

## Modification of S50 Agreement Relating to Land at Kingsway East Retail Park to Include an Additional Use Under Schedule II of The Minute of Agreement

### KEY INFORMATION

**Ward** East End

**Address**  
Retail Warehouse  
Milton Of Craigie Retail Park  
Dundee  
DD4 7XE

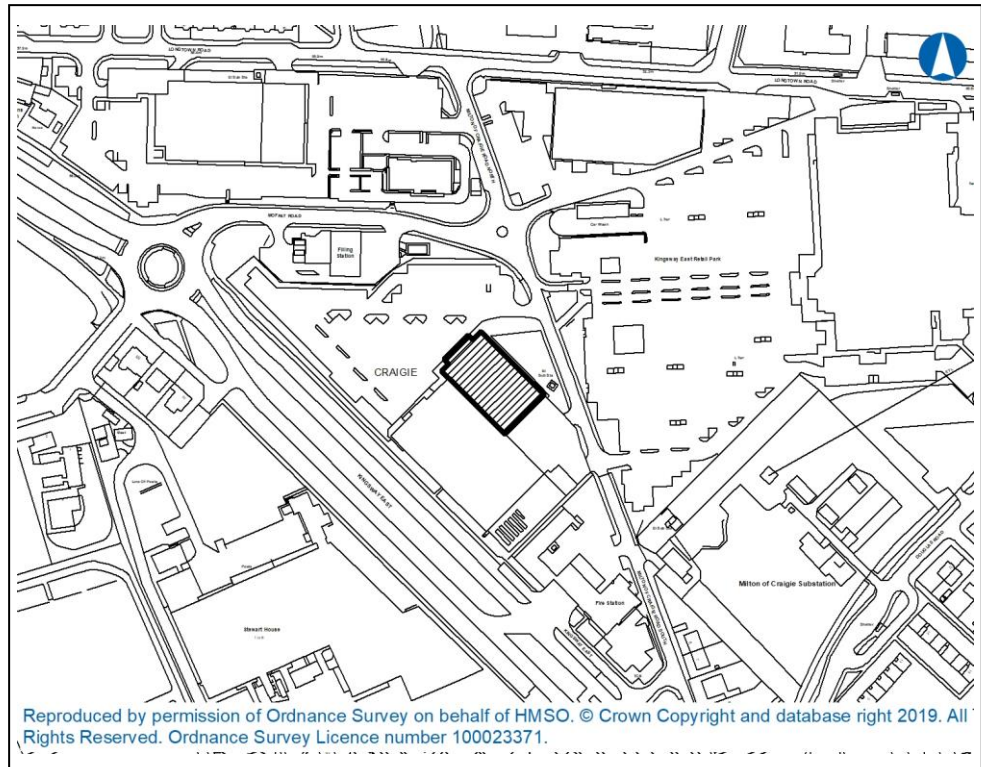
**Applicant**  
New River Retail (Napier) Ltd

**Agent**  
CMS Cameron McKenna

**Registered** 18 Nov 2020

**Report by Head of Planning & Economic Development**

**Contact:** Craig Swankie



### SUMMARY OF REPORT

- The application is for the modification of a Section 50 Agreement to include an additional use under Schedule II of the Minute of Agreement relating to land at Kingsway East Retail Park.
- This is in effect a duplicate of the other Modification application on the agenda, but this relates to a separate planning permission and legal obligation.
- The additional use is for a Health and Fitness Club (Class 11) relating to planning application 20/00118/FULL which was approved at the Planning Committee in September 2020.
- The proposal satisfies the requirements of Circular 3/2012: Planning Obligations and Good Neighbour Agreements in terms of the modification of Planning Obligations.
- In accordance with Dundee City Council's scheme of delegation, this application is to be determined by the Planning Committee as it relates to the modification of a planning obligation.
- More details can be found at: <http://idoxwam.dundee.gov.uk/idoxpa-web/applicationDetails.do?keyVal=QJZWMPGC03900&activeTab=summary>

### RECOMMENDATION

It is recommended that this application be **APPROVED** and the **Section 50 Planning Obligation** shall have effect subject to the modifications specified in the application.

