Agenda Item	6.8
Report	PLS
No	046/19

HIGHLAND COUNCIL

- **Committee:** South Planning Applications Committee
- **Date:** 11 June 2019

Report Title: 19/01124/S42: Forrest Developments Ltd

Sainsbury's Supermarkets Ltd, Nairn, IV12 5QF

Report By: Area Planning Manager – South

Purpose/Executive Summary

- **Description:** Application under Section 42 (Erection of a Class 1 retail unit & a restaurant with drive-thru lane (Sui Generis) with associated parking & other ancillary works) to vary Condition 3 (18/00906/FUL) Amend opening hours for restaurant and drive-thru.
- Ward: 18 Nairn and Cawdor

Development category: Local

Reason referred to Committee: Five or more representations objecting to the proposal

All relevant matters have been taken into account when appraising this application. It is considered that the proposal accords with the principles and policies contained within the Development Plan and is acceptable in terms of all other applicable material considerations.

Recommendation

Members are asked to agree the recommendation to **Grant** planning permission as set out in section 11 of the report.

1. PROPOSED DEVELOPMENT

1.1 This is an application for non-compliance with Condition 3 of Planning Permission 18/00906/FUL for the erection of a Class 1 retail unit and restaurant with drive thru that was granted on 06 March 2019. The proposal is to amend the wording of Condition 3 from:

'The Class 1 retail unit hereby approved shall only be open to the public between 08.00 hours to 22.30 hours Mondays to Sundays. The "Drive Through" restaurant shall only be open to the public from 06.00 22.30 hours Mondays to Sundays.'

to:

'The Class 1 retail unit hereby approved shall only be open to the public between 08.00 hours to 22.30 hours Mondays to Sundays. The "Drive Through" restaurant shall only be open to the public from 06.00 to 24.00 hours Mondays to Sundays.'

- 1.2 Pre Application Consultation: none
- 1.3 Supporting Information: none
- 1.4 Variations: none

2. SITE DESCRIPTION

2.1 The site sits to the east of the Sainsbury's building on the edge of Nairn. The site faces the A96(T) which links Inverness and Aberdeen. Access is taken from a roundabout within the A96(T) which also serves Balmakeith Industrial Estate.

3. PLANNING HISTORY

3.1 06.03.19 18/00906/FUL, erection of a Class 1 retail GRANTED unit and restaurant with drive thru

4. PUBLIC PARTICIPATION

- 4.1 Advertised: Unknown Neighbour
 - Date Advertised: 26.03.19

Representation deadline: 11.04.19

Timeous representations (objections): 6

Late representations (objections):

Timeous representations (in support): 47

Late representations (in support):

4.2 Material considerations raised are summarised as follows:

Objections:

a) Nairn is a rural community and does not require more extensive opening hours.

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3

b) Will encourage more traffic on already congested A96.

- c) Noise will impact amenity of houses in Boathpark/Riverpark.
- d) Original decision of the Planning Committee should be adhered to; there have been no material changes since then.
- e) Bullying tactics of applicant; likely to seek 24 hour opening in the future.
- f) The opening hours should be the same for the supermarket and garage as the drive through.
- g) Will encourage unsociable behaviour.
- h) Nairn is not a 24/7 town and there is no requirement for burgers through the night.
- i) Empty carpark late at night could be an invitation for anti-social behaviour.
- j) Will put other takeaways and restaurants in the town at a disadvantage.
- k) Encourages unhealthy fast food consumption.

