

# Development Management Sub Committee

Wednesday 26 January 2022

**Application for Planning Obligation 21/05744/OBL  
at land 143 metres southeast of 94, Ocean Drive,  
Edinburgh.**

**Application under S75A for the modification of a planning  
obligation relating to the land 143 metres south-east of 94  
Ocean Drive.**

**Item number**

**Report number**

**Wards**

00 - No Ward Number

## Summary

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The requested modification to the 19/02778/FUL legal agreement is acceptable and it is recommended that the proposed discharge relating to the Ocean Drive Eastwards Extension is agreed.

## Links

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[Policies and guidance for  
this application](#)

LDPP, LDEL01, LTRA07, LTRA08, NSG, SGDC,  
SPP,

# Report

## **Application for Planning Obligation 21/05744/OBL at land 143 metres southeast of 94, Ocean Drive, Edinburgh. Application under S75A for the modification of a planning obligation relating to the land 143 metres south-east of 94 Ocean Drive.**

### **Recommendations**

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1.1 It is recommended that this application be accepted and the agreement be modified

### **Background**

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#### **2.1 Site description**

The application relates to a site of 1.01 hectares which is located on an area of land between Albert Dock to the north and Victoria Dock to the south with Ocean Drive forming the southern boundary. The site is currently vacant brownfield land. The development approved at the site is for 338 homes with 71 car parking spaces, 14 motorcycle spaces and 708 bicycle spaces. There will be two car club spaces. The site opposite (Waterfront Plaza) has permission for a residential development which is currently under construction. The Ocean Point office development and Ocean Terminal are located to the west.

#### **2.2 Site History**

3 November 2020 - Planning permission was granted for a residential development of 338 flats over 4 apartment buildings with heights of 10 storeys (Building A), 14 storeys (Building B), 12 storeys (Building C) and 10 storeys (Building D) with two commercial units (Class 1,2,3 and 4), car parking and associated landscaping (as amended) (application reference:19/02778/FUL) . The following were secured by a s75 legal agreement:

##### Education

The site falls within the Leith Trinity Contribution Zone and the following contributions are required to help mitigate the impact of new residential development in Leith Waterfront:

- £622,002 infrastructure contribution (index linked)
- £36,686 land contribution (no indexation)

### Healthcare

The site is located within the Leith Waterfront Healthcare Contribution Zone which requires a contribution of £945 per residential unit.

This equates to a contribution of £319,410 (index linked).

### Transport

The site is located within the Tram Contribution Zone.

A total contribution of £555,297 is required (index linked). This covers both the residential and commercial uses.

A contribution of £639,568 (index linked) is also required for transport actions in the LDP Action Programme:

- Water of Leith Cycle Route (Commercial Street to Warriston)
- Victoria Quay to Water of Leith Cycle Route
- Ocean Drive Eastwards Extension.

### Affordable Housing

Affordable Housing will account for 25% of the new homes and will be provided on site.

## **History of nearby site at Ocean Drive (distillery)**

26 September 2019 - Planning permission was granted with a tied Section 75 legal agreement for a proposed distillery (sui generis) and ancillary uses, including visitor experience/tasting area and shop, office and restaurant, bar and use of the external yard for distillery related servicing and storage (application reference: 17/04428/FUL)

29 September 2020 - Application refused to modify 75 agreement seeking to remove transport action contributions and corresponding text of planning consent 17/04428/FUL (application reference: 20/02591/OBL)

11 May 2021 - Appeal on the OBL refusal was allowed. The Reporter stated that the s75 transport contributions set out in the s75 legal agreement did not meet the tests of Circular 3/2012. In addition, the Reporter concluded that the Council's unadopted supplementary guidance did not provide a clear basis for the retention of the planning obligation (appeal reference: POA-230-2010).

## **Main report**

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### **3.1 Description of the Proposal**

The proposal is for the existing planning obligation agreement attached to planning permission 19/02778/FUL to be modified to remove the requirement for financial contributions for Transport actions set out in the Local Development Plan Action program. This relates to the Ocean Drive Eastwards Extension and equates to £593,528.