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## 1 DESCRIPTION OF PROPOSAL

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- 1.1 The proposal relates to the outline planning permission for the erection of a retail park at Kingsway East. Planning permission reference D/12345 was granted subject to the completion of a Section 50 Agreement on 9 July 1987.
- 1.2 The Agreement was entered into between (1) Tayside Regional Council (now Dundee City Council) and (2) Kildonan Corporation. The Agreement is dated 11 and 19 May 1988 and recorded in the General Register of Sasines for the County of Angus on 19 May 1988.
- 1.3 The purpose of the Agreement is to restrict the range of goods and the floor space of the retail stores at Kingsway East Retail Park.
- 1.4 The Applicant seeks a modification of the Minute of Agreement to insert an additional use, authorised by planning permission reference 20/00118/FULL, under Schedule II of the Minute of Agreement as follows:
- “(e) In addition to use in accordance with the other Clauses in this Schedule II, the use authorised by planning application 20/00118/FULL (and only this use and without prejudice to the foregoing generality no other use within Class 11 of the Town and County Planning (Use Classes) (Scotland) order 1997) shall be permitted in the unit shown outlined in red on the Existing Site Plan annexed and executed as relative hereto but in no other units on the said land.”
- 1.5 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.
- 1.6 The applicant has submitted the following in support of the application:
- Minute of Agreement;
  - Decision Notice for D/12345; and
  - Planning Statement and Supporting Statement.

