

Variation of Planning Obligation to Enable Sub Division of Retail Unit B14 Within The Kingsway West Retail Park

KEY INFORMATION

Ward Lochee

Address

Unit B14
Kingsway West Retail Park

Applicant

Kingsway West S.a.r.l
2 Rue Albert Borschette
L-1246
Luxembourg

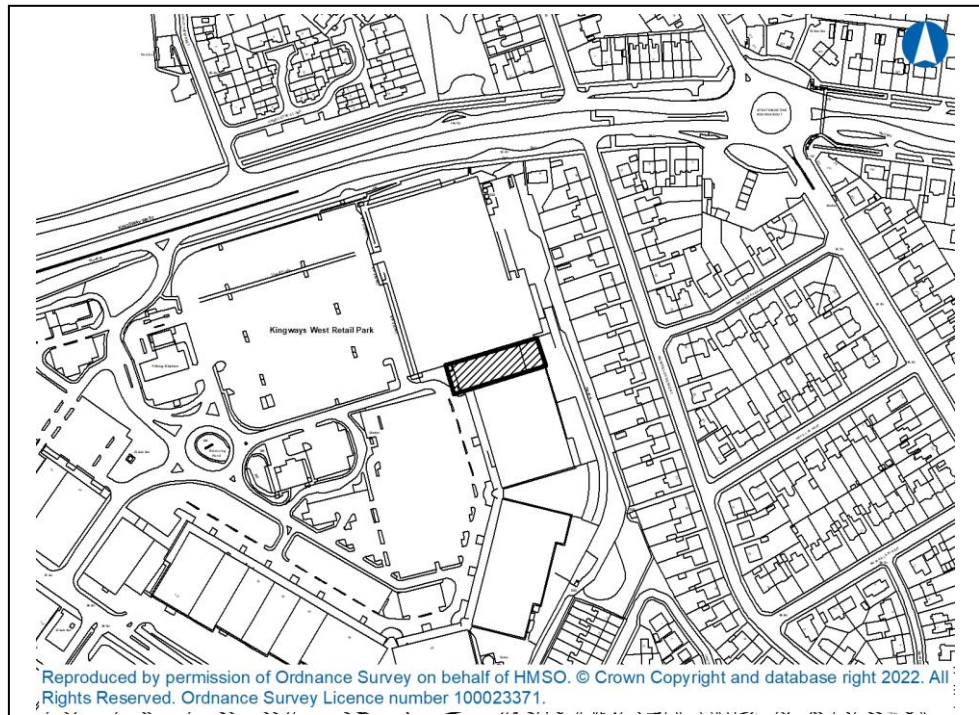
Agent

Shepherd and Wedderburn

Registered 25 May 2022

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

Contact: Claire Myles



SUMMARY OF REPORT

- This application seeks to vary a planning obligation to enable the sub-division of Unit B14 in the Kingsway West Retail Park, to form two small units with floor areas of 465m².
- The application relates to a clause within a Section 75 Agreement (Planning Obligation) between Dundee City Council and Ravenside Investments Limited and others relating to planning permission 99/24198/D for the development of this part of the Kingsway West Retail Park. The clause prevents the sub-division of units.
- It is considered that the planning obligation should remain in place without variation in order to continue to protect the City Centre and District Centres from the potential diversion of expenditure away from these centres with potentially damaging effects on their footfall, vitality and viability. This conclusion satisfies the policy tests in Scottish Government Circular 3/2012 (updated 2020): Planning Obligations and Good Neighbour Agreements.
- In accordance with Dundee City Council's scheme of delegation, this application is to be determined by the Planning Committee as it relates to a planning obligation.
- More details can be found at: <https://idoxwam.dundee.gov.uk/idoxpa-web/applicationDetails.do?keyVal=RCHAQ3GC0CU00&activeTab=summary>

RECOMMENDATION

It is recommended that this application should be **REFUSED** and that **Clause (d)** in Part 3 of the schedule of the planning obligation shall remain in place without variation.