The Transport contribution is set out in the s75 legal agreement as 'one thousand, eight hundred and ninety-two pounds and twenty one pence sterling indexed per residential unit (£1892.21).' The obligation seeks to reduce this to £136.21 per unit by removing the Ocean Drive Eastwards Extension contribution (£593,528), and retaining the two transport actions for cycle route provision/ upgrade to Water of Leith (£29,744) and to Victoria Quay (£16,296).

A supporting statement has been submitted with the application; this concludes that the Ocean Drive Eastwards extension transport contribution is not necessary, bears no relationship to the proposed development, does not serve a planning purpose and will result in excessive contributions towards the cost of infrastructure.

#### Scheme one:

Initially the applicant sought to remove the planning obligation for cycling infrastructure for the Water of Leith (Commercial Street to Warriston) and, West end of Victoria Quay building to Water of Leith Cycle Route (via citadel) in addition to the Ocean Drive Eastwards extension. Through discussion, the applicant has agreed that the cycling infrastructure parts the original legal agreement should remain in place.

### **3.2 Determining Issues**

Section 75A(1)(a) of the Town and Country Planning (Scotland) Act 1997 states - A planning obligation may not be modified or discharged except, by agreement, between the planning authority and a person against whom that obligation is enforceable.

Section 25 of the Town and Country Planning (Scotland) Act 1997 requires that planning decisions, including the modification or discharge of a section75 agreement, be made in accordance with the development plan, unless material considerations indicate otherwise.

In determining such an application for the modification or discharge of a planning obligation, the specific provision should be considered against the five policy tests set out in Planning Circular 3/2012. These tests relate to: necessity, planning purpose, relationship to the proposed development, relationship to scale and kind and reasonableness

### **3.3 Assessment**

To address these determining issues, the Committee needs to consider whether:

- (a) the discharge of the obligation, as proposed, is considered to be acceptable and
- (b) financial implications are acceptable.

a) The Discharge of the Obligation

**Edinburgh Local Development Plan**

This application has to be assessed in relation to current policies within the Edinburgh Local Development Plan (LDP).

LDP policy Del 1 (Developer contributions and infrastructure delivery) requires development to contribute to the specified infrastructure provision where relevant and necessary to mitigate any negative additional impact (either on an individual or cumulative basis) and where commensurate to the scale of the proposed development. In order to provide further detail on the approach to implementation of this policy and to provide the basis for future action programmes the policy states that Supplementary Guidance will be prepared to provide guidance on a number of matters including the required infrastructure in relation to specific sites and/or areas.

LDP policy Tra 7 (Public transport proposals and safeguards) seeks to protect safeguarded transport routes which includes the cycle / footpath to the north of this site and the proposed tram along the southern boundary of the site. The approved planning application proposal included the extension of the boardwalk; this was designed to enable links with the adjacent site should a development proposal come forward in the future. Financial contributions were sought and secured for transport infrastructure for the tram.

LDP policy Tra 8 (Transport infrastructure) states that development proposals relating to major housing or other development sites, and which would generate a significant amount of traffic, shall demonstrate through an appropriate transport assessment and proposed mitigation, and how this relates to the provision of transport infrastructure. The approach to the delivery of the required transport infrastructure is set out in Policy Del 1 (Developer Contributions and Infrastructure Delivery), which states that further detail will be provided by Supplementary Guidance which will be prepared.

The principle of securing appropriate contributions towards the improvement of transport infrastructure is consistent with Local Development Plan policy where necessary and relevant.

**Other material considerations**

The following are material considerations in the determination of this application:

The Local Development Plan Action Programme (December 2021), The Finalised Supplementary Guidance on Developer Contributions and Infrastructure Delivery (August 2018), the recent appeal decision on the distillery site at Ocean Drive (application reference: 20/02591/OBL) and Scottish Government Circular 3/2012 (updated 18 November 2020) - Planning Obligations and Good Neighbour Agreements.

## **The Local Development Plan Action Programme December 2021**

The Action Programme should be read alongside Local Development Plan Policy Del 1 (Developer Contributions) and The Supplementary Guidance on Developer Contributions and Infrastructure Delivery. It sets out how the infrastructure and services required to support the growth of the city will be delivered.

The planning application approved which is subject of this OBL application sought and secured £658,688 for education, £319,410 for healthcare, £555,297 for the tram, £639,568 for transport actions and required 25% of the residential units to be affordable.