In Support:

- a) Increased job opportunities for locals, especially young people.
- b) Rather have one locally than have to drive to Inverness or Elgin (may encourage people to stay in Nairn and shop there too).
- c) Support Nairn moving into the 21st Century; increased choice a good thing.
- d) Nairn needs to get with the times.
- e) Businesses should be encouraged to come to Nairn as we need a thriving community.
- f) Why let Inverness have all the business?
- g) Extra wages will hopefully be spent in Nairn.
- h) Any investment in the town is a good thing and may lead to further investment by other franchises and more traffic stopping in Nairn.
- i) Site is on the outskirts of town and far enough away from residential houses for the proposed hours not to be a problem.
- j) The applicant operates a similar store in Inverness without any major issues, which is closer to residential housing than the proposed site.
- k) Should be a 24 hour application, Nairn has begun to go backwards used to have 24hour provision from the Westend Service Station.
- I) Good for tourism.
- m) Some people do have to work past 10.30 at night and there is only very limited choice at the moment; several companies open 24 hours.
- n) Some takeaways in the town are already open until 12 so why shouldn't this one?
- o) There is a demand for takeaway food after hours; this is a tourist town in the summer months and McDonalds will fill a missing niche in the market.
- p) Relatively minor adjustment to the trading hours.
- q) Nairn needs to be promoted as an 'open for business' location.
- 4.3 All letters of representation are available for inspection via the Council's eplanning portal which can be accessed through the internet www.wam.highland.gov.uk/wam.

5. CONSULTATIONS

5.1 Environmental Health: No objection. Noise Assessment demonstrates that

noise levels from plant and equipment associated with the restaurant and drive thru will meet the recommended standards and can be covered by condition. Notes that this does not include noise from customers.

6. DEVELOPMENT PLAN POLICY

The following policies are relevant to the assessment of the application

6.1 Highland Wide Local Development Plan 2012

28 – Sustainable Design34 – Settlement Development Areas40 – Retail Development

6.2 Inner Moray Firth Local Development Plan 2015

Policy 1 - Promoting and protecting town centres Policy 2 - Delivering development Policy NA 12 - Retail

7. OTHER MATERIAL POLICY CONSIDERATIONS

7.1 Scottish Government Planning Policy and Guidance

8. PLANNING APPRAISAL

8.1 Section 25 of the Town and Country Planning (Scotland) Act 1997 requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise.

Determining Issues

8.2 This means that the application requires to be assessed against all policies of the Development Plan relevant to the application, all national and local policy guidance and all other material considerations relevant to the application.

Planning Considerations

- 8.3 The key considerations in this case are:
 - a) Planning history and compliance with the development plan and other planning policy;
 - b) modification of Condition 3
 - c) Impact on residential and community amenity; and
 - d) any other material considerations.

Planning history and development plan/other planning policy

8.4 Planning permission was granted by the South Planning Applications Committee on 18 September 2018 for a 1,858 sqm retail unit and a 379 sqm restaurant and drive thru within the existing Sainsbury's retail development on the edge of Nairn.

- 8.5 The proposal was considered under the relevant policies of the Highland wide Local Development Plan and the Inner Moray Firth Local Development Plan, taking into account all other material considerations, including a Retail Impact Assessment. Planning permission was granted subject to conditions.
- 8.6 The drive-thru permission is extant therefore the principle of the restaurant is not under consideration. The key issue therefore is whether the amendment of the condition applied for would result in the development being incompatible with the Development Plan. If the Council is satisfied that there will be no significant adverse impact from the proposals as tabled within this amending submission then the application can be supported. This report focuses upon the proposed modification and assesses its compatibility with the Development Plan.

Modification of Condition 3

- 8.7 This application seeks only to amend the opening hours of the drive-thru, which were restricted by Condition 3 of the consent. Determination of the application must therefore be restricted to the question of whether or not it is reasonable for the wording of the planning condition to be amended to allow the drive-thru to trade for an additional hour and a half per day, closing at midnight rather than 22.30.
- 8.8 Condition 3 of planning permission 18/00906/FUL reads:

The Class 1 retail unit hereby approved shall be open to the public between 08.00 hours to 22.30 hours Mondays to Sundays. The "Drive-Thru" restaurant shall only be open to the public from 06.00 hours to 22.30 hours Mondays to Sundays.

Reason: To protect local residential amenity

If granted, this permission would amend Condition 3 to read:

The Class 1 retail unit hereby approved shall be open to the public between 08.00 hours to 22.30 hours Mondays to Sundays. The "Drive-Thru" restaurant shall only be open to the public from 06.00 hours to midnight Mondays to Sundays.