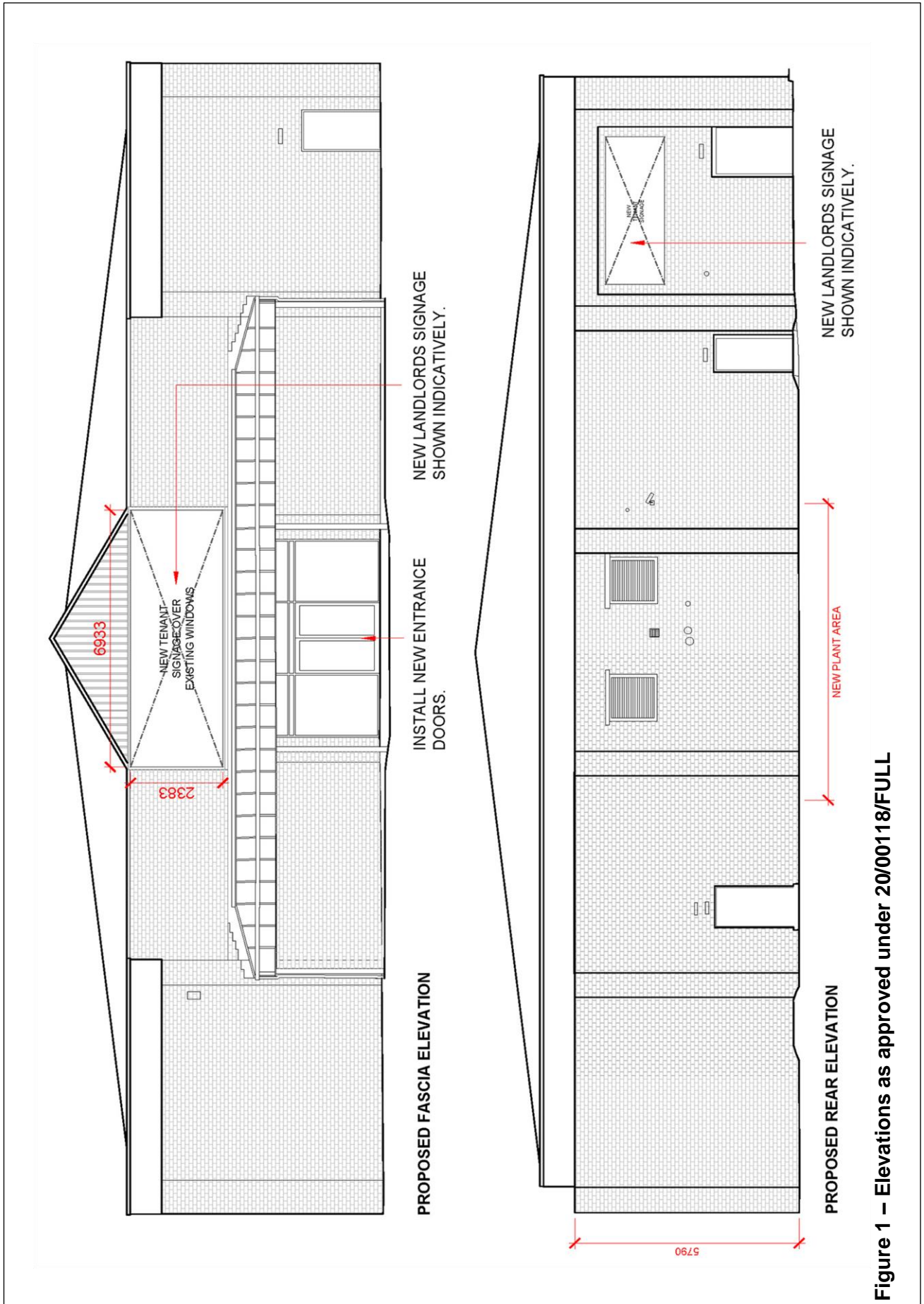


Figure 1 – Elevations as approved under 20/00118/FULL

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## 2 SITE DESCRIPTION

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- 2.1 The application relates to an existing retail unit located within Kingsway East Retail Park, adjacent to the A972 Kingsway East.
- 2.2 The property has a footprint of 1,382m<sup>2</sup>. The main entrance is to the north elevation, with car park beyond which is shared with a neighbouring retail unit to the west. The unit is presently occupied by a Harry Corry store and it has planning permission to allow the change of use to a health and fitness club.
- 2.3 The Kingsway East Retail Park includes a range of outlets, including a DIY store, food and homeware stores such as B & M and Home Bargains, a supermarket and restaurant with drive through outlet. The retail park is located to the immediate east of the A90 Kingsway East. Beyond the retail park, to the north, south and east are residential areas. To the west is vacant ground with planning permission for 71 houses.

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### 3 POLICY BACKGROUND

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3.1 The following plans and policies are considered to be of direct relevance:

**TAYPlan 2016-2036**

Policy 5: Town Centres First

**DUNDEE LOCAL DEVELOPMENT PLAN 2019**

Policy 7: Tourism and Leisure Developments

Policy 54: Safe and Sustainable Transport

Policy 56: Parking

**SCOTTISH PLANNING POLICY, PLANNING ADVICE NOTICES AND CIRCULARS**

Circular 3/2012: Planning Obligations and Good Neighbour Agreements

3.2 There are no other plans, policies and non-statutory statements that are considered to be of direct relevance.

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### 4 SITE HISTORY

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4.1 The application site has been subject of planning applications and applications for advertisement consent in recent years, relating to the site use and operation as a retail outlet.

4.2 Planning permission D/12345 granted outline consent for a retail park with ancillary parking and service areas. The outline planning permission was granted subject to the completion of a Planning Obligation on 19 May 1988.

4.3 Planning permission D/13779 granted planning permission for a retail park with restaurants and ancillary car parking and services. Planning permission was granted subject to the completion of a Planning Obligation on 13 February 1989.

4.4 Planning application (20/00118/FULL) for the change of use from retail (Class 1) to a Health and Fitness Club (Class 11) was approved at Planning Committee in September 2020.

