

TOWN AND COUNTRY PLANNING ACT 1990

SECTION 73 APPLICATION

Planning Statement

Land at
Trago Mills
Swansea Road
Merthyr Tydfil



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CT/TRAG-1-1

PLANNING STATEMENT

1 BACKGROUND

- 1.1 Trago Mills (Merthyr Tydfil) Ltd (the 'Applicant') wishes to modify the planning conditions applying to the Swansea Road site
- 1.2 Merthyr Tydfil County Borough Council (the 'LPA') consider that condition 3 prevents the sale of food goods on any part of the site (other than ancillary franchise units). The LPA does not consider the mobile units on the pitches by the entrance to the store to be ancillary franchise units.
- 1.3 Whilst the Applicant disputes that interpretation, the Applicant wishes to ensure that a way forward is agreed with the LPA so as to avoid any unnecessary litigation and sees a benefit to both themselves and the LPA in reviewing and modifying a condition from a planning permission that is now over 20 years old. This application is therefore made without prejudice to the Applicant's position that Condition 3 does not prevent the operation of the two pitches.
- 1.4 The Applicant sought pre-application advice (PA/20/0038) following previously refused applications (Ref P/20/0054 & P/19/0173) for the retention of two mobile units.
- 1.5 The Applicant has commissioned a report to assess the impact of the retail pitches on the Town Centre (the 'Retail Report'), which is included within this application. This information was not available at the time of the previous applications.

2 AMENDED CONDITIONS

- 2.1 As the Retail Report sets out, the retail conditions on the Outline Permission have remained unchanged since 1995. Since that date there have been major changes to the way people undertake their convenience shopping including the rise of internet shopping and home delivery and the significant growth of the limited assortment discounters such as Aldi and Lidl.
- 2.2 There has also been considerable retail development in the Merthyr area both within and outside the town centre. The system of planning control has limited reach on some of these newer areas of retail and as such a retailer may alter their operations and cause the type of harm to the Town Centre envisaged by the Planning Officer in his refusal of P/20/0054 & P/19/0173. E.g. a major food retailer expanding either home delivery or click and collect services will result in the same loss of 'linked trips', but would not be subject to planning control.
- 2.3 Since the Outline Permission was granted, the Marks & Spencer store (including foodhall) was permitted which was considered to have an individual impact of around £2.21m, which dwarfs the impact of trade from two traders from mobile units.

- 2.4 The convenience offer in the town centre increased between 2007 and 2017.
- 2.5 The Retail Report refers to the draw of customers to Trago from a wide area. It is understood that it is not controversial that Trago's draw is wider than that of Merthyr Town Centre.
- 2.6 The Retail Report addresses the relevant planning policy and sets out the need for the development and considers the sequential test.
- 2.7 The use of the two mobile units would not increase the range of goods that could be sold from the Trago site from that which is already permitted. As acknowledged in the pre-app, these traders could operate from the Trago site were they to occupy one of the 11 units at the entrance to the store.
- 2.8 The Retail Report addresses the point around linked trips, including a conclusion that at most just 5% of customers of the mobile units might make a linked shopping trip to Merthyr Town Centre and an even smaller percentage of those would have been looking to make a linked trip to the town centre for just fruit and vegetables and / or fresh meat. The Retail Report concludes that *"The mobile units do not have an unacceptable impact on the trade, turnover, vitality and viability of Merthyr town centres and there is therefore no impact reason why this variation of condition application should be refused"*.
- 2.9 The Retail Report concludes that the proposal to allow two mobile units would not be contrary to Local Plan Policies.
- 2.10 Having considered the Retail Report, the Applicant proposes a new condition 3 which would allow the mobile units to trade. Three options are provided below, however, the Applicant would be willing to discuss the drafting with the LPA as appropriate.
- 2.10.1 *"No food retailing shall take place other than within the ancillary franchise units or from an area of the car park extending to no more than 96 sqm gross (as shown on plan [xxx]). The use of the car park area will be limited to mobile businesses only"* (Option A).
- 2.10.2 *"No food retailing shall take place other than within the area shown on the attached plan. The net retail floorspace for the sale of convenience goods shall not exceed 540 sqm"* (Option B); or
- 2.10.3 *"No food retailing shall take place other than within the ancillary franchise units or from the area of the car park shown on the attached plan. The net retail floorspace for the sale of convenience goods shall not exceed 540 sqm."* (Option C).
- 2.11 Option A is preferred by the Applicant on the basis that the Retail Report has demonstrated that there is no harm to the town centre from the mobile units.
- 2.12 Where, notwithstanding the Retail Report, Option A is not accepted by the LPA, then Options B and C remain suitable as these result in: i) no net increase in retail floor area; and ii) no new range of products. Therefore, Options B and C can clearly be seen to have no effect whatsoever on the town centre and therefore the application may be approved on the basis of Options B and C even

if it were considered (contrary to the Retail Report) that Option A were contrary to the relevant policies.

- 2.13 The proposals will not result in any increase in floor area available for food retail, or increase total retail floor area above that already authorised.
- 2.14 Accordingly, the Retail Report concludes that such a change would be in accordance with planning policy – specifically Policies EcW3 and EcW6 of the RLDP.
- 2.15 On the basis that the amendment of the condition as proposed in Options B or C would not result in any net change in the position as already permitted, the condition should be modified as requested.

