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# Appeal Decision

Site visit made on 6 January 2022

**by David Prentis BA BPI MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 17<sup>th</sup> January 2022**

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## **Appeal Ref: APP/H2265/W/21/3279375**

### **Units 1B and 1C, Tonbridge Retail Park, Cannon Lane, Tonbridge TN9 1PN**

- 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 a condition subject to which a previous planning permission was granted.
- The appeal is made by LondonMetric Saturn Limited against the decision of Tonbridge and Malling Borough Council.
- The application Ref TM/20/02334/FL, dated 15 October 2020, was refused by notice dated 28 May 2021.
- The application sought to extend the range of the goods that can be sold from Units 1B and 1C by varying a condition attached to planning permission TM/16/00818/FL, dated 1 November 2016.
- The condition in dispute is No 1 which states that:  
*The use of the retail warehousing hereby approved shall be limited to the retail sales of DIY home and garden products, hardware, self-assembly or pre-assembled furniture, household furnishings, floor coverings, electrical goods, motor accessories and motor vehicles, office equipment and supplies, bicycles, pets, pet food and drink and pet products, camping equipment and computer equipment.*  
*Unit 1C shown edged green on plan shall additionally be permitted to be used for the sale of tents, camping and caravanning equipment and accessories, outdoor pursuit equipment and accessories and an associated ancillary outdoor clothing and footwear range equating to not more than 20% of the net retail floorspace of Unit 1C.*  
*Unit 1D shown edged purple on plan shall additionally be permitted to be used for variety retailing including the retail sale of food and drink goods from an area not exceeding 30% of the net retail floorspace of Unit 1D, and otherwise shall be used for the sale of non-food comparison goods. It shall not be used for the principal purpose of the sale and display of clothing and footwear.*
- The reason given for the condition is: *The site is located outside an area where general retailing would be permitted.*

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## **Decision**

1. The appeal is allowed and planning permission is granted for variation of condition 1 of planning permission TM/16/00818/FL to allow the sale of convenience goods from Units 1B and 1C at Units 1B and 1C, Tonbridge Retail Park, Cannon Lane, Tonbridge TN9 1PN in accordance with the terms of the application, Ref TM/20/02334/FL, dated 15 October 2020 and the plans Site Location Plan (11136-L-001), Existing Floor Layout (11136-P-001), Proposed Floor Layout (11136-P-002) and Proposed Site Plan Car Park Entrance Modifications (9843-P-301) submitted with it, subject to the conditions set out in the attached schedule.

### **Application for costs**

2. An application for costs was made by LondonMetric Saturn Limited against Tonbridge and Malling Borough Council. This application is the subject of a separate decision.

### **Preliminary matters**

3. A planning obligation in the form of a unilateral undertaking (UU) was submitted with the appeal. The UU would provide for a financial contribution to public realm works. I comment further on this matter below.

### **Background and main issue**

4. The appeal relates to two units within a modern retail park. In summary, the appellant seeks to amalgamate the two units and enable them to be occupied by a food store.
5. The subdivision and extension of Unit 1, formerly occupied by B&Q, was permitted in 2016. A separate application (TM/16/00818/FL) was also approved, varying an earlier planning condition restricting the range of goods to be sold. This enabled Unit 1C to be used for the sale of equipment for camping, caravanning and outdoor pursuits. At the time of my site visit, Unit 1B was occupied by Carpet Right and Unit 1C was occupied by Go Outdoors.
6. The appellant seeks to vary the relevant condition again, by inserting the following wording into Condition 1 of planning permission TM/16/00818/FL (which is set out in full in the heading to this decision):

*Up to 1,900 sqm (GIA) within Units 1B and 1C shall additionally be permitted to be used for the sale of convenience goods and associated comparison goods.*

Unit 1C, the larger of the two units, currently has an extensive mezzanine floor which is in retail use. The proposal is that the mezzanine floor would be removed. This is reflected in the floorspace figure set out in the condition, as proposed to be varied.