This OBL application relates to the financial contribution for the Ocean Drive Eastwards Extension (T16) and is for a new street with a baseline capital cost of £12,678,750. The financial requirement for this action is £593,528; this equates to 4.7% of the total required. The Action is consistent within the Local Development Plan Action Program.

### **The Finalised Supplementary Guidance on Developer Contributions and Infrastructure Delivery (August 2018)**

The Finalised Developer Contributions and Infrastructure Delivery Supplementary Guidance (SG) sets out the Council's approach to infrastructure provision and improvements associated with development; it seeks to ensure that developers make a fair and realistic contribution to the delivery of necessary infrastructure provision and improvement associated with development. The Guidance is not adopted but is a material planning consideration in the determination of this application. The North Edinburgh Transport Contribution zone was removed from the 2018 version of the SG. Ministers issued a Direction in January 2020 which stated that there was insufficient evidence to demonstrate that the transport contributions sought through the SG would fairly and reasonably relate in scale and kind to proposed development so as to be proportionate to such development; the relative impact of each development requiring the action should be a factor, not simply the number of units in a development.

### **Recent appeal decision**

A nearby site on Ocean Drive was subject to a recent appeal to modify the s75 to remove the requirement for transport actions. These items of infrastructure were the improvement required to the Lindsay Road and Commercial Street junction and the Ocean Drive eastward extension. The Reporter allowed the appeal stating that the transport contributions set out in the s75 legal agreement did not meet the tests of Circular 3/2012. The reasons given were that:

- the use of a s75 (rather than a planning condition) was necessary; however other considerations arise in relation to planning purpose and relationship to the development tests.
- the requirements served no planning 'purpose' necessary to make the development acceptable. There is no provision in the Development Plan policy to require transport contributions outside any contribution zone unless justified as necessary. In the absence of a clear justification, particularly in terms of the relationship with the development, scale and kind and reasonableness tests

mean that the retention of the planning obligation would not serve a planning purpose and that test would not be met.

- no development-specific item of transport infrastructure provision or enhancement was identified as being necessary to make the distillery development acceptable. No concerns were raised regarding impact on traffic, road safety etc. There is insufficient specific information to enable a safe conclusion that the transport actions would be necessary to enable the distillery development to be acceptable in transport terms. The planning obligation requiring payment of the transport contribution does not meet the relationship to the development test.
- the North Edinburgh Contribution Zone was not retained in the SG. Insufficient evidence was provided to demonstrate that the transport contributions sought through the SG would fairly and reasonably relate in scale and kind to the proposed development so as to be proportionate. The limited scale of traffic generated from the development would not contribute to any significant degree to the need for the transport actions required. The scale and kind test is not met.
- the obligation for transport actions was not reasonable. The relationship to the development and scale and kind tests established in circular 3/2012 were not reasonable.

The Reporter also found that consistent with the decision given by the Supreme Court in the *Elsick* case, the transport contribution obligation was insufficiently related to the development to be within the scope of the provisions of s75 of the 1997 Act.

### **Scottish Government Circular 3/2012 (updated 18 November 2020) - Planning Obligations and Good Neighbour Agreements**

The circular explains that obligations are to be promoted in strict compliance with the five policy tests. These tests relate to necessity; planning purpose; relationship to the development; scale and kind; and reasonableness.

The applicants have sought to justify their modification application on the basis that the transport contribution obligation in the existing agreement does not meet the five tests set out in the Scottish Government Planning Circular 3/2012 "Planning Obligations and Good Neighbour Agreements". The circular indicates that an obligation should not be sought or should consequently be discharged if it fails any one of these five tests.

#### Necessity test

In terms of the 'necessity' test, the planning obligation should be necessary to permit the proposed development. With a financial contribution a planning condition cannot be used. The contribution involved a payment towards transport infrastructure, a planning obligation, and not a planning condition. The use of an obligation was appropriate, thereby satisfying the 'necessity' test.

## Planning purpose test

The requirement to contribute towards the provision of transport or other infrastructure would meet the planning 'purpose' test, if that infrastructure is necessary to make the development acceptable.

