

REPORT TO: DEVELOPMENT MANAGEMENT COMMITTEE – 21 OCTOBER 2013

REPORT ON: KINGSWAY WEST RETAIL PARK, 467 CLEPINGTON ROAD
DUNDEE – MODIFICATION OF LEGAL AGREEMENT ASSOCIATED
WITH PLANNING APPLICATION REFERENCE: D/12001 TO
PERMIT CLOTHING AND FOOTWEAR TO BE SOLD FROM NOT
MORE THAN 1,300M² OF THE SALES AREA OF UNIT 3
(13/00404/MDPO)

REPORT BY: DIRECTOR OF CITY DEVELOPMENT

REPORT NO: 441-2013

1 PURPOSE OF REPORT

- 1.1 To request Committee determine an application to modify the existing planning obligation associated with planning application ref: D/12001.
- 1.2 This application seeks consent to modify the Legal Agreement associated with planning application reference D/12001 to permit clothing and footwear to be sold from not more than 1,300m² of the sales area of units A3 and A4 (Unit 3) of Kingsway West Retail Park. This application relates to the occupation of Units A3 and A4 (Unit 3) by Next Home and Garden. Next Home and Garden stores involve retailing clothes and footwear which are goods that are restricted from being sold at Kingsway West Retail Park.
- 1.3 Planning application ref: D/12001 granted permission for the demolition of existing buildings and construction of non-food retail stores, fast food takeaway and parking. Planning permission was granted subject to the completion of a Section 50 Agreement. Upon completion of the Section 50 Agreement, permission was issued on 7 September 1987.
- 1.4 The Section 50 was entered into between (1) The Tayside Regional Council and (2) The Scottish Metropolitan Property Plc dated 18 and 23 June 1987 and recorded in the General Register of Sasines for the County of Angus on 26 June 1987. The purpose of the Section 50 Agreement is to restrict the range of goods and the floor space of the proposed retail stores at Kingsway West Retail Park as approved by planning application ref: D/12001.
- 1.5 Clause (First) and Schedule II of the planning obligation impose restrictions on the range of goods that may be sold from retail units at Kingsway West Retail Park, including Unit 3. Schedule II (1)(a)(II) prohibits the sale of "clothing and footwear (other than protective or safety footwear or headgear and clothing, normally worn in connection with the repair and maintenance of buildings and motor vehicles)".
- 1.6 This application is for the modification of the restriction imposed in terms of Schedule II(1)(a)(II) of the planning obligation so as to permit clothing and footwear to be sold from not more than 1,300m² of the sales area of Unit 3.
- 1.7 Other than as modified through the approval of this application, the restrictions imposed by the existing planning obligation would continue to apply to Unit 3.

- 1.8 The restrictions imposed by the existing planning obligation (other than as previously varied by the First Amendment and the Second Amendment) would continue to apply to other retail units at Kingsway West Retail Park.
- 1.9 Members should note that the current terminology for Section 50 Agreements and S75 Agreements is "Planning Obligation" and this report will use the current terminology hereafter.

2 RECOMMENDATION

- 2.1 It is recommended that the Committee refuses this request to modify the existing planning obligation associated with planning application ref: D/12001 to permit clothing and footwear to be sold from not more than 1,300m² of the sales area of Unit 3, Kingsway West Retail Park.

3 FINANCIAL IMPLICATIONS

- 3.1 There are no financial implications associated with this report.