7. In addition to the units which are the subject of this appeal, the retail park is also occupied by M&S (food hall), Halfords, Jollyes Pet Superstore and Home Bargains, together with a smaller unit occupied as a coffee shop. Although the site is within the central area of Tonbridge, in terms of retail policy it is neither in the town centre nor in an edge of centre location. Policy CP22 of the Council's Core Strategy (CS) sets out a sequential test for the preferred location for retail development. The Council considers that this approach is generally consistent with the approach to main town centre uses contained in the National Planning Policy Framework (the Framework). The retail assessment submitted with the application considered various potential sites within and around the town centre, concluding that there were no sequentially preferable sites available. The Council accepts those findings.
8. The Council and the appellant agree that the scale of the appeal proposal is below the threshold where a retail impact assessment would be required. Insofar as Policy CP22 requires retail need to be taken into account, the Council considers that this requirement is unduly restrictive and inconsistent with the Framework. Accordingly, the Council does not consider that the appellant has to demonstrate need in this case. The Council's overall conclusion is that the

sequential test has been passed and that there would be no threat to the vitality or viability of the town centre. Accordingly, no objection is raised on retail policy grounds. I see no reason to disagree with the Council's conclusions on these matters.

9. Interested parties have raised other concerns, which are discussed below. However, from the Council's perspective, the sole objection relates to impact on the highway network. The main issue is, therefore, the effect that varying the condition would have on the highway network.

## **Reasons**

10. The retail park adjoins the A26, Cannon Lane, a main traffic route skirting the eastern side of the central area of Tonbridge. The retail units face two sides of a central car park. The appellant's transport assessment (TA) included a parking accumulation model which did not identify the need for any additional parking. The Council has not taken issue with that finding and no changes to existing parking arrangements are proposed.
11. Access to the retail park is directly from Cannon Lane, by way of a junction with one lane in and one lane out. Planning permission has previously been granted for junction improvements which would provide a second exit lane. This would increase junction capacity by separating left and right turning traffic. It would also provide more capacity for traffic queueing to leave the car park at busy times. The works would also include a pedestrian crossing facility for those crossing the access road at the junction. It is proposed that these works to the junction would be implemented as part of the appeal scheme. This is a matter that could be secured by a condition. The Council has not identified any concerns in relation to highway safety and I see no reason to take a different view.
12. The TA compared the traffic generated by the existing uses with the proposed use, focussing on the weekday PM peak hour and the Saturday peak hour. This exercise took account of the proposed reduction in retail floor area. The TA concluded that there would be a slight reduction in total trips in the weekday peak and a slight increase in the Saturday peak. However, the amount of change in each case was so slight that, in my view, it would not be material in planning terms.
13. Kent County Council (KCC), as highway authority, made two formal consultation responses to the application. In addition, KCC provided a note to assist the planning committee. The first response raised a highways objection, whilst making clear that the matters being raised might be capable of resolution. The letter questioned various aspects of the TA, including trip generation rates, committed developments affecting the A26 and the definition of the peak hours.
14. Further information was provided by the appellant and KCC provided a further consultation response to the Council<sup>1</sup>. This stated that the highway authority was satisfied with the approach to trip generation, committed development and the definition of the peak hours. The letter expressed concern that there may be some queueing of traffic leaving the site during the peak hour. However, the summary comment was that, as the junction improvement scheme had been

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<sup>1</sup> Dated 12 February 2021

assessed as part of this application, it was imperative that this mitigation measure be implemented to enable improved egress from the site.

15. KCC's note for the Committee meeting confirmed its view that there were no sustainable highways grounds for objection, that the proposal was expected to generate similar levels of traffic movements to the current use and that the residual cumulative impact would not be severe.
16. After the application had been determined, the Council commissioned a further highways report (the C&A report). The C&A report questioned the approach of the TA to trip generation rates, for both the baseline condition and the development scenario. It pointed out that the baseline was derived from the TA submitted in 2016, arguing that (for present purposes) those rates should have been validated either by surveys of actual rates at the site or by a fresh TRICS analysis<sup>2</sup>. Similar points were made in respect of the trip rates assumed for the proposed food store, which were based on rates agreed by KCC in connection with an Aldi store which is located further along Cannon Lane. The C&A report also drew attention to the capacity assessment for the retail park access in the 2016 TA. That assessment predicted that the junction arm leading out of the retail park would be above capacity during the Saturday peak hour, resulting in some queuing.
17. The C&A report suggested that this could result in traffic entering the site backing up on Cannon Lane. It went on to argue that further modelling should be carried out and that it was inconsistent to propose junction improvement works in circumstances where the appellant's case was that there would be no material change in traffic generation.
18. In preparation for this appeal, the appellant carried out traffic surveys in June 2021 which showed that the traffic then being generated by the retail park was actually less than the predictions from the 2016 TA (taking account of other developments in the locality).
19. Whilst I note that the TA relied on traffic surveys from 2013, it has also been informed by annual average daily flow data for Cannon Lane, derived from automated traffic counts, up to 2018. Moreover, the June 2021 surveys were carried out at a time when most Covid restrictions had been lifted. I consider that they provide a useful check on the data used in the TA.
20. A local Borough Councillor carried out a traffic count in September 2021. The time of day has not been specified and figures for an 8 hour day appear to have been calculated by multiplying the figures for a single hour by 8. Given that traffic flows typically vary throughout the day, that seems unlikely to yield an accurate result. Consequently, I attach only limited weight to this data.
21. The key point of difference between the TA and the C&A report relates to trip generation rates. The appellant accepts that, in an ideal world, the baseline would have been established through fresh surveys. However, this application was submitted in October 2020 when it was simply not possible to carry out representative surveys because the pandemic had fundamentally altered travel patterns. In the circumstances, I consider that using data from the 2016 TA was a reasonable and pragmatic approach to determining the baseline.