The LDP Action Programme and Supplementary Guidance provide no specific detail or information on why the proposed transport action which is the subject of this application are necessary to enable the development to be acceptable in transport terms. The site is not within a contribution zone in the unadopted SG; the Development Plan requires a transport contribution in respect of development outside any contribution zone if it is clearly justified as necessary. The Reporters decision for the distillery appeal concluded that in terms of the planning purpose test, the absence of a clear justification, particularly in terms of the relationship with the development, scale and kind and reasonableness tests contained within the agreement would not serve a planning purpose and the planning purpose test would not be met.

A Transport Assessment was submitted in support of the original planning application to which this OBL application relates. This detailed the expected transport impact of the proposed development on the existing road network. The applicant estimated trip generation and mode share for the proposed development and combined this with traffic counts to predict traffic flows in the area to understand the impact at key local junctions. Further to this, vehicle trips generated by surrounding committed development were taken into account and an appropriate traffic growth rate applied. This allowed for four different assessment scenarios to be carried out on five junctions in the vicinity of the site.

The assessment showed a minimal increase of traffic at these junctions during peak times, ranging from 1% - 3.4%. As the impact on the junctions was considered minimal no further detailed capacity analysis was carried out. The details provided in the assessment by the applicant has been assessed by transport officers and is considered to be an acceptable reflection of both the estimated traffic generated by the development and of the traffic on the surrounding road network. The submitted transport assessment is generally in line with the published guidelines on transport assessments.

There will be limited opportunities to park outwith the site in this area due to the waiting and loading restrictions associated with the Tram and the implementation of a Controlled Parking Zone in this area, further reducing potential reliance on car usage.

The s75 contribution for the Ocean Drive Eastwards Extension is not clearly related to the use and development of the land in question and is not directly proportionate to the size and proximity of the development. The development, given its low levels of car parking spaces, is unlikely to contribute significantly to traffic on that new road, given it will also take traffic to Ocean Terminal, Port of Leith and other existing and proposed development in the vicinity. The infrastructure for which the contributions are sought are not necessary to make the development acceptable.

The absence of a clear justification for the requirement of contributions towards the Ocean Drive Eastwards extension means that the retention of the planning obligation would not serve a planning purpose. The obligation for transport action does not meet the test of 'planning purpose' as set out in Circular 3/2012.

#### Relationship to the proposed development test

*Circular 3/2012 states that "Planning obligations must relate to the development being proposed. Where a proposed development would either; create a direct need for particular facilities, place additional requirements on infrastructure (cumulative impact) or have a damaging impact on the environment or local amenity that cannot be resolved satisfactorily through the use of planning conditions or another form of legal agreement, a planning obligation could be used provided it would clearly overcome or mitigate those identified barriers to the grant of planning permission. There should be a clear link between the development and any mitigation offered as part of the developer's contribution."*

Contributions for transport infrastructure improvements should be needed for the development at the site to meet the relationship to the development test. The Report to Committee for the original planning application stated that *'the level of parking has been restricted with only 71 car parking spaces proposed for 338 flats. This site is identified for housing in the LDP, benefits from excellent public transport connections and will enhance the existing cycle routes in the area. Subject to the required contribution to the tram and other transport infrastructure identified through the LDP Action Programme, the proposal will not have an unreasonable impact on existing transport routes and it has been demonstrated that the existing network has the capacity to deal with the increase in traffic volume. No objections have been raised by the Roads Authority.'* The Ocean Drive eastwards extension action is not in close proximity to the development site; and given the above the development would not create a direct need for the proposal to contribute towards the provision of this infrastructure.

The contribution is not necessary to enable the development to be acceptable in transport terms and is not required as a direct consequence of the development.

The planning obligation requiring payment of the Transport Contribution does not meet the 'relationship to the development' test derived from circular 3/2012.

#### Scale and kind test

In terms of the 'scale and kind' test, the Circular states that the planning obligation must be related in scale and kind to the proposed development. In assessing the contribution, account can be taken of the cumulative impact of a number of proposed developments, and obligations used to share those costs proportionately. The effect of such infrastructure investment may be to provide some wider community benefit, but contributions should always be proportionate to the scale of the proposed development.