1 DESCRIPTION OF PROPOSAL

- 1.1 The Section 75 Agreement (planning obligation) between Dundee City Council and Ravenside Investments Limited and others dated 19 and 21 August 2002 was recorded in the General Register of Sasines applicable to the County of Angus on 18 September 2002.
- 1.2 The planning obligation is in respect of planning permission 99/24198/D for an extension to the existing Kingsway West Retail Park to include 14 additional retail warehouse units, a fast food outlet and associated infrastructure.
- 1.3 The proposed variation relates only to Unit B14. It is the applicant's intention to sub-divide the current 943.94m² of retail floorspace within Unit B14 into 2 separate retail units, each with a floor area of approximately 465m². The current restriction in the planning obligation prohibits the size of any single retail unit to not less than 929m² gross internal floor space. This means the unit cannot be subdivided unless and until the planning obligation is modified.
- 1.4 The applicant proposes a variation of Clause (d) in Part 3 of the Schedule which reads:
- "No single retail warehouse unit (whether following its original construction or following subsequent sub-division) will be less than 929m² gross internal floor space, subject to a tolerance margin of plus or minus three per centum..."*
- 1.5 The applicant proposes the insertion of the following words at the beginning of Clause (d):
- "With the exception of the Unit 14 Subjects, once the Unit 14 planning permission is implemented..."*
- 1.6 The applicant has submitted the following in support of the application:
- Planning Statement – letter form;
 - Dundee Retail Study 2015;
 - Minute of Agreement;
 - Paper Apart – Statement; and
 - Relevant Title Sheets and Plans.

