired/re-instated at developer's expense to the satisfaction of the Planning Authority.*

*Any damage caused to existing road surface by turning movements of delivery of material to site by haulage trucks shall be made good by applicant.*

*Reason: In the interest of road safety and orderly development.*

- 8.14. The applicant in appealing this condition critiques it on several grounds: Its wording is too vague, and it risks double payment as the applicant would, under Condition 29, pay a development contribution towards "refurbishing, upgrading, enlarging, or replacing existing roads."

- 8.15. The applicant also contends that the condition is like one for a special contribution, only it lacks specificity, and it fails to apportion costs between the developer and any other beneficiaries of the works envisaged.
- 8.16. Under Section 7.3 of the Development Management Guidelines advice is given on criteria that conditions are required to meet. These criteria include the need to be precise, reasonable, and enforceable. I concur with the applicant that Condition 18 is insufficiently precise: For example, the first sentence includes the phrase “Any damage to existing roadway” and the second sentence includes the phrase “Any damage caused to existing road surface”. I concur, too, that the risk of double payment would arise. Accordingly, the applicant’s “without prejudice” submission of a more tightly worded version of Condition 18 is not one that is needed.
- 8.17. Under Section 7.12 of the Development Management Guidelines advice is given on special contribution conditions under Section 48(2)(c) of the Act. Such conditions may be appropriate “where specific exceptional costs not covered by a scheme are incurred by a local authority in the provision of public infrastructure and facilities which benefit the proposed development.” The basis for such costs should be explained and so “it will be necessary to identify the nature/scope of works, the expenditure involved and the basis for the calculation, including how it is apportioned to the particular development.” As indicated above, road repairs can be funded under the local authority’s Development Contribution Scheme and so the need for a special contribution is thereby excluded. Even if this were not the case, the opportunity to meet the requirement of specific exceptional costs would not arise with respect to future road repairs that may or may not be needed as a result of the proposed development.
- 8.18. I, therefore, conclude that Condition 18 fails to meet the criteria for a valid condition and that reworking it in either a more tightly worded form or as a special contribution would be, variously, unnecessary and unachievable. This Condition should thus be omitted.

**(iii) Condition 19**

- 8.19. Condition 19 states the following:

*Any damage to existing footpath shall be repaired/re-instated at developer’s expense to the satisfaction of the Planning Authority.*

*Reason: In the interest of safety.*

- 8.20. The applicant draws attention to the enhancements that it would make to pedestrian access to the site: In this respect, notation on drawing no. 3020 revision PL3 refers to a “proposed new footpath” along the site’s frontage with Fermoy Road to the north-east of the vehicular access and the “existing footpath to be retained and tied with existing” to the south-west. These enhancements would be integral to the proposed development. They would connect with other new on-site footpaths that would serve the new foodstore.
- 8.21. The applicant in appealing this condition critiques it on several grounds: Its wording is too vague, and it risks double payment as the applicant would, under Condition 29, pay a development contribution towards “refurbishing, upgrading, enlarging, or replacing existing roads.” The reference to roads here includes footpaths.
- 8.22. The applicant also contends that the condition is like one for a special contribution, only it lacks specificity, and it fails to apportion costs between the developer and any other beneficiaries of the works envisaged.
- 8.23. Under Section 7.3 of the Development Management Guidelines advice is given on criteria that conditions are required to meet. These criteria include the need to be precise, reasonable, and enforceable. I concur with the applicant that Condition 18 is insufficiently precise: For example, it includes the phrase “Any damage to existing footpath”. I concur, too, that the risk of double payment would arise. Accordingly, the applicant’s “without prejudice” submission of a more tightly worded version of Condition 19 is not one that is needed.
- 8.24. Under Section 7.12 of the Development Management Guidelines advice is given on special contribution conditions under Section 48(2)(c) of the Act. Such conditions may be appropriate “where specific exceptional costs not covered by a scheme are incurred by a local authority in the provision of public infrastructure and facilities which benefit the proposed development.” The basis for such costs should be explained and so “it will be necessary to identify the nature/scope of works, the expenditure involved and the basis for the calculation, including how it is apportioned to the particular development.” As indicated above, footpath repairs can be funded under the local authority’s Development Contribution Scheme and so the need for a special contribution is thereby excluded. Even if this were not the case, the

opportunity to meet the requirement of specific exceptional costs would not arise with respect to future footpath repairs that may or may not be needed as a result of the proposed development. Clearly, too, with the proposed new footpath to the north-east of the vehicular access, the only stretch of footpath that would potentially be in need of repair would be to the south-west.

- 8.25. I, therefore, conclude that Condition 19 fails to meet the criteria for a valid condition and that reworking it in either a more tightly worded form or as a special contribution would be, variously, unnecessary and unachievable. This Condition should thus be omitted.

## **9.0 Recommendation**

- 9.1. That the Planning Authority be directed to amend Condition 4 to state 2200 instead of 2130 as the closing time on Mondays to Saturdays.
- 9.2. That the Planning Authority also be directed to omit Conditions 18 and 19.

## **10.0 Reasons and Considerations**

Having regard to Retail Planning Guidelines and the planning history of the site, it is considered that Condition 4 attached to the permission granted to application reg. no. 21/4517 should be amended to state 2200, instead of 2130, as the closing time on Mondays to Saturdays for the new foodstore on the site. This amendment would be compatible with the residential amenities of the area and traffic safety. It would thus accord with the proper planning and sustainable development of the area.

Having regard to the provisions of the Planning and Development Act, 2000 - 2021, and the Development Management Guidelines, it is considered that Conditions 18 and 19 attached to the permission granted to application reg. no. 21/4517 should be omitted as they fail to meet the criteria for valid planning conditions and they would in the presence of Condition 29, risk a double payment scenario. In these circumstances, the rewording of these conditions to achieve compliance with the criteria would be unnecessary. Likewise, the recasting of them as special contributions would be unnecessary and, indeed, unachievable under the provisions of Section 48(2)(c) of the Act.



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Hugh D. Morrison  
Planning Inspector

14<sup>th</sup> September 2021