Reason: To protect local residential amenity

8.9 The original proposal sought permission for 24 hour opening to allow for full flexibility, although the actual opening times would have been dictated by footfall and local circumstances. As this would represent the first establishment of this kind in Nairn it was considered prudent to restrict the opening times, at least initially, until the impacts could be assessed through the operation of the business. The hours put forward in the Committee Report for the 18/00906/FUL application, which were subsequently agreed at Committee, were based on providing a level of consistency between the opening hours of the garage which operates within the Sainsbury's site and the drive-thru. Consideration was not given to the opening hours of other similar establishments within Nairn or nearby restaurants/drive-thrus operated by McDonalds.

- 8.10 McDonalds has stated that it cannot commit to the establishment of the business based on the times restricted by the planning condition; however it is not seeking 24 hour opening, but an increase of one and a half hours which would be consistent with its other, similar, nearby facilities.
- 8.11 It is worth highlighting that an application submitted under S42 of the Planning Act provides the Planning Authority with an opportunity, as part of the process in considering the proposed variation, to amend any, or each of the original conditions previously applied which it considers necessary to regulate the development proposed. This can ensure the wording is in line with current good practice and to ensure the conditions are suitable to regulate the proposed development.

Impact on residential and community amenity

- 8.12 The reason given for restricting the drive-thru's opening hours was "to protect local residential amenity". The application site is 160m from the nearest residential property which sits to the west of the restaurant on the other side of the Sainsbury's carpark. The site is surrounded by open fields to the south and east and the Balmakeith Business Estate to the north. It is therefore unlikely that the restaurant will result in any direct noise nuisance to these houses. It is noted that McDonalds operate a similar drive-thru at Inshes Retail Park in Inverness and another in Elgin. The Inverness branch is situated only 70m from the nearest residential property and successfully operates between 06.00 and midnight.
- 8.13 There is likely to be some increase in traffic in the immediate environs from vehicles accessing the restaurant, although much of the late night trade will be from people passing through on the A96(T). One concern is the possibility of littering from takeaway packaging, however this is an issue that needs to be addressed no matter the operating hours and was covered by planning condition (No.6) of 18/00960/FUL requiring the implementation of a Litter Management Plan.
- 8.14 The applicant states that its peak trading hours are lunchtimes followed by evenings and breakfasts. Trading to midnight allows provision of a service to local shift workers, emergency service workers and those travelling late at night and early in the morning. The proposed hours would also allow for consistency with the opening hours of other establishments in Nairn town centre, many of which open to midnight most nights and some to 00.30 at the weekend. Over 40 letters of support have been received from local residents in relation to the application, many of which refer to increased choice, consistency with other establishments, catering to shift workers, the creation of jobs, and retention of income to Nairn rather than residents having to go to Inverness or Elgin to access such establishments. This suggests there is considerable public support for the extended opening hours.
- 8.15 Six timeous objections to the application were received, some of which raised concerns of potential anti-social behaviours if the restaurant were to be open later than 22.30. This is not a material planning consideration and any such behaviour would be for the management and the police; however the applicant has stressed

that it takes such matters very seriously and that it is in their own commercial interests to ensure good community relations. It therefore uses management and staff training, CCTV, police liaison, and security systems within its restaurants to address potential late night issues.

8.16 The applicant also states that McDonalds keep records of any complaints or issues which arise at their stores and has confirmed that it has received no neighbour complaints at either their Inverness or Elgin branches in the year to September 2018.

Other material considerations

8.17 There are no other material considerations.

Matters to be secured by Section 75 Agreement

8.18 A Section 75 Legal agreement for a developer contribution for footpath improvements has already been agreed as part of the 18/00906/FUL application. An application for a modification of this agreement will need to be made and determined prior to the issue of any new planning application.