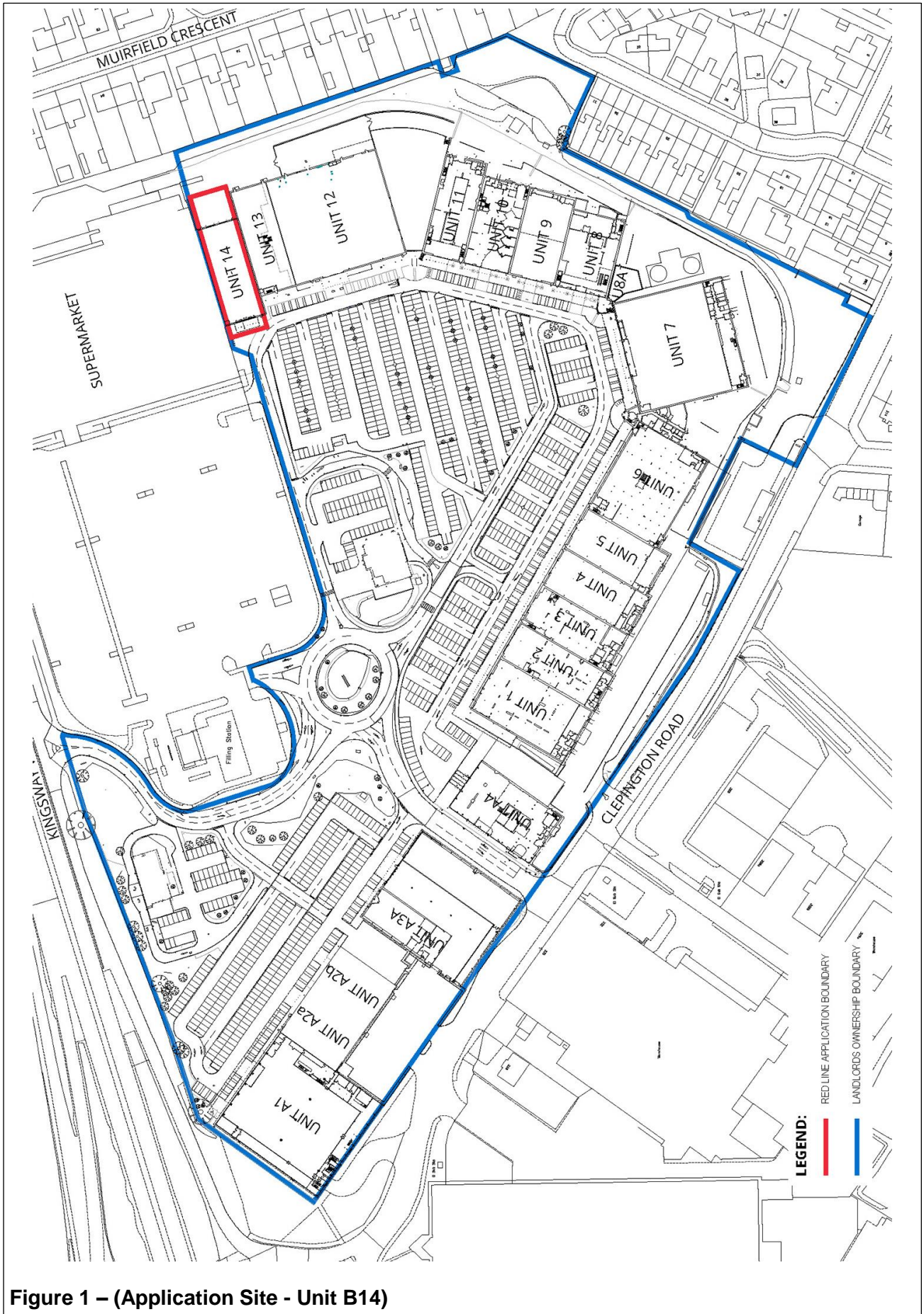


Figure 1 – (Application Site - Unit B14)

2 SITE DESCRIPTION

- 2.1 The application site is Unit B14 located within Kingsway West Retail Park. The unit is located adjacent to Tesco Extra on the east side of the retail park. It has a floorspace of 943.94m². The applicant has advised that the unit was last occupied by a retailer in 2016 and that it has been used by a charity since 2019.
- 2.2 To the north of the site is the A90 Kingsway West; to the west is the retail park car park; to the south are commercial units within the retail park and to the east beyond the rear service area of the unit are the rear gardens of residential properties.



Figure 2 – (Photo of Unit)

3 POLICY BACKGROUND

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

TAYPlan 2016-2036

The application raises no issues of relevance.

DUNDEE LOCAL DEVELOPMENT PLAN 2019

Policy 24: Goods Range and Unit Size Restrictions.

SCOTTISH PLANNING POLICY, PLANNING ADVICE NOTICES AND CIRCULARS

Scottish Planning Policy

Circular 3/2012 (updated 2020): 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.

4 SITE HISTORY

- 4.1 22/00140/FULL – planning permission approved for external alterations to Unit B14 which involved the formation of two entrance doors on front elevation and two servicing accesses on the rear elevation.
- 4.2 99/24198/D – planning permission for an extension to the existing Kingsway West Retail Park to include 14 additional retail warehouse units, a fast food outlet and associated infrastructure approved subject to conditions and a Section 75 legal agreement.

5 PUBLIC PARTICIPATION

- 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 the Council has notified the parties with an interest in the planning obligation identified by the applicant. No objections or representations have been received from these interested parties.

6 CONSULTATIONS

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

7 DETERMINING ISSUES

Observations

7.1 The current restriction in the Planning Obligation, in respect of planning permission 99/24198/D, prohibits the size of any single retail unit to not less than 929m² gross internal floor space.

7.2 The is set out in clause (d) in Part 3 of the Schedule which reads:

“No single retail warehouse unit (whether following its original construction or following subsequent sub-division) will be less than 929m² gross internal floor space, subject to a tolerance margin of plus or minus three per centum...”

7.3 The applicant proposes the insertion of the following words at the beginning of clause (d):

“With the exception of the Unit 14 Subjects, once the Unit 14 planning permission is implemented...”

Background to the Planning Obligation

7.4 The purpose of the restriction is to protect the City Centre and District Centres as part of the Council’s long standing retail planning strategy.

7.5 This approach has been carried through land use policies in various Development Plans and the adopted Local Development Plan 2019 continues this policy approach through Policy 24: Goods Range and Unit Size Restrictions. This current policy recognises that without controls and restrictions on the commercial centres, there could be a damaging diversion of expenditure from retailers within existing shopping centres, specifically that creating small units within a retail park environment could draw high street retailers and other businesses away from the City Centre and District Centres with damaging effects on their footfall, vitality and viability.

Circular 3/2012 Planning Obligations and Good Neighbour Agreements (Revised November 2020)

7.6 The Scottish Government Circular 3/2012 Planning Obligations and Good Neighbour Agreements (Revised November 2020) states at paragraph 75 that any application for modification or discharge of a planning obligation should be considered against the policy tests set out in paragraphs 15-25 of the circular. The policy tests are as follows:

- necessary to make the proposed development acceptable in planning terms;
- serve a planning purpose and, where it is possible to identify infrastructure provision requirements in advance, should relate to development plans;
- relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area;
- fairly and reasonably relate in scale and kind to the proposed development; and
- be reasonable in all other respects.

