

**REPORT TO: DEVELOPMENTMANAGEMENT COMMITTEE--17 DECEMBER 2012**

**REPORT ON: POWERHOUSE, MILTON OF CRAIGIE RETAIL PARK, MILTON OF CRAIGIEROAD NORTH, DUNDEE – MODIFICATION OF S75 PLANNING OBLIGATION ASSOCIATED WITH PLANNING APPLICATION D14495 TO ALLOW THE SALE OF PET FOOD AND ALL PET RELATED PRODUCTS (REF: 12/00774/MDPO)**

**REPORT BY: DIRECTOR OF CITY DEVELOPMENT**

**REPORT NO: 487-2012**

## **1 PURPOSE OF REPORT**

1.1 To request that Committee determine an application to modify the terms of a Section 75 Agreement (previously known as a Section 50 Agreement) to remove the restriction on food sales to allow for the sale of pet food and all pet related products. Members should note that the current terminology for such an agreement is “a Section 75 obligation” and this report will use the current terminology hereafter.

1.2 Schedule II, the subject of this application is as follows:

“The following categories of goods shall not be sold from any premises on the land:

- a Food (other than for consumption within an in-store café or in a freestanding food unit for consumption on the premises or in take away form).
- b 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).
- c Jewellery, silverware, watches and clocks other than as incidental sales within an electrical retail warehouse.
- d Toys and sports goods.

The floorspace allocated for an electrical retail warehouse on the land shall be limited to a maximum of 1,000m<sup>2</sup> gross and the following range of electrical goods shall not be sold from premises other than an electrical retail warehouse; radio and television sets, video recorders, record players, tape recorders, stereo and hi-fi equipment, computers, musical instruments, gramophone records, audio visual discs and cassettes, cameras, freezers (which may be sold from such electrical warehouse unit) may only be sold elsewhere as built-in appliances as part of integrated kitchen furniture.

In the event that an electrical retail warehouse is established on adjoining land which is the subject of a Section 50 Agreement executed in relation to planning application D12345 then no electrical retail warehouse shall be established on the site of planning application D14495.

No single retail warehouse will be less than 10,000 ft<sup>2</sup> gross floorspace.”

1.3 The application proposes that Schedule II of the Obligation be modified as follows:

“The following categories of goods shall not be sold from any premises on the land:

- a Food (other than for consumption within an in-store café or in a freestanding food unit for consumption on the premises or in take away form).
- b 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).

- c Jewellery, silverware, watches and clocks other than as incidental sales within an electrical retail warehouse.
- d Toys and sports goods.

The floorspace allocated for an electrical retail warehouse on the land shall be limited to a maximum of 1,000m<sup>2</sup> gross and the following range of electrical goods shall not be sold from premises other than an electrical retail warehouse; radio and television sets, video recorders, record players, tape recorders, stereo and hi-fi equipment, computers, musical instruments, gramophone records, audio visual discs and cassettes, cameras, freezers (which may be sold from such electrical warehouse unit) may only be sold elsewhere as built-in appliances as part of integrated kitchen furniture.

In the event that an electrical retail warehouse is established on adjoining land which is the subject of a Section 50 Agreement executed in relation to planning application D12345 then no electrical retail warehouse shall be established on the site of planning application D14495.

No single retail warehouse will be less than 10,000 ft<sup>2</sup> gross floorspace.

The above restrictions do not apply where the items are intended for the use or consumption by animals.”

## 2 RECOMMENDATION

- 2.1 It is recommended that the Committee approve the application on the basis of and for the reasons set out in this report and that the planning obligation is to have effect subject to the modifications specified in the application.

## 3 FINANCIAL IMPLICATIONS

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

## 4 BACKGROUND (PLANNING HISTORY)

- 4.1 The application site is the vacant retail unit adjacent to Wickes, located between Longtown Road and Moffat Road in Dundee. The unit measures 897m<sup>2</sup> and was last occupied by Powerhouse. The site lies approximately 2km to the nearest District Centre and 4km to the east of Dundee City Centre.
- 4.2 Outline planning consent was granted in December 1989 for the erection of restaurant and change of use from vacant industrial building to leisure/retail premises. The permission was granted subject to a Section 75 Agreement.

Schedule II of the agreement relates to the permitted retail use of the permitted retail floorspace:

“The following categories of goods shall not be sold from any premises on the land:

- a Food (other than for consumption within an in-store café or in a freestanding food unit for consumption on the premises or in take away form).
- b 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).
- c Jewellery, silverware, watches and clocks other than as incidental sales within an electrical retail warehouse.
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The floorspace allocated for an electrical retail warehouse on the land shall be limited to a maximum of 1,000m<sup>2</sup> gross and the following range of electrical goods shall not be sold from premises other than an electrical retail warehouse; radio and television sets, video recorders, record players, tape recorders, stereo and hi-fi equipment, computers, musical instruments, gramophone records, audio visual discs and cassettes, cameras, freezers (which may be sold from such electrical warehouse unit) may only be sold elsewhere as built-in appliances as part of integrated kitchen furniture.

In the event that an electrical retail warehouse is established on adjoining land which is the subject of a Section 50 Agreement executed in relation to planning application D12345 then no electrical retail warehouse shall be established on the site of planning application D14495.