9. CONCLUSION

- 9.1 The proposal to increase the opening hours of the drive thru restaurant until midnight (Mondays to Sundays) represents an increase of one and a half hours to the previously consented opening hours. It is considered that the proposal would bring the opening hours more closely in line with permitted opening hours at other drive-thru restaurants in Inverness and Elgin which are closer to noise sensitive properties and operate without any serious issues. The location of the drive thru to the far east of the town and distance from noise sensitive properties should ensure that it does not result in any significant noise or amenity issues.
- 9.2 All the other conditions attaching to the original permission (18/00906/FUL) are considered appropriate to be applied to this proposal. Subject to this, the amendment to the wording of Condition 3 will ensure that the development continues to have no significant detrimental impact on community and residential amenity, the environment or existing infrastructure.
- 9.3 All relevant matters have been taken into account when appraising this application. It is considered that the proposal accords with the Development Plan and is acceptable in terms of all other applicable material considerations.

10. IMPLICATIONS

- 10.1 Resource: Not applicable
- 10.2 Legal: Not applicable
- 10.3 Community (Equality, Poverty and Rural): Not applicable
- 10.4 Climate Change/Carbon Clever: Not applicable

- 10.5 Risk: Not applicable
- 10.6 Gaelic: Not applicable

11. **RECOMMENDATION**

Action required before decision issued	Ν
Notification to Scottish Ministers	Ν
Conclusion of Modification of S75 Obligation	Y
Revocation of previous permission	Ν

Subject to the above, it is recommended that planning permission be **GRANTED** subject to the following:

Conditions and Reasons

1. The Class 1 retail unit hereby approved shall be open to the public between 08.00 hours to 22.30 hours Mondays to Sundays. The "Drive-Thru" restaurant shall only be open to the public from 06.00 hours to midnight Mondays to Sundays.

Reason: To protect local residential amenity

2. The amount of floorspace devoted to the Class 1 retail unit hereby approved shall be restricted as follows: -

a) The maximum gross floor area shall not exceed 1,858sqm.

b) The maximum net sales area shall not exceed 1,486sqm, with a maximum area of 446sqm for food sales.

c) The minimum net sales area shall not be less than 558sqm.

d) No part of the unit shall be used as a café, restaurant (other than staff café or restaurant).

Reason: To help to protect the vitality and viability of Nairn town centre and the continued provision of local retail facilities elsewhere in Nairn.

3. Prior to the occupation of any part of the development hereby approved, the means of access to the site shall be completed in accordance with approved plans and all car and cycle parking shall also be provided. Thereafter all car and cycle parking provisions shall remain available for these purposes at all times.

Reason: To ensure that adequate car and cycle parking is provided.

4. All plant, machinery and equipment associated with ventilation, airconditioning, heating and refrigeration services or similar and including fans, ducting and external openings shall be so installed, maintained and operated such that any associated operating noise does not exceed NR 20 when measured or calculated within any existing noise-sensitive premises with windows open for ventilation purposes. For the purposes of this condition, "noise-sensitive premises" includes, but is not necessarily limited to, any building, structure or other development the lawful use of which a) falls within Classes 7 (Hotels & Hostels), 8 (Residential Institutions) or 9 (Houses) of the Town and Country Planning (Use Classes) (Scotland) Order 1997 (as amended), or b) is as a flat or static residential caravan.

Reason: To protect local residential amenity.

5. Prior to commencement of the development, details of the frontage landscaping treatment along the Trunk Road boundary shall be submitted to, and approved by, the Planning Authority, after consultation with Transport Scotland TRBO.

Reason: To ensure that there will be no distraction to drivers on the Trunk Road, and that the safety of the traffic on the Trunk Road will not be diminished.

6. Prior to commencement of the development, details of the barrier proposals along the trunk road boundary shall be submitted to, and approved by, the Planning Authority, after consultation with Transport Scotland.

Reason: To minimise the risk of pedestrians and animals gaining uncontrolled access to the Trunk Road with the consequential risk of accidents.

7. There shall be no drainage connections to the Trunk Road drainage system.

Reason: To ensure that the efficiency of the existing trunk road drainage network is not affected.

