

REPORT TO: DEVELOPMENT MANAGEMENT COMMITTEE – 18 NOVEMBER 2013

REPORT ON: B&Q, KINGSWAY EAST RETAIL PARK, DUNDEE - APPLICATION TO MODIFY SCHEDULE II OF SECTION 50 AGREEMENT ASSOCIATED WITH APPLICATION REF: 87/12345/D RECORDED ON 19 MAY 1988 AND TO MODIFY SCHEDULE II OF SECTION 50 AGREEMENT ASSOCIATED WITH APPLICATION REF: 88/13779/D RECORDED ON 14 AUGUST 1989 (REF: 13/00596/MDPO)

REPORT BY: DIRECTOR OF CITY DEVELOPMENT

REPORT NO: 480-2013

1 PURPOSE OF REPORT

- 1.1 To request that Committee determine an application to modify the terms of Schedule II of the Section 50 Agreements associated with planning applications 88/13779/D and 87/12345/D.
- 1.2 The proposed modifications involve a relaxation of the existing goods range restrictions at Kingsway East Retail Park to allow 10.3% of the net sales floor space of Unit 1 to be used for the sale of Food, Clothing and Footwear and Toys.
- 1.3 The applicant also proposes to incorporate the floor space of the existing outdoor garden centre into the net sales floor space of the application site.
- 1.4 The current application is a revision of application ref: 13/00309/MDPO and is accompanied by detailed supporting information that concludes that the proposed relaxation would not adversely impact on the vitality, viability or vibrancy of the City Centre and District Centres.
- 1.5 The information submitted in support of this application fails to demonstrate that the proposal will not have an adverse impact on the City Centre and District Centres. In addition, the proposal is contrary to the retail strategy outlined by the Scottish Planning Policy 2010, the Draft Scottish Planning Policy, Tayplan Strategic Development Plan, Dundee Local Plan Review 2005 and the Proposed Dundee Local Development Plan. There are no material considerations that justify support of the proposal.
- 1.6 Members should note that the current terminology for a Section 50 Agreement is a "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 vary the terms of the Planning Obligations and that the Planning Obligations continue to have effect without modification.

3 FINANCIAL IMPLICATIONS

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

4 BACKGROUND

- 4.1 Planning application ref: 87/12345/D sought outline planning permission for a retail park with ancillary parking and service areas on the site of the former Timex Factory on Kingsway East. This application was approved by Tayside Regional Council on 9 July 1987 subject to the completion of a Section 50 Planning Agreement restricting the range of goods that could be sold from the proposed retail park.
- 4.2 Planning application ref: 88/13779/D sought detailed planning permission for the erection of a retail park with shopper's restaurant and ancillary car parking and service areas at Milton of Craigie Retail Park. Planning permission was granted subject to the completion of a Section 50 Planning Agreement on 13 February 1989 by Dundee District Council. The purpose of the Section 50 Agreement is to restrict the range of goods that can be sold from the proposed retail park.
- 4.3 Application ref: 13/00309/MDPO sought permission under Section 75A of the Town and Country Planning (Scotland) Act 1997 as amended to modify Schedule 2 of the Section 50 Agreement associated with planning application ref: 88/13779/D. The purpose of this application was to modify the existing range of goods restrictions to allow for the sale of food, clothing and footwear, toys and housewares from the application site. This application was recommended for refusal given that the proposal would be likely to draw trade from the City Centre and surrounding District Centres. However, before this application could be reported to the Development Management Committee it was declared invalid as the applicant had failed to acknowledge the restrictions binding the application site by the Section 50 Agreement associated with planning application ref: 87/12345/D.
- 4.4 Application ref: 13/00309/MDPO was accompanied by planning application ref: 13/00310/FULL which sought permission under Section 42 of the Act to vary Condition 2 of planning application ref: 88/13799/D. The purpose of planning application ref: 13/00310/FULL was to enable the sale of all goods under Class 1 (Retail) of the Town and Country Planning (Use Classes) (Scotland) Order 1997 as amended within a proportion of both Unit 1 and the food store at Kingsway East Retail Park. This application was reported to the Development Management Committee on 12 August 2013. This application was refused by the Committee because the proposal failed to demonstrate that the introduction of an element of additional unrestricted retail sales floor space into Kingsway East Retail Park would not undermine the Local Plan retail strategy or adversely impact on the vitality or vibrancy of the City Centre and District Centres. In addition, the proposal failed to demonstrate that there is a qualitative or quantitative deficiency in retailing in the area surrounding the application site. The proposal was therefore considered to be contrary to the requirements of Policy 7 of Tayplan Strategic Development Plan, Policy 47 of the Dundee Local Plan Review 2005 and Policy 23 of the Proposed Dundee Local Development Plan.