4 BACKGROUND

- 4.1 Over the last 20 years there have been a variety of planning applications approved by the Council for the development and redevelopment of Kingsway West Retail Park which have included restrictions on the range of goods that can be sold.
- 4.2 The Council is currently considering 3 other applications for Kingsway West Retail Park.
- 4.3 Planning application ref: 13/00402/FULL seeks permission for external alterations to elevations, formation of an external sales and display area and associated works at Units A3 and A4 (Unit 3) Kingsway West Retail Park. The purpose of this application is to facilitate the creation of a Next Home and Garden store within the retail park.
- 4.4 Planning application ref: 13/00405/FULL seeks planning permission for the demolition of the Pagazzi retail warehouse building and the erection of 2 retail warehouse buildings with mezzanine floor levels and associated alterations to car parking at Unit A5 Kingsway West Retail Park.
- 4.5 Application ref: 13/00403/MDPO seeks consent to discharge planning obligations registered on 26 June 1987, 12 October 1990, 15 August 1996, 2 April 1997 and 18 September 2002 and enter into a replacement planning obligation. The planning obligations referred to above restrict the range of goods that can be sold from Kingsway West Retail Park and the minimum floor area of the retail units. The purpose of application ref: 13/00403/MDPO is to consolidate the five existing planning obligations into one planning obligation for the whole of Kingsway West Retail Park.

5 CHANGES TO LEGISLATION

- 5.1 On 1 February 2011 new legislative provisions came into force whereby the Planning etc (Scotland) Act 2006 amended the 1997 Act by replacing the existing Section 75 with a new Section 75 and added new sections including Sections 75A, 75B and 75C which deal with Planning Obligations (the replaced version of Section 75 provided for

"Planning Agreements"). Section 75A establishes a formal process whereby a person against whom a planning obligation is enforceable can apply to the planning authority to have that obligation either modified or discharged. S75B provides for a right of appeal to Scottish Ministers where a planning authority either refuses the application or fails to determine it within 2 months. The Council considers that the new legislation is not retrospectively applicable and therefore only relates to S75 Planning Obligations concluded after 1 February 2011.

- 5.2 On 14 November 2011, a further Statutory Instrument came into force which attempted to clarify the legal position by providing that a pre 1 February 2011 agreement is to have effect as if made under Section 75, as it existed after that date. However, it is considered appropriate that, given the doubts regarding how the courts may interpret or treat the legislation, the Committee gives its views on the merits of this application without prejudice to any arguments on the legality of the legislation.

6 APPLICANTS CASE

- 6.1 Planning consultants acting on behalf of Ravenside Investments Plc (Land Securities) have submitted a detailed retail statement and supporting planning statement in support of their clients' application.
- 6.2 The retail statement outlines Land Securities interests in Dundee and their vision for Kingsway West Retail Park. To help meet the expectations of modern day shoppers, in light of competition from other destinations and challenges from the internet, the retail statement highlights that Land Securities is committed to pursuing the investment in Scotland's first Next Home and Garden store at Kingsway West Retail Park.
- 6.3 The retail statement states that the Next Home and Garden store model combines traditional bulky goods items with limited sales of fashion and footwear products (sales of which are currently restricted within Kingsway West). This combination provides a mix of Next's current high street retail format with their Next: Home store format. The applicant considers that a Next Home and Garden store at Kingsway West Retail Park would deliver the following benefits to the City:
- a introduce the first new dual format Next Home and Garden store with an exciting mix of complementary products on offer;
 - b deliver a high quality building, which reflects the high quality goods associated with the store concept and provide attractive front and side elevation treatments;
 - c provide development at an inherently sustainable and accessible location, within an established shopping location, which is well served by different modes of transport;
 - d constitute a substantial inward investment into Dundee, sending out a clear signal of investor confidence within the city region;
 - e create significant employment opportunities, in the form of 85 new jobs and 4 apprenticeships. Further jobs will be created during the construction phase of development;

- f ensure that Dundee retains its prominence as the most significant retail destination within the region; and
 - g provide a retail location at Kingsway West that meets evolving consumer demands in respect to providing an attractive mix of retail and leisure uses, but in a way that complements Dundee City Centre.
- 6.4 However, in order to deliver the first Next Home and Garden store, the Legal Agreement associated with planning application reference D/12001 requires to be modified to permit clothing and footwear to be sold from not more than 1,300m² of the sales area of units A3 and A4 (Unit 3) of Kingsway West Retail Park.
- 6.5 To demonstrate that the introduction of fashion and footwear into Kingsway West will not adversely impact on the viability and vitality of the City Centre and District Centres, the retail statement contains a detailed Dundee City Centre Health Check as well as a sequential approach to site selection and a deficiency assessment of the area surrounding the application site.
- 6.6 Proposals to discharge, modify or enter into Planning Obligations should comply with the following five tests in Circular 1/2010: Planning Agreements - necessity, planning purpose, relationship to the development, scale and kind, and reasonableness.