8. No development shall commence on site until a Construction and Environmental Management Document (CEMD) is submitted for approval of the site. Thereafter all works shall make progress in full accordance with the approved CEMD unless otherwise agreed in writing with the Planning Authority. The CEMD shall as a minimum highlight: -

a) Final proposed mitigation measures during construction;

b) Areas to be deployed for construction purposes including material storage, offices, staff parking, vehicle turning, pollution prevention, etc.

c) A scheme for recycling / disposing of waste resulting from construction works.

d) Measures to control the emission of dust and dirt during construction.

e) The erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate.

Reason: In order to safeguard the amenity of neighbouring property and existing infrastructural assets during all periods of construction.

9. No development shall commence on the drive through restaurant until a Litter Management Plan which sets out proposals for reducing the potential for litter to arise in the surrounding community, has been submitted to, and approved in writing by, the Planning Authority. The Litter Management Plan shall include:

a) Measures for addressing litter locally through public education, packaging, waste and littering and associated financial contributions;

b) Details for the management, monitoring, review and reporting of these measures; and

c) Details of the duration of the Litter Plan.

The approved Litter Plan shall thereafter be implemented from the date of first occupation of any part of the development.

Reason: To assist with the protection of local amenity generally through reduced litter / littering.

10. Prior to the commencement of the development of the drive-thru restaurant final plans shall be submitted to the Planning Authority for the approval of Play Area Fencing. The fencing around the children's play area / seating area must ensure that there are no obstructions within the visibility splay for motorists leaving the drive-thru. The approved final design shall thereafter be implemented in full.

Reason: In the interests of road safety.

11. Prior to the commencement of the development of the drive-thru restaurant final plans and supporting Waste Collection Method Statement shall be submitted to the Planning Authority for the approval. This shall outline details of the servicing strategy for waste and recycling collection for the restaurant to ensure the safety of the public. The MS must show the route for wheeling bins, should the bin store be blocked by customer cars, and the location of all dropped crossings to ensure that operatives do not have to lift refuse containers up and down kerbs. The approved plans and Waste Collection Statement shall then be implemented in full.

Reason: In the interests of public safety and effective and safe waste management.

12. Between the hours of 06:00 and 07:00 Monday - Sunday, the operating noise Rating level of the drive thru restaurant must not exceed the Background Noise level by more than 5dB(A) including any characteristics penalty at any noise sensitive premises. Terms and measurements to be in

accordance with BS 4142:2014 Methods for Rating Industrial and Commercial Sound.

Reason: In order to avoid undue noise and disturbance arising, in the interests of residential amenity.

REASON FOR DECISION

All relevant matters have been taken into account when appraising this application. It is considered that the proposal accords with the principles and policies contained within the Development Plan and is acceptable in terms of all other applicable material considerations.

TIME LIMIT FOR THE IMPLEMENTATION OF THIS PLANNING PERMISSION

In accordance with Section 58 of the Town and Country Planning (Scotland) Act 1997 (as amended), the development to which this planning permission relates must commence within THREE YEARS of the date of this decision notice. If development has not commenced within this period, then this planning permission shall lapse.

FOOTNOTE TO APPLICANT

Initiation and Completion Notices

The Town and Country Planning (Scotland) Act 1997 (as amended) requires all developers to submit notices to the Planning Authority prior to, and upon completion of, development. These are in addition to any other similar requirements (such as Building Warrant completion notices) and failure to comply represents a breach of planning control and may result in formal enforcement action.

- 1. The developer must submit a Notice of Initiation of Development in accordance with Section 27A of the Act to the Planning Authority prior to work commencing on site.
- 2. On completion of the development, the developer must submit a Notice of Completion in accordance with Section 27B of the Act to the Planning Authority.

Copies of the notices referred to are attached to this decision notice for your convenience.

Accordance with Approved Plans & Conditions

You are advised that development must progress in accordance with the plans approved under, and any conditions attached to, this permission. You must not deviate from this permission without consent from the Planning Authority (irrespective of any changes that may separately be requested at the Building Warrant stage or by any other Statutory Authority). Any pre-conditions (those requiring certain works, submissions etc. prior to commencement of development) must be fulfilled prior to work starting on site. Failure to adhere to this permission and meet the requirements of all conditions may invalidate your permission or result in formal enforcement action

Flood Risk

It is important to note that the granting of planning permission does not imply there is an unconditional absence of flood risk relating to (or emanating from) the application site. As per Scottish Planning Policy (paragraph 259), planning permission does not remove the liability position of developers or owners in relation to flood risk.