No single retail warehouse will be less than 10,000 ft<sup>2</sup> gross floorspace. “

## 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.
- 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, we remain of the view that there are stateable legal arguments that could be advanced to challenge this legislation. If the Committee does not adopt the recommendations of this report, the applicants may seek to appeal to Scottish Ministers. It is therefore considered appropriate that, given the doubts regarding how the courts may interpret or treat the legislation, the Committee also gives its views on the merits of the application without prejudice to any arguments on the legality of the legislation.

## 6 APPLICANTS CASE

### 6.1 Reasons for the Application

The agents seek a minor amendment to the wording of the Agreement to make it explicit that the sale of pet goods is permitted. The proposed amendment to the permitted retail use of the floorspace is required to enable Pets at Home to trade from the site. The intention of this variation is to make it explicit that the sale of pet goods is not precluded by the legal agreement and ensure that the permitted uses and existing operations are consistent.

### 6.2 Justification for the Proposed Variation

#### a The Pets at Home Business Model

As part of a comprehensive retail offer to meet the requirements of pet owners, Pets at Home sells a wide range of pets and pet related products. The categories of goods sold in its retail warehouses include: animals, pet foods, health products, clothing, equipment and toys. A significant number of goods sold by Pets at Home, including live animals, can only realistically be transported by private modes of transport and accordingly, are considered to be “bulky”. The physical characteristics of the goods, combined with a low value and space expansive storage and display requirements, creates operating characteristics for the retailer akin to more traditional out of centre retailers. These characteristics drive the requirement for large format, low value floorspace.

Pets at Home have been trading from Unit 1B at the same retail park for 15 years. It follows that the sale of pet goods and the specific Pets at Home operation is well established at the site. During this time there has been no adverse impact on any defined commercial centres as a direct result of the operation. Pets at Home are an established out of town retailer in Scotland and requires large format units such as the application site in order to viably trade. The relocation is intended to enable the operator to provide an enhanced shopping facility for local residents.

b Assessment of the Proposed Development Against Relevant Planning Policy

As part of the submitted justification the agent's provided information in respect of the proposed development's accordance with national and local planning policies.

The application site is part of an established retail destination which is allocated within the adopted Dundee Local Plan Review 2005 for retail warehousing under Policy 47. The Policy states that the following ranges of goods at Kingsway East Retail Park are restricted:

- i Food and groceries;
- ii Clothing and footwear;
- iii Jewellery, silverware, watches and clocks;
- iv Toys and sports goods; and
- v Electrical goods.

Policy 47 does not restrict the sale of pets or pet related products and so it follows that Pets at Home product range accords with the Development Plan. The restricted ranges only relate to those goods when they are for consumption or use by humans as it is those goods which underpin the vitality and viability of defined retail centres. The restriction on food and groceries for example is clearly imposed to restrict the sale of convenience goods and prevent a food store from trading at site. It has not been imposed to restrict the sale of pet food.

## 7 OBSERVATIONS

7.1 Circular 1/2010: Planning Agreements sets out 5 tests against which any obligation should be assessed and the Council's observations with regard to these tests 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 ensure that this restriction will bind successors in title and therefore satisfies this test.

b Planning Purpose

The Obligation should serve a planning purpose. The Dundee Local Plan Review 2005 contains 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. 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 floorspace which can be used for the display and sale of such goods. Accordingly, planning permissions have been the subject of specific conditions or Section 75 Legal Obligations to enforce such restrictions. It is concluded that the planning purpose test is satisfied.

c Relationship

The Circular requires that the Obligation 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 Obligation is to restrict the manner in which the store may be operated and an unrestricted consent, a planning condition or a Section 75 Obligation to allow no restriction on the type of goods to be sold was perceived by the planning authority to be a barrier to planning permission being granted. The proposed modification substitutes an alternative restriction on the type of goods that can be sold. It has no wider effect and therefore this test is satisfied.

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. The annex to Circular 1/2010 confirms that external factors affecting the development need to be taken into account when judging whether an obligation remains reasonable.

The applicant entered into the obligation in full knowledge of the details and developed a store which operated successfully until the demise of “Powerhouse” in 2003. The premises have lain vacant for a number of years and the owners have now secured a tenant who is a retailer of pets and pet related products. The application has been submitted on the basis that clarification is sought from the applicants that all restrictions only relate to those goods for use or consumption by humans, this will allow them to proceed with leasing the building. The Council considers that clarification on this matter is a reasonable request as the intention of the Agreement was to restrict goods for human consumption.

Having taken into account all the relevant matters, the Council considers that approval of this application would be reasonable and meets this test.

## **8 CONCLUSION**

8.1 It is considered that approval of the proposed modification of the original Section 75 planning obligation applicable to planning permission (D14495) for the erection of restaurant and change of use from vacant industrial building to leisure/retail premises would be reasonable and will result in a development which will comply with the relevant policies in the Dundee Local Plan Review 2005 in respect of retail parks and goods range restrictions.

8.2 It is considered that taking into account all the relevant issues above, the Committee is recommended to approve the application and the Section 75 Obligation shall have effect subject to the modifications specified in the application.

## **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 75 Agreement.
- 11.2 Dundee Local Plan Review 2005.
- 11.3 The Planning etc (Scotland) Act 2006.
- 11.4 Circular 1/2010: Planning Agreements.

Mike Galloway  
Director of City Development

Gregor Hamilton  
Head of Planning

CW/PF/KM

30 November 2012

Dundee City Council  
Dundee House  
Dundee