7 OBSERVATIONS

- 7.1 The applicant's case is set out in Section 6 of this report.
- 7.2 The Council's assessment of this application with regard to the tests required by Circular 1.2010 is as follows:

- a Necessity

The Circular is written for the benefit of planning authorities that are considering whether, in order for planning permission to be granted, a planning obligation is required. However, this is an application to modify an existing planning obligation and there is no option to impose a planning condition. Accordingly, a planning obligation remains necessary in this regard in order to control the range of goods and percentage of floor area to be used for the sale of specified goods. It is concluded that the necessity test is satisfied.

- b Planning Purpose

The Obligation should serve a planning purpose. The Dundee Local Plan Review 2005 and the Proposed Dundee Local Development Plan contain specific policies to both encourage a wide range of appropriate retailing and to protect the vitality and viability of Town Centres and District Centres in the delivery of retailing and other services. This approach is supported at a regional level by Tayplan Strategic Development Plan and at national level by the Scottish Planning Policy 2010 and the Draft Scottish Planning Policy as well as the National Review of Town Centres External Advisory Group Report: Community and Enterprise in Scotland's Town Centres. Where retail units have been permitted in Retail Parks or outwith the retail centres, restrictions have been placed on the range of goods which can be sold and the percentage of floor space which can be used for the display and sale of such goods.

Accordingly, planning permissions have been the subject of specific conditions or Planning Obligations to enforce such restrictions. It is concluded that the planning purpose test is satisfied.

c Relationship

The Circular requires that Obligations should "relate directly to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area". The effect of the existing obligations is to restrict the manner in which Kingsway West Retail Park may be operated and an unrestricted consent, allowing comparison retailing and/or retail units under 1,000m² in floor area was perceived by the planning authority to be a barrier to planning permission being granted.

The main aim of the goods restrictions imposed by the existing planning obligations associated with Kingsway West Retail Park are to avoid a potentially damaging diversion of expenditure away from the City Centre and District Centres and to ensure that they continue to provide a valuable and accessible service for shoppers.

Each of the existing planning obligations relate directly to the planning permissions granted for the phased creation of Kingsway West Retail Park. It has been clearly established above that the retail floor space and range of goods sold from Kingsway West Retail Park require to be restricted in order to protect and enhance the vibrancy and viability of the City Centre and District Centres.

To demonstrate that the introduction of fashion and footwear into Kingsway West will not adversely impact on the viability and vitality of the City Centre and District Centres, the applicant's retail statement contains a detailed Dundee City Centre Health Check as well as a sequential approach to site selection and a deficiency assessment of the area surrounding the application site.

The City Centre Health Check concludes that Dundee City Centre continues to perform well despite the turbulent financial environment over the last 5 years. This is demonstrated by a decrease in vacancy rates within the City Centre since May 2012, with vacancy rates within the City Centre remaining well below the national average. In addition there is a good mix of commercial uses within the City Centre, with retailing dominating as expected, seeing an increase since May 2012. This is attributed to a good quality shopping environment, with a high quality shopping centre (Overgate) offering a good range of national brands, supported by a large amount of independent retailers elsewhere in the City Centre.

The City Centre Health Check demonstrates that Dundee City Centre continues to thrive as a regional shopping centre. However, this is a clear reflection of the success of the Development Plan retail strategy to restrict the range of goods that can be sold from out of centre retail parks and commercial centres. The City Centre Health Check does not demonstrate that the proposed relaxation of the existing goods restrictions at Kingsway West would not divert expenditure away from the City Centre or that allowing the sale of clothing and footwear at Kingsway West Retail Park would not adversely impact on the vibrancy and viability of the City Centre.