4.5 Planning permission (20/00683/MDPO) for the proposed modification of a Planning Obligation associated with planning application reference D/13779 to permit a Class 11 Use within Kingsway East Retail Park is to go before planning committee.

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### 5 PUBLIC PARTICIPATION

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5.1 This is not a planning application and does not require to be notified to neighbouring properties.

5.2 In accordance with Regulation 5 of the Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010 this Department has notified the parties with an interest in the Planning Obligation identified by the applicant.

5.3 No objections or representations have been received from these interested parties.

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## 6 CONSULTATIONS

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- 6.1 No party has been consulted on the application. This is in accordance the Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010.

## 7 DETERMINING ISSUES

### APPLICANT'S CASE

- 7.1 The proposal relates to outline planning permission D/12345 for a retail park with ancillary car parking and services. Planning permission was granted subject to the completion of a planning obligation. Upon agreement of the planning obligation, permission was issued on 19 May 1988.
- 7.2 The Planning Obligation was entered into between (1) Tayside Regional Council (now Dundee City Council) and (2) Kildonan Corporation. The agreement is dated 11 and 19 May 1988 and was recorded in the General Register of Sasines for the County of Angus on 19 May 1988.
- 7.3 The purpose of the planning obligation is to restrict the range of goods and the floor space of the proposed retail stores at Kingsway East Retail Park as approved by planning application ref: D/12345.
- 7.4 The Applicant seeks a modification of the Minute of Agreement to insert an additional use, authorised by planning application 20/00118/FULL, under Schedule II of the Minute of Agreement as follows:
- “(e) In addition to use in accordance with the other Clauses in this Schedule II, the use authorised by planning application 20/00118/FULL (and only this use and without prejudice to the foregoing generality no other use within Class 11 of the Town and County Planning (Use Classes) (Scotland) order 1997) shall be permitted in the unit shown outlined in red on the Existing Site Plan annexed and executed as relative hereto but in no other units on the said land.”
- 7.5 The supporting documents outline the site's history and relevant legal agreements which control retail floor space and the range of goods which can be sold at Kingsway East Retail Park. Following the approval of planning application 20/00118/FULL, the applicant seeks to add a Clause to the existing legal agreement which would allow a Health and Fitness Club, as approved, to operate within the retail park.
- 7.6 Planning application 20/00188/FULL for a change the use from retail (Class 1) to a Health and Fitness Club was approved at Planning Committee in September 2020. The application was assessed against Policy 7 (Tourism and Leisure Developments) as a major leisure use.
- 7.7 In respect of Policy 7 (Tourism and Leisure Developments), a sequential assessment was undertaken by the applicant which demonstrated that there are no sequentially preferable sites in the City Centre and District Centres or Leisure Parks. In line with Scottish Planning Policy's "Town Centre First Principle", Kingsway East is a commercial centre and a sequentially preferable location in the Local Development Plan after the City Centre and District Centres and the edge of town centre. The proposal would ensure the continued use of a large, highly visible commercial unit in a sequentially preferable location and create a complementary use for the wider site. The proposal is in accordance with the development plan.

## OBSERVATIONS

- 7.8 Proposals to discharge, modify or enter into Planning Obligations should comply with the following five tests in Circular 3/2012: Planning Obligations and Good Neighbour Agreements - necessity, planning purpose, relationship to the development, scale and kind, and reasonableness. The Council's assessment of this application with regard to the tests required by Circular 3/2012 is as follows:

### A - NECESSITY

- 7.9 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

- 7.10 The Obligation should serve a planning purpose. The purpose of the planning obligation 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/12345 to ensure they do not jeopardise the vitality and viability of the City Centre and District Centres.
- 7.11 The proposed modification to insert an additional use, namely a Health and Fitness Club (Class 11) and no other Class 11 Use of the Town and Country Planning (Use Classes) (Scotland) order 1997, ensures the restrictions of the planning obligation remain in place to protect the vitality and viability of the City Centre and District Centres. The proposed change of use is in accordance with the Local Development Plan.
- 7.12 It is considered that the modifications proposed to the obligation would serve a planning purpose and would satisfy this test.