7.7 The assessment of this application with regard to the policy tests required by Circular 3/2012 is as follows:

A – NECESSITY AND B – PLANNING PURPOSE

- 7.8 The application seeks to sub-divide a retail unit at Kingsway West Retail Park. This is the city's largest retail park with a wide range of mainly bulky household goods operators. It is very accessible to residents and others by its location on the Kingsway trunk road.
- 7.9 In order to ensure the retail park does not jeopardise the vitality and viability of the City Centre and District Centres it is subject to goods range restrictions set out Policy 24 and Appendix 6 with the following being restricted goods at Kingsway West – food and groceries; clothing and footwear; jewellery, silverware, watches and clocks; toys and sports goods and electrical goods ie these are goods ranges the sale of which is restricted within the retail park.
- 7.10 In commercial centres, which includes Kingsway West Retail Park, the units are restricted in size through Policy 24 and Appendix 6 to ensure no unit with a gross floorspace of less than 1,000m² shall be created through the development of new units; the subdivision of a unit; or the occupation by more than one retailer. This provides a consistent and transparent approach for all the commercial centres in light of the various and historic planning obligations in place.
- 7.11 As noted in paragraph 7.42 of the Local Development Plan, creating small units within a retail park environment could draw high street retailers and other businesses away from the City Centre and District Centres with damaging effects on their footfall, vitality and viability. Paragraph 7.43 notes that the aim of these controls is to avoid a potentially damaging diversion of expenditure away from these centres and to ensure that they continue to provide a valuable and accessible service for shoppers.
- 7.12 Subdivision of a retail unit is classed as permitted development, not requiring planning permission. Within commercial centres, including the Kingsway West Retail Park, control is exercised through the Planning Obligation and the Local Development Plan Policy 24 and Appendix 6 to prevent the damaging impacts of subdivision.
- 7.13 The Circular states that, in relation to the planning purpose test, planning authorities should satisfy themselves that an obligation is related to the use and development of land. This judgement should be rooted primarily in the development plan.
- 7.14 The Local Development Plan recognises that creating small units within a retail park environment could draw high street retailers and other businesses away from the City Centre and District Centres with the damaging effects on their footfall, vitality and viability. This is controlled through Policy 24 and Appendix 6 of the adopted Local Development Plan which is in accordance with Scottish Planning Policy's "town centres first approach".
- 7.15 There is a necessity and planning purpose for retaining clause (d) without any modification to ensure there would be no damaging effect on the footfall, vitality and viability of the City Centre and District Centres. As outlined above, the approach aligns with the adopted Local Development Plan.

- 7.16 There is a necessity and planning purpose for retaining the planning obligation without any variation.

C – RELATIONSHIP TO THE DEVELOPMENT

- 7.17 The Circular requires that Planning 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".
- 7.18 The aim of the clause in the planning obligation is to avoid a potential damaging diversion of expenditure away from the City Centre and District Centres to ensure they provide a valuable and accessible service and support for the local population and lifetime communities. This remains the case.
- 7.19 Creating small units within a retail park environment could draw high street retailers and other businesses away from the City Centre and District Centres with damaging effects on their footfall, vitality and viability.
- 7.20 The City Centre and District Centres have been impacted by online retailing and out of centre retailing for some time, a fact emphasised by the recent pandemic. It is vital that the recovery of the City Centre and District Centres is supported. The purpose of the Local Development Plan policy approach to protect these centres is perhaps more important than ever as the Council and its partners support the recovery of these centres from the damaging effects of the pandemic. The role and function of commercial centres therefore has to continue to be controlled by the application of restrictions on the range of goods that can be sold and the size of the units.
- 7.21 The planning obligation relates directly to the proposed development and as such the proposed variation is not acceptable.