The approved development proposal includes a total of 71 off street car parking spaces for 338 residential units. The Transport Assessment submitted with the planning application concludes that 'The assessment demonstrates that the addition of the development related traffic will not have an impact on the operation of the local road network. The introduction of reduced parking, the close proximity to relevant local amenities and the extension of the Edinburgh Tram route is anticipated to have a positive impact on travel with potential to minimise new development vehicle trips. This will also assist in reducing the existing vehicle mode share in the Leith and north of Edinburgh area.'

The consultation response from Transport confirmed that the details provided by the applicant had been assessed and were considered to be an acceptable reflection of both the estimated traffic generated by the development and of the traffic on the surrounding road network. The scale of traffic generation that would arise from this development would not contribute to any significant degree to any need for the eastward extension of Ocean Drive.

The transport contribution obligation contained in the s75 agreement does not meet the 'scale and kind' test as set out in circular 3/2012 in relation to the Ocean Drive eastwards extension action.

#### Reasonableness test

In terms of the 'reasonableness' test, the Circular provides a number of questions of which a negative answer to anyone would generally render a planning obligation inappropriate.

- (i) is an obligation, as opposed to conditions, necessary to enable a development to go ahead?
- (ii) in the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
- (iii) is the requirement in the obligation so directly related to the regulation of the proposed development that it should not be permitted without it?
- (iv) will the obligation mitigate the loss of, or the impact upon, any amenity or resource present on the site prior to the development?

In response to these questions:

- (i) Yes
- (ii) No
- (iii) No
- (iv) No

Considered against the current situation in relation to the policy and guidance, and in light of the Reporters decision on the section 75 for the distillery appeal case, in this instance, the transport contribution previously sought cannot be considered to meet the 'reasonableness' test.

It is considered that the obligation is not necessary to make the development acceptable in planning terms. The other tests relating to planning purpose, relationship to the development, scale and kind and reasonableness tests are not met; as these other tests are not met the contribution cannot be considered as necessary.

### **Scottish Planning Policy 2014**

The policy explains that one of the core values of the planning service is proportionality, with obligations being appropriate only where necessary.

### **Emerging Policy Context**

NPF 4 - Draft National Planning Framework 4 is being consulted on at present. As such, it has not yet been adopted. Therefore, little weight can be attached to it as a material consideration in the determination of this application.

City Plan 2030 - While the proposed City Plan is the settled will of the Council, it has not yet been submitted to Scottish Ministers for examination. As such, little weight can be attached to it as a material consideration in the determination of this application.

### **b) Finance**

The Action Program sets out that the delivery of the Ocean Drive Eastwards Extension would be delivered 'with development'. The delivery of the new road may be put at risk if there is an inability to secure funds that were previously considered to be acceptable. This OBL proposal would relate to a figure of 4.7% of the total cost of its delivery.

### **Conclusion**

In conclusion, the transport contribution was unreasonable and does not meet at least one of the tests in Circular 3/2012. The applicants' requested modification to the 19/02778/FUL legal agreement is acceptable and it is recommended that it is agreed.

It is recommended that this application be accepted, and the agreement be modified

### **3.4 Conditions/reasons/informatives**

#### **Informatives**

It should be noted that:

1. Please submit an engrossed Discharge or Minute of Variation (as appropriate) in accordance with the terms of this Decision Notice for execution and registration by the City of Edinburgh Council along with the required registration forms and registration fee. Submissions should be sent to The City of Edinburgh Council, Legal Services, 4 East Market Street, Edinburgh, EH8 8BG.

#### **Financial impact**

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##### **4.1 The financial impact has been assessed as follows:**

The proposed modification of the s75 would result in the removal of the clause relating to transport action relating to the Ocean Drive Eastwards extension; the required payment of £593,528 relating to this specific transport action would be removed from the s75 legal agreement.

#### **Risk, Policy, compliance and governance impact**

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5.1 Provided planning applications are determined in accordance with statutory legislation, the level of risk is low.

#### **Equalities impact**

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##### **6.1 The equalities impact has been assessed as follows:**

The application has been assessed and has no impact in terms of equalities or human rights.

#### **Sustainability impact**

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##### **7.1 The sustainability impact has been assessed as follows:**

This application is not subject to the sustainability requirements of the Edinburgh Design Guidance.