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<sup>2</sup> The TRICS database includes survey data from many sites and is widely used by those carrying out traffic assessments

22. The C&A report suggests that trip generation rates for the development scenario would be higher than those used in the TA. This conclusion was based on TRICS data for a number of sites around the UK, which the authors judged to be comparable with the appeal site. The use of TRICS requires the application of professional judgment, in relation to comparability of the sites chosen and other matters. In this case, the appellants have relied on agreed (albeit predicted) rates for the Aldi store. I regard this as a good comparator because it is near to the appeal site and in a similar relationship to the primary road system and the central area of Tonbridge. I also attach significant weight to the fact that KCC has reviewed the trip rates used in the TA and found them to be robust.
23. A further factor to consider is the way transferred trips and linked trips are accounted for in the assessments. These can be an important factor, particularly in cases such as this where the subject premises are located within an established retail park with an existing food store (M&S). It is not clear how the C&A report has taken account of transferred and linked trips in arriving at the trip rates it presents.
24. Although the C&A report suggests that the junction improvements have not been assessed, KCC has clearly stated that it is important that the improvements are implemented precisely because they have been included in the assessment<sup>3</sup>. I take this to be a reference to the assessment in the 2016 TA because KCC did not seek further modelling in support of the appeal application. I note that the junction modelling in the 2016 TA predicted some queuing during the Saturday peak. However, the predicted queuing was confined to the retail park arm of the junction. Both of the Cannon Lane arms were predicted to be within capacity.
25. There is a possibility that traffic queuing to leave the retail park could block traffic trying to turn right from the access road into part of the car park. This could, in turn, cause traffic to back up onto Cannon Lane. No party has attempted to quantify the likelihood of this happening, or the likely duration or extent of any such impact. The potential for internal queuing was considered in the second response from KCC but was not thought to be of such significance as to give rise to an objection on highways grounds. Nor was it seen as a matter that required further modelling. To my mind, there is no reason to think that internal queuing would result in a severe impact on the wider highway network.
26. Drawing all this together, I acknowledge that the pandemic has impacted on travel patterns in a way that has caused practical difficulties in carrying out assessments of this sort. Nevertheless, applicants and planning authorities are bound to proceed on the best available evidence, notwithstanding those difficulties. Whilst I note the trip rates proposed in the C&A report, for the reasons given above I attach greater weight to the trip rates set out in the TA. Taking account of the proposed reduction in trading floor area, I consider that the variation of the condition would not result in a significant change in traffic conditions at the retail park.
27. I conclude that the proposal would accord with CS Policy CP2 in that it would be compatible with the character and capacity of the highway network in terms of the volume and nature of traffic generated. It would also accord with Policy SQ8

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<sup>3</sup> KCC second response, dated 12 February 2021

of the Managing Development and the Environment Development Plan Document which states that development proposals will only be permitted where they would not significantly harm highway safety and where the traffic generated can adequately be served by the highway network.