D – SCALE AND KIND

- 7.22 The Circular requires that Planning Obligations must be related in scale and kind to the proposed development.
- 7.23 Creating small units within a retail park environment could draw high street retailers and other businesses away from the City Centre and District Centres with the damaging effects on their footfall, vitality and viability.
- 7.24 In commercial centres, which includes Kingsway West Retail Park, Local Development Plan Policy 24 restricts the size of retail units to ensure no unit with a gross floorspace of less than 1,000m² shall be created through the development of new units; the subdivision of a unit; or the occupation by more than one retailer.
- 7.25 Subdivision of a retail unit is classed as permitted development, not requiring planning permission. Therefore, this potentially damaging effect has to be controlled by other planning mechanisms. In this case, through the planning obligation and the Local Development Plan Policy 24 and Appendix 6.
- 7.26 The planning obligation is related in scale and kind to the proposed development.
- 7.27 The proposed variation is not acceptable.

E – REASONABLENESS

- 7.28 The Circular requires that the obligation should be reasonable in the particular circumstances of the case. The annex to Circular 3/2012 confirms that external factors affecting the development need to be considered when judging whether an obligation remains reasonable.
- 7.29 The Applicant's Case states that the unit was vacated by the previous commercial tenant in 2016, when that retailer ceased to trade, and that a charity has occupied the unit since 2019. It has been marketed during the subsequent six years for a commercial tenant, without success. It states that there is a complete lack of market interest in the unit as it stands (in its current size) and there is a need to ensure that the unit does not remain commercially unviable. Conversely, there is market interest in the unit were it to be sub-divided.
- 7.30 The purpose of the planning obligation is to protect the City Centre and District Centres. The proposed variation is not acceptable as the creation of small units within a retail park environment could draw high street retailers and other businesses away from the City Centre and District Centres with the damaging effects on their footfall, vitality and viability.
- 7.31 This restriction in the planning obligation is strengthened through the local development plan which aligns with the town centre first principle advocated by Scottish Planning Policy. Further the Scottish Government's draft fourth National Planning Framework (NPF4) reports that as a result of long term change, exacerbated by COVID-19, our city, town and local centres are facing significant and serious economic, environmental and societal challenges.
- 7.32 Draft NPF4 states, the planning system should help these centres adapt and be vibrant, healthier, creative, enterprising, accessible and resilient places for people to live, learn, work, enjoy and visit and should identify opportunities to enhance town centres.
- 7.33 The planning obligation continues to be reasonable in light of external factors and circumstances and as outlined previously in the report serves a planning purpose.
- 7.34 It is concluded that clause (d) in Part 3 of the Schedule should remain without modification. This conclusion satisfies the policy tests in Circular 3/2012: Planning Obligations and Good Neighbour Agreements.

Applicant's Case

- 7.35 The applicant has submitted a supporting statement which sets out their case for requesting the variation to the planning obligation. This case is summarised in the following paragraphs.
- 7.36 The applicant advises that there has been a lack of commercial interest in Unit 14 at Kingsway West Retail Park for 6 years, however, there is commercial interest from two bulky goods operators should the unit be subdivided into two smaller units. The current restriction in the Planning Obligation prohibiting the size of any single retail unit to not less than 929m² gross internal floor space means the unit cannot be subdivided unless and until the Planning Obligation is modified.
- 7.37 The sub-division of a retail unit will normally be classed as permitted development, not requiring planning permission. However, in the case of Kingsway West Retail Park, the current Section 75 Agreement (Planning Obligation) sets a minimum unit size, within the park, of 929m² (GIA). A variation of that planning obligation will therefore be required.
- 7.38 A planning obligation must meet the tests set out in Circular 3/2012 and should only be used where they meet these tests. Included are necessity, purpose and reasonableness tests ie a

planning obligation must be necessary to make the proposed development acceptable in planning terms, serve a planning purpose and be reasonable.