The deficiency assessment concludes that within the City and including current commitments (Overgate extension, Asda Myrekirk etc) 17.8% of available comparison expenditure is lost from the defined catchment area through competition from other locations outwith the area and the internet. The deficiency assessment also states that the introduction of clothing and footwear at Kingsway West Retail Park would assist in rebalancing the existing loss of available comparison expenditure by retaining more expenditure within the city.

Given that the catchment area includes Perth, Forfar, Dundee City, Carnoustie, Coupar Angus, Arbroath, Blairgowrie and North and East Fife many of which settlements have vibrant town centres and out of centre locations retailing bulky goods and in addition to the convenience of internet shopping, it is to be expected that Dundee City cannot secure 100% of available comparison expenditure.

The proposed clawback in available expenditure that is lost (17.8%) to locations outwith Dundee and the internet is to be generated by allowing clothing and footwear to be retailed from Kingsway West Retail Park. However, the commentary in trade diversion and impact considerations detailed in the Planning and Retail Statement does not account for any of the 17.8% of available expenditure being recouped by the city let alone Kingsway West. In addition the planning and retail statement concentrates on the impact of the proposals on existing commercial centres and retail parks but fails to account for the impact on the City's District Centres and specifically Lochee District Centre and the Stack which is currently the subject of major regeneration works.

The planning and retail statement highlights that Next will continue to have presence in the City Centre in the form of the Overgate store and that the existing Next Home store in Kingsway West will move to Unit 3 in the form of a Next Home and Garden store should this application to modify the existing planning obligation restricting Unit 3 be approved by the Committee. The planning and retail statement does not specifically state that the Next store in Gallagher Retail Park will close should this application be approved. However, Next have confirmed that it is their intention to close the existing store at Gallagher Retail Park as part of introducing this new concept store. The loss of the flagship brand at Gallagher Retail Park will impact significantly on vitality and vibrancy of this retail park as well as the City Centre given its location.

The planning and retail statement highlights job creation as one of the significant benefits that would arise out of a branch of Next Home and Garden locating at Kingsway West Retail Park. In the absence of a detailed breakdown of the eighty five jobs to be created by the proposed Next Home and Garden concept store at Kingsway West it is anticipated that the number of new jobs created will be significantly lower than 85. This is because the existing staff at the Gallagher Retail Park store will most likely be relocated to Kingsway West with the existing staff at Kingsway West branch of Next Home also relocating to the proposed Next Home and Garden store.

The sequential approach to site selection contained within the planning and retail statement is shaped by the Next Home and Garden business model and the interests of the applicant. Sites such as the Stack or Gallagher retail park have

been discounted for reasons that contradict the very basis of this application (that they are contrary to the Development Plan's good range restrictions policies). The sequential approach also avoids locations within the City's District Centres which national and local policy seek to protect.

In this instance the information submitted in support of this application fails to demonstrate that the introduction of fashion and footwear at Kingsway West Retail Park would not adversely affect the vitality, vibrancy and viability of the City Centre, District Centres and in particular Gallagher retail park. As Kingsway West Retail Park currently enjoys 100% occupancy with an application to expand the retail park currently being considered by the Council, the planning and retail statement also fails to demonstrate that there is a need at Kingsway West Retail Park to relax the current goods range restrictions.

d Scale and Kind

The Council concurs that the test is not relevant to this application.

e Reasonableness

The Circular requires that the obligation should be reasonable in the particular circumstances of the case.

A relaxation of the retailing controls in Kingsway West Retail Park would also have to be equally applied to Kingsway East Retail Park and other out of centre shopping destinations. While the proposed relaxation to allow 1,300m² of Unit 3 at Kingsway West Retail Park to be used for the sale and display of clothes and footwear does not appear to be significant alone, if allowed across all existing retail parks then it would significantly undermine the existing centres. It would also undermine the policy approach of different restrictions at Gallagher Retail Park and the Kingsway West and East Parks. Given the current economic climate it is important to ensure that the success of maintaining the restrictions at the Retail Parks and the benefits that this has brought to the City Centre and District Centres is not undermined at this time.