### C – RELATIONSHIP TO THE DEVELOPMENT

- 7.13 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".
- 7.14 The main aim of the goods restrictions imposed by the existing planning obligations associated with Kingsway East 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. The proposed modification inserts a restriction on the use of the commercial unit only and is in accordance with the recently granted planning permission for the change of use of the unit to a health and fitness club. It has no wider effect and therefore this test is satisfied.

### D – SCALE AND KIND

- 7.15 The scale and kind test requires obligations to be proportionate to the scale of the development and to address any objectionable implications of the development itself.
- 7.16 The application seeks a modification to an existing planning obligation to insert an additional use in Schedule II of the planning obligation. This is to ensure that only the use authorised by planning application 20/00118/FULL shall be permitted and no other uses in Class 11 of the

Town and Country Planning (Use Classes) (Scotland) Order 1997 are permitted within the commercial unit or any other units in the Kingsway East Retail Park.

- 7.17 The Use Classes (Scotland) Order confirms Class 11 uses include cinemas, concert halls, bingo halls, casinos, dance halls, discotheques, skating rinks, swimming baths and gymnasiums. Planning application 20/00118/FULL is for a Health and Fitness Club. The proposed modification would ensure that no other Class 11 use could occupy the unit and therefore prejudice the vitality and viability of the City Centre and District Centres.
- 7.18 The proposed modification is related in scale and kind to the development and meets this test.

## **E – REASONABLENESS**

- 7.19 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.
- 7.20 As outlined previously in the report, the purpose of the planning obligation is to restrict the range of goods and the floor space of the proposed retail stores at Kingsway East Retail Park as approved by planning application ref: D/12345 to ensure they do not jeopardise the vitality and viability of the City Centre and District Centres.
- 7.21 The proposed change of use has been assessed under Policy 7 (Tourism and Leisure Developments) as it is a major leisure use. A sequential assessment undertaken by the applicant demonstrates that there are no sequentially preferable sites in the City Centre and District Centres or Leisure Parks for the proposed use.
- 7.22 Separately, an assessment following the sequential town centre first approach as set out in Scottish Planning Policy recognises that Kingsway East, as a commercial centre identified in the Local Development Plan, is a sequentially preferable location after the City Centre and District Centres and the edge of town centre as identified in the Local Development Plan.
- 7.23 As considered under planning application 20/00118/FULL, the proposed use is in a location and of a scale which would not significantly alter the existing pattern of footfall in the area. It would not therefore individually or cumulatively prejudice the vitality or viability of the City Centre or District Centres. The approved planning application 20/00118/FULL fully accorded with the development plan.
- 7.24 The Use Classes (Scotland) Order identifies Class 11 uses to include cinemas, concert halls, bingo halls, casinos, dance halls, discotheques, skating rinks, swimming baths and gymnasiums. Planning permission 20/00118/FULL is for a Health and Fitness Club. The proposed modification would ensure that no other Class 11 use would occupy the unit and therefore prejudice the vitality and viability of the City Centre and District Centres.
- 7.25 The proposed modification is reasonable in the particular circumstances of the case and meets this test.
- 7.26 **It is concluded that the proposed modification complies with the five tests in Circular 3/2012: Planning Obligations and Good Neighbour Agreements.**



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## **8 CONCLUSION**

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- 8.1 It is considered that taking into account all the relevant issues above, the Council's stated aims of maintaining the vitality and viability of the City Centre and District Centres would be served by approval of this application and that the planning obligation should continue to have effect with the modification proposed.

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## **9 RECOMMENDATION**

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- 9.1 It is recommended that this application should be APPROVED and the planning obligation shall have effect subject to the modifications specified in the application.