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 The current application proposes to modify the terms of Schedule II of the Section 50 Agreements associated with planning application ref: 88/13779/D and 87/12345/D to allow:

- a the title and contents of Schedule II Part One to be amended to relate to all units other than the land shown outlined in red on the site location plan for Unit 1;
- b a new Part Three, to be added to Schedule II, relating specifically to the land shown outlined in red on the site location plan for Unit 1;
- c the title of Part Three of each Agreement to read "Range of Goods (Limitation - Unit 1 Retail Warehouse)";
- d Part Three to include the same four goods categories as set out in Schedule II (One) subject to the following allowances:
 - "Food" to allow for 129m² net (3.7% of the net sales floor space) to be used for the sale of food goods;
 - "Clothing and Footwear" to allow for 114m² (3.3% of the net sales floor space) to be used for the sale of clothing and footwear;
 - "Toys and Sports Goods" to allow for 114m² (3.3% of the net sales floor space) to be used for the sale of toys goods but maintain restriction of sports goods;
 - allowances to be made for the sale of housewares that include small domestic electrical goods; and
 - the 763m² net floor space of the outdoor garden centre is included in the net sales figures stated above.
- e the existing Part Three, titled "Access, Egress and Car Parking" to be renumbered as Part Four; and
- f an undertaking that for a period of 5 years from the commencement of trading from Unit 1 by B&M Retail Limited or any associated company, B&M Retail Limited or such associated company shall only be permitted to trade from the

said unit provided that it continues to trade from a store within the boundary of Dundee City Centre as defined within the Development Plan. This undertaking shall only apply to B&M Retail Limited or an associated company.

- g The applicant has confirmed that 1.7% of the net sales floor space will also be used for the sale of cleaning products which are not restricted by the existing planning obligations. The applicant has also confirmed that the existing external garden centre area shall be used to sell garden related products, goods which are also not restricted by the existing planning obligations.
- 6.2 Planning consultants acting on behalf of Threadneedle Investments have submitted a detailed Retail Statement and Supporting Planning Statement in support of their clients' application.
- 6.3 The Supporting Statement considers the existing planning obligations relating to the "retail warehouses" at Kingsway East Retail Park to be unreasonably restricting the future viability of the application site in light of perceived widespread changes to retail patterns and the current economic climate.
- 6.4 The Supporting Statement indicates that B&Q intend to move out of Unit 1 Kingsway East Retail Park at the end of their current tenancy agreement. B&M Retail Limited has registered a formal interest with the applicant (Threadneedle Investments) with a view to locating a branch of their B&M Homestore in Unit 1 Kingsway East Retail Park.
- 6.5 The supporting information states that the B&M Homestores trading model focuses on 75% of the floor space of each unit being used for the sale and display of bulky comparison goods such as indoor and outdoor furniture, gardening products, home textiles, household goods including small electrical goods, home adornment, seasonal items such as Christmas and garden centre items, paint wallpaper and DIY products. The remaining 25% is used for the sale and display of food, confectionary, drinks, cleaning products, clothes and toys. In the case of the current proposal they state that 88% of the retail floor space of Unit 1 will be used for the sale and display of bulky comparison goods and 10.3% will be used for the sale and display of goods currently restricted by the existing planning obligations and Condition 2 of planning application ref: 88/13779/D. The remaining 1.7% of the total sales floor space of Unit 1 will be used for the sale of cleaning goods which are not restricted.
- 6.6 The purpose of this application is to vary the Planning Obligations associated with planning applications ref: 87/12345/D and 88/13779/D to allow for the sale of a limited range of both food and non-food goods (currently restricted by the Planning Obligations and Condition 2 of planning application ref: 88/13779/D) over 10.3% of the total sales floor space of Unit 1, Kingsway East Retail Park. The approval of this application would facilitate the creation of a B&M Homestore at Kingsway East Retail Park.
- 6.7 The Retail Statement includes a Retail Assessment and Town Centre Health Check for Dundee City Centre, Hilltown and Albert Street District Centres as well as selected Out of Centre Shopping Destinations. The Retail Assessment seeks to determine whether the introduction of comparison sales floor space at Unit 1 Kingsway East Retail Park would have an adverse impact on other shopping provision within the city.