Such developments would undermine the vibrancy and vitality of the City Centre and District Centre not only by drawing trade from these local and regional shopping centres but also drawing popular high street retailers from their current City and District Centre locations. This is demonstrated by the likely closure of the Next store at Gallagher Retail Park should the Committee approve this application.

Objections have been received from the owners of Gallagher Retail Park and Dundee Civic Trust with regard to the impact that the proposal would have on the vitality and vibrancy of the City Centre and district centres in terms of attracting investment away from established retailing centres within the City. These objections are framed around the aspirations of the retail strategy contained within the Scottish Planning Policy 2010 and Draft Scottish Planning Policy which the adopted Local Plan and proposed Local Development Plan adhere to.

In its current form, the proposal is contrary to the retail strategy outlined by TAYplan Strategic Development Plan, the adopted Local Plan and proposed

Dundee Local Development Plan. The Council's retail strategy is in line with the Scottish Planning Policy, the draft Scottish Planning Policy and the National Review of Town Centres External Advisory Group Report: Community and Enterprise in Scotland's Town Centres.

Therefore, in a period when consumer and retailer confidence remains low and occupancy levels within the City Centre and retail parks remains high it is considered that the proposed modifications to allow for the introduction of clothing and footwear in Kingsway West Retail Park should be resisted by the Council.

- 7.3 Having taken into account all the relevant matters, the refusal of this application would be reasonable.

8 CONCLUSION

- 8.1 The Council has operated a policy of maintaining a balance between the City Centre/District Centres and the out of centre retail parks for the past 20 years. This has been achieved through the imposition of Planning Obligations restricting the goods that could be sold at the retail parks to those of a more bulky nature. This policy approach has seen the Retail Parks operate at almost 100% capacity without having a significant detrimental affect on the City or District Centres. The current amendments proposed to the Planning Obligation would result in a significant shift in the Policy approach to the retail parks. If the change is supported then it would have to be permitted in other units across both Kingsway West and East Retail Parks. This could result in significant trade drawn from the City Centre and District Centres. It would also put considerable pressure for further relaxations to the existing range of goods restrictions. It should be noted that current government thinking through the Draft Scottish Planning Policy highlights the need to focus retail and other uses back to the town centre and that the development plan can specify a centre's function, for example a centre restricted to the sale of bulky goods. Networks will change over time, therefore any significant changes in the evolving role and function of centres should be addressed through development plans rather than changes being driven by individual applications. Changes to the network of centres should be justified using the results of a health check. The health check submitted relates to the City Centre only and suggests that at this particular time, the City Centre appears to be trading well and currently displays the vitality and viability which the City Council has sought to protect by the application of the policies in the Dundee Local Plan Review 2005 and that current national and regional policy and guidance aspires to create.
- 8.2 In a period when consumer and retailer confidence remains low, there is concern that the city centre and District Centres could be vulnerable to the impact of changes in the goods restrictions at out of centre retail parks.
- 8.3 It is considered that taking into account all the relevant issues above, the City Council's stated aims of maintaining the vitality and viability of the City Centre and District Centres are not served by approval of this application and that the planning Obligation should continue to have effect without modification.

9 POLICY IMPLICATIONS

- 9.1 This Report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues.

10 CONSULTATIONS

- 10.1 The Chief Executive, the Director of Corporate Services and Head of Democratic and Legal Services have been consulted and are in agreement with the contents of this report.

11 BACKGROUND PAPERS

- 11.1 Planning Obligation Registered 18 and 20 June 1987.
- 11.2 Dundee Local Plan 2005.
- 11.3 The Planning etc (Scotland) Act 2006.
- 11.4 Circular 1/2010: Planning Agreements.
- 11.5 TAYplan Strategic Development Plan.
- 11.6 Scottish Planning Policy 2010.
- 11.7 Draft Scottish Planning Policy.
- 11.8 National Review of Town Centres External Advisory Group Report: Community and Enterprise in Scotland's Town Centres.

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