Scottish Water

You are advised that a supply and connection to Scottish Water infrastructure is dependent on sufficient spare capacity at the time of the application for connection to Scottish Water. The granting of planning permission does not guarantee a connection. Any enquiries with regards to sewerage connection and/or water supply should be directed to Scottish Water on 0845 601 8855.

Local Roads Authority Consent

In addition to planning permission, you may require one or more separate consents (such as road construction consent, dropped kerb consent, a road openings permit, occupation of the road permit etc.) from the Area Roads Team prior to work commencing. These consents may require additional work and/or introduce additional specifications and you are therefore advised to contact your local Area Roads office for further guidance at the earliest opportunity.

Failure to comply with access, parking and drainage infrastructure requirements may endanger road users, affect the safety and free-flow of traffic and is likely to result in enforcement action being taken against you under both the Town and Country Planning (Scotland) Act 1997 and the Roads (Scotland) Act 1984.

Further information on the Council's roads standards can be found at: <u>http://www.highland.gov.uk/yourenvironment/roadsandtransport</u>

Application forms and guidance notes for access-related consents can be downloaded from:

http://www.highland.gov.uk/info/20005/roads_and_pavements/101/permits_for_w_orking_on_public_roads/2

Mud & Debris on Road

Please note that it an offence under Section 95 of the Roads (Scotland) Act 1984 to allow mud or any other material to be deposited, and thereafter remain, on a public road from any vehicle or development site. You must, therefore, put in place a strategy for dealing with any material deposited on the public road network and maintain this until development is complete.

Construction Hours and Noise-Generating Activities

You are advised that construction work associated with the approved development (incl. the loading/unloading of delivery vehicles, plant or other machinery), for which noise is audible at the boundary of the application site,

should not normally take place outwith the hours of 08:00 and 19:00 Monday to Friday, 08:00 and 13:00 on Saturdays or at any time on a Sunday or Bank Holiday in Scotland, as prescribed in Schedule 1 of the Banking and Financial Dealings Act 1971 (as amended).

Work falling outwith these hours which gives rise to amenity concerns, or noise at any time which exceeds acceptable levels, may result in the service of a notice under Section 60 of the Control of Pollution Act 1974 (as amended). Breaching a Section 60 notice constitutes an offence and is likely to result in court action.

If you wish formal consent to work at specific times or on specific days, you may apply to the Council's Environmental Health Officer under Section 61 of the 1974 Act. Any such application should be submitted after you have obtained your Building Warrant, if required, and will be considered on its merits. Any decision taken will reflect the nature of the development, the site's location and the proximity of noise sensitive premises. Please contact <u>env.health@highland.gov.uk</u> for more information.

Protected Species – Halting of Work

You are advised that work on site must stop immediately, and Scottish Natural Heritage must be contacted, if evidence of any protected species or nesting/breeding sites, not previously detected during the course of the application and provided for in this permission, are found on site. For the avoidance of doubt, it is an offence to deliberately or recklessly kill, injure or disturb protected species or to damage or destroy the breeding site of a protected species. These sites are protected even if the animal is not there at the time of discovery. Further information regarding protected species and developer responsibilities is available from SNH: www.snh.gov.uk/protecting-scotlands-nature/protected-species

Section 75 Obligation

An Obligation in terms of Section 75 of the 1997 Planning Act are as follows:

1. Active Travel Plan - Contribution £30k.

The full Section 75 Obligation can be inspected at the relevant planning office.

Signature:	David Mudie
Designation:	Area Planning Manager – South
Author:	Christine Macleod
Background Papers:	Documents referred to in report and in case file.
Relevant Plans:	Plan 1 - AL(0)100 rev A – Location Plan