- 6.8 The purpose of the town centre health checks is to determine the impact of the proposals on the vitality and vibrancy of the District Centres, City Centre and other Out of Centre Shopping Destinations. The health checks carried out by the consultants are limited in content given that all of the health checks were carried out over a two day period on 29 May and 7 June 2013 (a Wednesday and a Friday). Therefore, whilst they conclude that all existing centres checked are in reasonable health this has to be treated with some caution given the duration and period over which the health checks were carried out.
- 6.9 The conclusions drawn by the appointed consultants, state that the level of floor space to be used for comparison retailing is ancillary to the main use of the premises for the sale of bulky household items. However, Members should be aware that while this is the case, the incorporation of the outdoor garden centre into the net sales floor space of the application site consequently makes the 10.3% of the net sales floor space that is to be used for the sale of restricted goods seem less significant than it actually is. In addition the proposed floor plan indicates that the 10.3% of the net sales floor space to be used for the sale of goods that are currently restricted at Kingsway East Retail Park relates to shelf space only. This is indicative that the introduction of restricted goods proposed will take up more than 10.3% of the net sales floor area of the application site when aisle space is factored into the internal layout of the building.
- 6.10 The consultants also argue that the turnover generated by the sale of unrestricted comparison goods within Unit 1 will be so negligible as so to have little to no impact on the vitality and vibrancy of the District Centres, City Centre, other out of centre shopping destinations and standalone food stores. The Supporting Statement highlights the level of trade that will be drawn from the City Centre (£1.2 million per annum), District Centres (£300,000 cumulatively per annum) and out of centre shopping destinations and freestanding food stores (£2.72m cumulatively per annum).
- 6.11 The supporting information also highlights that the proposed B &M Homestore will provide for approximately seventy one jobs. Fifty five of the proposed jobs will be full time with a further 16 part time positions.
- 6.12 Planning Obligations should comply with the following 5 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 existing planning obligations 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

- 1 Planning Obligations 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.
- 2 The Directorate for Planning and Environmental Appeals in their Report of Examination of the Proposed Dundee Local Development Plan responded to requests to relax the range of goods restrictions at Kingsway East Retail Park by stating that a lack of success at Kingsway East Retail Park should not be addressed by relaxing existing restrictions. The Report of Examination did not recommend any changes to the retail strategy or the Policy on the range of goods restrictions at the Retail Parks. Therefore, in order to safeguard the vitality and viability of the City Centre and District Centres it has been acknowledged that there remains a need to restrict the range of goods that can be sold from within the city's retail parks and out of centre shopping destinations. In this instance the planning purpose test is satisfied.

c Relationship

- 1 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 are to restrict the manner in which Unit 1 of Kingsway East Retail Park may be operated. At the time of deciding planning applications ref: 87/12345/D and 88/13799/D, an unrestricted consent, was perceived by the planning authority to be a barrier to planning permission being granted.
- 2 The main aim of the existing planning obligations associated with planning applications ref: 87/12345/D and 88/13799/D is 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.
- 3 The applicants Supporting Statements state that the proposed introduction of a restricted element of comparison retailing at Kingsway East Retail Park

in addition to the existing food store will not impact on the vitality and vibrancy of the City Centre or District Centres. However, while the scale of comparison retailing proposed is not significant compared to the existing provision within the city, the level of trade that the proposed B&M Homestore would draw from the City Centre and District Centres could still have a detrimental impact on the vitality and viability of retailers within the City Centre and District Centres.