## **Consultation and engagement**

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### **8.1 Pre-Application Process**

There is no pre-application process history.

### **8.2 Publicity summary of representations and Community Council comments**

There are no other parties to this planning obligation that are required to be notified in accordance with the provisions of Regulation 5 of the Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010.

### **Background reading/external references**

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- To view details of the application go to
- [Planning and Building Standards online services](#)
- [Planning guidelines](#)
- [Conservation Area Character Appraisals](#)
- [Edinburgh Local Development Plan](#)
- [Scottish Planning Policy](#)

**Statutory Development  
Plan Provision**

The site is part of the urban area and within the Leith Waterfront area as identified in the Local Development Plan. It is part of the area referred to as Central Leith Waterfront (Proposal EW1b) and is designated for residential led regeneration.

A Tram Route Safeguard runs along Ocean Drive to the south of the site.

Ocean Terminal, adjacent to the site, is designated as a Commercial Centre.

**Date registered** 28 October 2021

**Drawing numbers/Scheme** ,

**David Givan**  
Chief Planning Officer  
PLACE  
The City of Edinburgh Council

Contact: Karen Robertson, Senior planning officer  
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**Links - Policies**

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**Relevant Policies:**

**Relevant policies of the Local Development Plan.**

LDP Policy Del 1 (Developer Contributions and Infrastructure Delivery) identifies the circumstances in which developer contributions will be required.

LDP Policy Tra 7 (Public Transport Proposals and Safeguards) prevents development which would prejudice the implementation of the public transport proposals and safeguards listed.

LDP Policy Tra 8 (Provision of Transport Infrastructure) sets out requirements for assessment and mitigation of transport impacts of new development.

### **Relevant Non-Statutory Guidelines**

Draft Developer Contributions and Infrastructure Delivery SG sets out the approach to infrastructure provision and improvements associated with development.

Scottish Planning Policy (SPP) - The SPP sets out Scottish Government policy on nationally important land use matters and includes subject specific policies on: economic development, town centres and retailing, housing, rural development, coastal planning, fish farming, historic environment, landscape and natural heritage, open space and physical activity, green belts, transport, renewable energy, flooding and drainage, waste management, minerals, on-shore oil and gas, surface coal mining and communications infrastructure.

# Appendix 1

**Application for Planning Obligation 21/05744/OBL at land 143 metres southeast of 94, Ocean Drive, Edinburgh. Application under S75A for the modification of a planning obligation relating to the land 143 metres south-east of 94 Ocean Drive.**

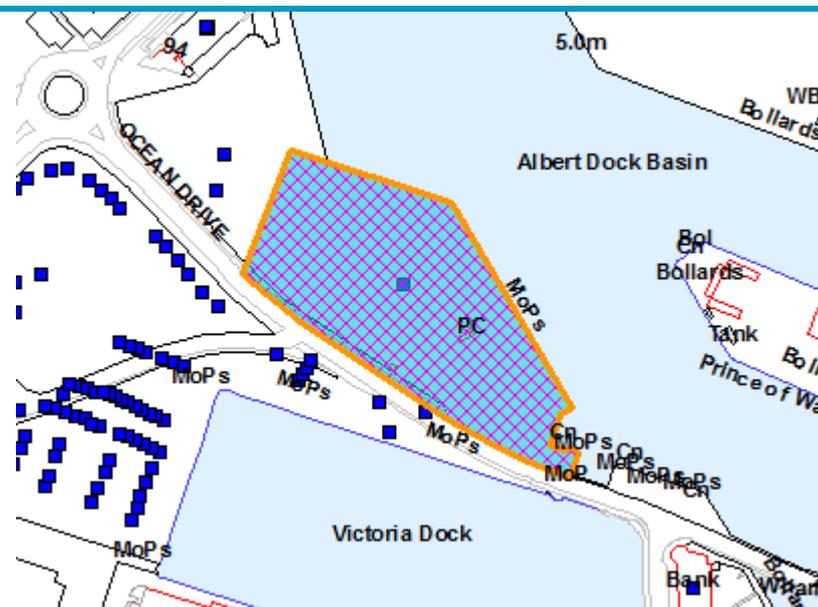
## Consultations

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No consultations undertaken.

## Location Plan

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