The Appeal decision

- 2.16 The refused P/19/0173 application was subsequently appealed (Ref: APP/U6925/C/20/3246448) with the Inspector stating *“Whilst I have found above that the sales pitches in themselves do not have a significant impact on the turnover of the town, and noting that the Trago Mills site serves a wider catchment than just the local area, the reduction of associated visits has the further knock on effect of depriving the town centre of linked trade that would have otherwise been captured by customers visiting the town. I find that this loss of trade is harmful to the centre’s viability and vitality particularly as it is identified as not being a strong centre”*.
- 2.17 The alteration of Condition 3 to Options B&C does not alter the uses, or floor areas that may be permitted for such uses. Accordingly, this application is materially different to the one considered by the Inspector, but also includes additional evidence which was not available at the time of the Appeal.
- 2.18 The Inspector was of the view that any harm caused by the units was as a result not of their direct effect on the town centre, but due to the potential harm in terms of linked trips. The retail report seeks to address this point.
- 2.19 The Inspector’s comments in respect of vacant units are addressed in the Retail Report, including that one of the units does continue to operate in the Town Centre. The Retail Report also addresses the sequential test.

Benefits of updating condition 3

- 2.20 This application also enables the LPA to update the relevant planning condition and resolve potential difficulties with the existing condition. The Applicant considers that Condition 3 as currently drafted suffers from a number of issues in terms of enforcement etc:-
 - 2.20.1 The condition is not sufficiently clear as to what it is seeking to achieve. In *Finney*, the Court of Appeal has confirmed that the description of the permission is the operative part of the permission, i.e. it tells you what you can do (here – ‘Shopping Centre and Leisure Park’) and it is the

conditions which take away from that grant, i.e. what you cannot do. Here Condition 3 of the Outline Permission is not prohibitory – it does not forbid any particular type of use, it does not subtract from the operative grant of permission at all. The condition purports to comment on the operative effect of the permission granted, but does not seek to restrict that grant of permission in the description, not in accordance with the model conditions, nor on a proper reading of the condition. Condition 3 is not in accordance with the model conditions in Circular 016/2014, nor in the relevant circular at the time the original permission was issued, Circular 35/95. The ‘condition’ states “*This consent does not allow for food retailing, other than ancillary franchise units*”, whereas the model condition from Circular 35/95 states “*49. The premises shall not be used for the sale of food for consumption...*” i.e. clearly negative. In *Trump*, Lord Carnwath stated that it must be borne in mind that a breach of planning conditions may support criminal proceedings (potentially as here, with a BCN) and that was a good reason for a “*relatively cautious approach*” to interpretation.

- 2.20.2 The condition in the Outline Permission refers to “*ancillary franchise units*” this differs from that in the reserved matters (03) permission “*the ancillary franchise units on the deposited plans*”. Given the use of the site was determined by the outline, the reserved matters may not impose conditions in respect of the use (in accordance with the relevant Circular). The condition imposed on the Outline Permission should therefore be the condition which takes precedence, the condition contained in the reserved matters is invalid.
- 2.20.3 Furthermore, the reserved matters permission condition (which the Applicant asserts is invalid) refers to “*other than the ancillary franchise units on the deposited drawings*” – but there are no ‘ancillary franchise units’ specified upon the deposited drawings.
- 2.20.4 Even if Condition 3 were to be prohibitory, the condition permits such sales at “*ancillary franchise units*” – it is considered that the ordinary meaning of these words in these circumstances are that: ‘ancillary’ means not being the main purpose; and ‘franchise’ means that it is operated by someone other than the main store operator (currently Trago Mills). At the time of the outline permission (and still now) there were no such designated units, hence a proper interpretation of the condition is that the permission applies to all such units, i.e. including the butcher and grocer.
- 2.20.5 The s73 permissions for the site are numerous. Each is a new grant of planning permission. The latter permissions do not contain the relevant condition. The Development Management Manual is clear that “*When issuing a permission after a condition has been removed or amended, that decision notice should refer to all the terms of the original permission, to avoid the possibility of the new permission being*

interpreted as having no conditions or only those that were amended. The LPA should therefore copy across all the relevant conditions (which they consider necessary) from the original decision notice”.

- 2.21 This s73 application gives the LPA the opportunity to address these issues and issue an up-to-date permission which sets out clearly the conditions applicable to the store (including those changes to conditions subsequently permitted through other s73 permissions).

3 RESPONSE TO THE PRE-APP REPORT

- 3.1 The possibility of an approach based on Options B and C was broached at the Pre-App meeting (albeit at that time based on a temporary use). The Officer's response (bearing in mind that the question had not previously been put to the Officer) was that the approach appeared *“to be somewhat counter intuitive, as permission would be sought for a retain use that could adequately be accommodated within an existing unit”*. This response underscores the points made in the Retail Report, i.e. there is nothing to stop the activities of the mobile units being carried out within the Trago units – and that accordingly, there is no harm resulting from them operating outside the units where there is no increase in either the floor area used for food retail, or overall.
- 3.2 It was suggested that a s106 Agreement may be necessary to prevent occupation of the ‘ancillary franchise units’ whilst the mobile units were present. It is considered that the proposed conditions in Options B and C adequately address the concerns of the LPA in respect of utilising all 11 of the ‘ancillary franchise units’ for the sale of food along with the mobile units. By applying a condition which limits the total floor area that may be used for food sales, the issue is overcome. Such a condition is readily enforceable, the occupants of each unit being identifiable upon a site visit.

4 OTHER MATTERS

- 4.1 In the Pre-app, the issue of generator noise was raised. The mobile units no longer utilise a generator, a supply of electricity being provided directly from the store. Accordingly, no acoustic report is necessary.

Stephens Scown LLP

12 February 2020