- 7.39 Policy 24: Goods Range and Unit Size Restrictions and Appendix 6 of the Dundee Local Development Plan (LDP) set out a minimum unit size restriction for Kingsway West Retail Park. The applicant's case is that this restriction, as set out in policy, is not justified and therefore the restriction in the Planning Obligation does not meet the necessity, purpose and reasonableness tests.
- 7.40 The Town Centre First policies set out in the LDP, state that the Dundee Retail Study 2015 was commissioned to inform the preparation of the LDP. Policy 24 goes further by stating the range of goods restrictions were reviewed in the Retail Study which concluded that the restrictions across commercial centres (including Kingsway West Retail Park) should be maintained (and not diluted). Policy 24 refers to Appendix 6 of the LDP which contains the goods range restrictions as well as the minimum unit size restriction (1,000m²). The applicant notes that this restriction does not reflect the restriction in the Planning Obligation which is a minimum unit size restriction of 929m².
- 7.41 The applicant questions where the origin of the minimum per unit size restriction in the LDP came from and how the Council justifies such a restriction. The Retail Study confirms that a review of existing restrictions on the range of goods under Policy 23 (goods range restrictions in the Commercial Centres) of the previous Dundee Local Development Plan forms part of the Retail Study. Policy 23 largely reflects the wording of Policy 24 of the LDP. It does not contain any restriction on unit sizes at Kingsway West Retail Park. The outcome of the Retail Study was that Policy 23 should remain and no amendments were recommended. The Retail Study did not suggest a minimum unit size restriction. Despite the conclusions of the Retail Study, which the Council uses to justify its Town Centre First policies in the LDP, the minimum unit size restriction has appeared as part of Policy 24 when it did not exist in the previous policy. There appears to be no planning justification for a restriction on subdivision of Unit 14 where the categories of goods that are proposed to be sold remain within the permitted categories.
- 7.42 The retail policy framework has existed in a similar form for nearly two decades in previous local development plans and local plans. The origin of the policy is therefore set in an entirely different era of retail environment. The 2019 iteration of the policy (which itself has its genesis around 2016/17 when the preparation of the current Local Development Plan was started) arises from an era before (1) the explosion of online shopping, (2) retail closures and downsizing, and (3) the pandemic. Combined, these factors have probably changed the retail environment forever. The current period is probably the era of the biggest shift in the retail environment since the 1980s/1990s. However, the policy framework is derived from the conditions and policy objectives of the late 20th Century.
- 7.43 The applicant considers that within this context, there are a range of factors which are of sufficient materiality for the Council to consider setting aside the current restrictions on minimum unit size, specifically in relation to Unit B14.
- 7.44 The applicant considers the key material considerations to be:
- the unit was vacated by the previous commercial tenant in 2016, when that retailer ceased to trade;
 - the unit has been marketed during the subsequent six years for a commercial tenant, without success;
 - there is a complete lack of market interest in the unit as it stands (in its current size);

- there is a need to ensure that the unit does not remain commercially unviable;
- conversely, there is market interest in the unit were it to be sub-divided;
- specifically, two retailers are signed-up and ready to occupy each of the units were the existing unit to be split in 2; and
- the occupation of the unit by retailers would generate employment, enhance economic activity, and protect the role of the Commercial Centre (as defined in policy).

7.45 The retailers which are signed-up to occupy these units should sub-division be allowed are Archers Sleep Centre and Bensons for Beds.

7.46 Both are bulky goods operators entirely consistent with the current retail policy for Kingsway West. Both are keen to occupy the units and to open for trading as soon as possible. This represents real market interest and provides an opportunity for a unit for which there has been no commercial interest for almost six years to be brought back into beneficial use, bringing both economic and employment advantages.

7.47 The applicant notes that these retailers only locate in bulky goods retail parks. They are not retailers which locate within conventional town centres and there is therefore no adverse impact on the town centre. This concept is recognised in the Local Development Plan where it states commercial centres have become an important focus for shopping and provide a distinction from town centres due to their range of uses and physical structures.

7.48 Finally, the draft Minute of Variation applies only to Unit B14. No variation is being sought for the park as a whole.

7.49 For the reasons set out above, it is the applicant's view that the Planning Obligation should be varied as requested.

RESPONSE TO APPLICANT'S CASE

7.50 This section responds to specific matters raised by the applicant in their supporting information.

7.51 **No justification for planning policy restriction on unit size within Commercial Centres:** the supporting information, states "Despite the conclusions of the Retail Study, which the Council uses to justify its Town Centre First policies in the LDP, the minimum unit size restriction has appeared as part of Policy 24 when it did not exist in the previous policy."