- 4 The relaxation of the retailing controls for this unit in Kingsway East Retail Park would lead to strong pressures to agree similar relaxations for other stores in the Kingsway East and Kingsway West Retail Parks and other out of centre shopping destinations. It is therefore inevitable that should the current proposal be supported by the Council such a decision in combination with similar relaxations in Kingsway West Retail Park and other out of centre shopping destinations would divert significant expenditure away from the City Centre and District Centres to the detriment of their vitality and viability. Relaxations have already been sought to the policy on range of goods restrictions through the Local Development Plan Examination and through recent applications to modify similar obligations at both Kingsway West and East Retail Parks.
- 5 The arguments put forward by the Retail Statement and Supporting Statement amongst other things focus on the continued presence of B&M within Dundee City Centre and the creation of additional jobs at Kingsway East Retail Park as justification for support of the proposal.
- 6 Members should note that the Supporting Statement and Retail Statement mention the presence of the City Centre B&M store as justification for support of the proposed modification of the planning obligation. However, the Supporting Planning Statement and Retail Statement only suggest that the City Centre B&M store will remain operational for 5 years if B&M Homestore moves into Unit 1 Kingsway East Retail Park. Therefore, the prospect of the creation of new jobs would be severely curtailed if the City Centre B&M store was to close after this 5 year period. Members should also note that if the existing B&Q store at Kingsway East Retail Park closes it is highly likely that this will result in job losses. Therefore, there is no evidence provided by the applicant that demonstrates that the proposed relaxation of the goods range restrictions at Kingsway East Retail Park will generate any additional new jobs.
- 7 For the avoidance of doubt, while the applicant proposes to modify the existing planning obligation to secure a City Centre branch of B&M for another 5 years, if the proposed relaxation of the goods range restrictions are supported, such an obligation would be outwith the parameters of Section 75A of the Town and Country Planning (Scotland) Act 1997 as amended and is therefore not possible in this instance.
- 8 Members should also be aware that approval of the proposed relaxation of the goods range restrictions does not guarantee that B&M will occupy the application site. In addition, if a retailer other than B&M occupies the application site the proposed protection of the City Centre store will be non-binding allowing B&M to close this branch at anytime.

- 9 No evidence is contained within any of the supporting documentation accompanying this application that demonstrates that the application site has been actively marketed by the applicant or that B&Q intend to vacate Unit 1 at the end of their current tenancy agreement or even the date on when that might occur. In addition, and contrary to the applicants assertions no evidence is contained within the Supporting Planning Statement or Retail Statement which demonstrates that should the application site become vacant it is likely to remain vacant for a prolonged period of time given the current goods restrictions at Kingsway East Retail Park.

d Scale and Kind

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

e Reasonableness

- 1 The Circular requires that the obligation should be reasonable in the particular circumstances of the case.
- 2 A relaxation of the retailing controls in Kingsway East Retail Park would also have to be equally applied to Kingsway West Retail Park and other out of centre shopping destinations. Such developments would undermine the viability 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 due to lower costs and free customer parking.
- 3 The proposed goods range relaxations if allowed across all existing retail parks would significantly undermine the City Centre and District Centres. The draft Scottish Planning Policy endorses the Councils current approach to retailing whereby new retail developments are encouraged to locate in the City Centre and District Centres with the type and range of goods available within retail parks and out of centre retailing destinations restricted. Like the adopted Local Plan and proposed Local Development Plan, the Draft Scottish Planning Policy advocates the use of Planning Obligations to prevent a diversion of expenditure away from the City Centre and District Centres. It should be noted that the issues raised by this application were considered through the recent Examination of the Local Development Plan. The Report of Examination did not support the requested relaxation to the goods ranges at Kingsway East. As part of the conclusion drawn the Reporter stated that "I do not consider that a lack of success at Kingsway East should be addressed by relaxing restrictions."
- 4 An objection has been received on behalf of Asda 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.

- 5 Therefore, in a period when consumer and retailer confidence remains low it is considered that the proposed modifications if applied to all retail parks and out of centre shopping destinations in Dundee would adversely impact on the vitality and vibrancy of the City Centre and District Centres.

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

8 CONCLUSION

- 8.1 The terms of the current Planning Obligations are consistent with the Obligations which have been concluded with many other developers within Kingsway East and Kingsway West Retail Parks. The applicants submitted studies suggest that at this particular time, the City Centre and District Centres as well as out of centre shopping destinations appear to be trading well and currently display 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.
- 8.2 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 Obligations would result in a significant shift in the policy approach to the retail parks. If the change is supported then it would generate significant pressure for similar relaxations at 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 within the city's retail parks and out of centre shopping destinations.
- 8.3 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 restrictions should be applied to commercial centres to control the range of goods to be sold from them. The Draft Scottish Planning Policy endorses the Council's approach to retailing within Dundee.
- 8.4 The Council's current position on the approach to controlling the goods range at the Retail Parks has been fully endorsed through the Examination of the Proposed Local Development Plan which the Committee agreed to adopt at the City Development Committee meeting in October 2013.
- 8.5 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 the proposed modifications to the Planning Obligations associated with planning applications ref: 87/12345/D and 88/13799/D. Therefore, it is recommended that the existing planning Obligations 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 Section 50 Agreement associated with application 87/12345/D.
- 11.2 Section 50 Agreement associated with application 88/13779/D.
- 11.3 Dundee Local Plan 2005.
- 11.4 The Planning etc (Scotland) Act 2006.
- 11.5 Circular 1/2010: Planning Agreements.

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7 November 2013

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