### *Other Matters*

28. Local residents objected to the proposal on various grounds. Insofar as the objections related to retail policy, the need for a new food store and highway impacts, these matters have been covered above. Concerns were also raised in relation to noise and disturbance from delivery vehicles. The application relates to an established retail park which is subject to a condition limiting the hours of deliveries. This condition could be re-imposed. The relationship of the service yard to nearby housing would not be altered. There would be no impact on a nearby conservation area because the general character of the retail park would not be materially affected.

### **Conditions**

29. The Council has suggested conditions which I have considered in the light of Planning Practice Guidance. These conditions have been accepted by the appellant. I have made some minor changes in the interests of clarity but the substance of the conditions I have imposed is consistent with that which has been agreed.
30. Condition 2 would restrict the range of goods to be sold, in the way proposed by the appellant. This is necessary in view of the location of the site outside the town centre of Tonbridge, in order to secure compliance with the development plan. Condition 3 would limit the hours at which deliveries could be made in the interests of the living conditions of nearby residents.
31. Condition 4 would require submission and approval of an updated site management plan in the interests of highway safety and the living conditions of nearby residents. It would be necessary for this condition to be discharged before the new use permitted by the condition is implemented because the impacts that the condition seeks to manage would occur at the outset. Condition 5 would require details of any external plant, and associated noise mitigation measures, to be submitted for approval in the interests of the living conditions of nearby residents. Condition 6 would secure implementation of junction improvements, in the interests of highway safety and capacity.

### **Planning obligation**

32. The planning obligation would provide for a financial contribution towards public realm works. The Council's rationale for this contribution is that the proposal would result in a more intense use of the appeal site that would generate additional pressure on the public realm. However, the proposal would result in a significant reduction in retail floorspace and would not materially affect the amount of vehicle traffic at the retail park. The general character of the retail park would be unchanged and there is no evidence that there would be any impact on the public realm, such as to require some form of mitigation. I do not consider that the obligation has been shown to be necessary to make the proposal acceptable in planning terms, nor is it related to the development in

question. The obligation does not meet the relevant tests<sup>4</sup> and, accordingly, I have not taken it into account in my decision.

### **Conclusion**

33. I conclude that the proposal would accord with the development plan. No considerations have been identified that would indicate a decision other than in accordance with the plan. The appeal should therefore be allowed.

*D Prentis*

Inspector

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<sup>4</sup> Set out in Regulation 122(2) of the Community Infrastructure Levy Regulations 2010

### **Schedule of conditions**

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The use of the retail warehousing shall be limited to the retail sales of DIY home and garden products, hardware, self-assembly or pre-assembled furniture, household furnishings, floor coverings, electrical goods, motor accessories and motor vehicles, office equipment and supplies, bicycles, pets, pet food and drink and pet products, camping equipment and computer equipment.

Up to 1,900 sqm (GIA) within Units 1B and 1C shall additionally be permitted to be used for the sale of convenience goods and associated comparison goods.

Unit 1D shall additionally be permitted to be used for variety retailing including the retail sale of food and drink goods from an area not exceeding 30% of the net retail floorspace of Unit 1D, and otherwise shall be used for the sale of non-food comparison goods. It shall not be used for the principal purpose of the sale and display of clothing and footwear.

- 3) No delivery or despatch of goods shall be carried out outside the hours of 07.00 to 21.00 Mondays to Saturdays or 09.00 to 17.00 on Sundays, Bank and Public holidays.
- 4) Before the use hereby approved is commenced details of an updated site management plan to coordinate deliveries to and the removal of waste from the new use at Units 1B and 1C shall be submitted to and approved in writing by the local planning authority, and the approved plan shall be adhered to by all occupiers of the building in perpetuity. The management plan shall include specific details of who is responsible for opening and closing the barrier at the entrance of the site and what times of the day it is to be opened and closed in order to facilitate the effective management of deliveries and waste removal. The units shall be strictly operated in accordance with the approved management plan.
- 5) No external plant (including air-conditioning or refrigeration plant) shall be installed on the building until details of such plant and any noise mitigation measures have been submitted to and approved in writing by the local planning authority, and the work shall be carried out in strict accordance with those details. Noise from all plant and equipment on site including temporary units shall not exceed NR35 at the nearest site boundary.
- 6) The use hereby approved shall not commence until the improvements to the local highway network to provide a widened two lane exit in accordance with approved drawing number 9843-P-301 have been completed (via a s278 Agreement with Kent County Council if required). The highway improvements shall be permanently retained thereafter.

*End of schedule*