7.52 **RESPONSE:** the local development plan recognises that the commercial centres in the City are distinct from town centres due to their range of uses in large warehouses which provide a complementary role as part of the shopping hierarchy within the city. The minimum size restriction was introduced to protect the City Centre and District Centres and to provide transparency and clarity to ensure a consistent planning approach is taken towards all four commercial centres in the City. The Retail Study helped to inform the preparation of the Local Development Plan only together with a number of other documents.

7.53 The restrictions set out in Policy 24 and Appendix 6 of the Local Development Plan were consulted on as part of the plan making process. Further, the Report of Examination (October 2018) of the Local Development Plan did not recommend any modifications to the Town Centres First and Retailing section which outlined the approach on the restrictions on goods range restrictions and unit sizes in commercial centres.

- 7.54 **No need to control unit size where use meets goods range restrictions:** the supporting information states that “there appears to be no planning justification for a restriction on subdivision of Unit B14 where the categories of goods that are proposed to be sold remain within the permitted categories.”
- 7.55 **RESPONSE:** it is noted that the proposal is consistent with the provisions of the relevant planning obligation in relation to the permitted range of goods. However, the restrictions set out in the Local Development Plan are two fold and restrict both the range of goods for sale in the commercial centres and restrict the minimum unit size in all the four commercial centres. The aim of these controls is noted in paragraphs 7.42 and 7.43 of the Local Development Plan as being in order to avoid a potentially damaging diversion of expenditure away from these centres and to ensure that they continue to provide a valuable and accessible service for shoppers. Smaller units are more likely to compete with the size of units traditionally found in town centres. The effect of relaxing either of these controls could result in potentially damaging diversion of expenditure away from the city centre and town centre.
- 7.56 **Proposed occupiers are bulky goods operators so no impact on City Centre or District Centres:** the supporting information, confirms the retailers which are signed-up to occupy these units are Archers Sleep Centre and Bensons for Beds. It notes these are bulky goods operators entirely consistent with the current retail policy for Kingsway West. It states that these retailers only locate on bulky goods retail parks. They are not retailers which locate within conventional town centres and there is therefore no adverse impact on the town centre. This concept, it states, is recognised in the Local Development Plan where it states commercial centres have become an important focus for shopping and provide a distinction from town centres due to their range of uses and physical structures.
- 7.57 Unit B14 has an existing GIA of 943.9m². If subdivided, the two units will each be c465m². The supporting information reports that one of the proposed occupants would require the installation of a mezzanine floor.
- 7.58 **RESPONSE:** commercial centres provide a distinction from town centres due to their range of uses and physical structure characterised by larger warehouse style units. The proposal to create two smaller units would not be in keeping with this distinct character. The introduction of a mezzanine floor would not meet the minimum size requirements of the planning obligation. The issue is the sub-division of a large warehouse style unit into two smaller units which is more likely to compete with the size of units traditionally found in town centres.
- 7.59 There is no supporting information presented to set out why a bulky goods operator would be seeking a smaller unit in the retail park. Importantly, if a smaller unit is required, the applicant has failed to demonstrate why the business cannot be accommodated in the many vacant smaller units to be found in the City Centre and District Centres.
- 7.60 The supporting information highlights that the proposed variation applies only to Unit B14. However, if this application were approved, this would set a damaging precedent which would have a significant cumulative detrimental effect on the City Centre and District Centres.
- 7.61 The Planning (Scotland) Act 2019 confirms that the purpose of planning is “to manage the development and use of land in the long term public interest”. In this instance, the application would serve the applicant’s short-term commercial operations only, not the long-term public interest. The planning obligation and the local development plan policies manage this in order to protect the City Centre and District Centres as part of the Council’s citywide retailing strategy which aligns with national planning policy.

- 7.62 The supporting information has been fully considered and it is recommended that the planning obligation should remain in place without modification in order to continue to protect the City Centre and District Centres.

8 CONCLUSION

- 8.1 It is considered that the planning obligation should remain in place without variation in order to continue to protect the City Centre and District Centres. Relaxing this control could result in potentially damaging diversion of expenditure away from these centres. This conclusion satisfies the policy tests in Circular 3/2012: Planning Obligations and Good Neighbour Agreements.

9 RECOMMENDATION

- 9.1 It is recommended that planning permission should be REFUSED and that Clause (d) in Part 3 of the Schedule of the Planning Obligation shall remain in place without variation.