



NP/23/0416/MOD

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Parc Cenedlaethol  
Arfordir Penfro  
Pembrokeshire Coast  
National Park

## PEMBROKESHIRE COAST NATIONAL PARK AUTHORITY COMMITTEE REPORT

<b>Application Ref</b>	NP/23/0416/MOD
<b>Case Officer</b>	Rob James
<b>Applicant</b>	GRD Ltd
<b>Agent</b>	
<b>Proposal</b>	Modification of a planning obligation relating to NP/18/0575/OUT - Clause 19 affordable housing/commuted sum payment
<b>Site Location</b>	Land to the East of Glasfryn Road, Glasfryn Road, St Davids, Pembrokeshire, SA62 6FJ

**This application is being considered by the Development Management Committee as it seeks to vary a Section 106 legal agreement, the terms of which were agreed previously by the Development Management Committee in relation to planning application NP/18/0575/OUT. The County Council is also party to the Section 106 agreement.**

### **Summary**

The application proposes the modification of a Section 106 legal agreement relating to a housing site in St Davids for 58 dwellings. Clause 19 of the existing legal agreement requires indexation of the planning obligations from the date of the agreement until the date of payment. The applicant is seeking the removal of this element of the agreement, on the basis that delays beyond their control have resulted in index linked payments being due, beyond a level which is reasonable. Having considered the evidence submitted, Officers consider that a modification to agree the removal of part of the indexation is not reasonable and that the agreement still serves a planning function and therefore recommends that this modification request be refused.

The application plans and full details can be found on the PCNPA website at: [PCNPA Planning \(pembrokeshirecoast.wales\)](https://www.pembrokeshirecoast.wales/PCNPA-Planning)

### **Consultee Response**

**PCC Planning Obligations Officer  
St Davids City Council**

Advisory  
Supporting

## **Public Response**

There is no requirement to publicise the request for a modification of a Legal Agreement, however the modification request has been published to the Authority's website.

St Davids City Council responded to note that the proposal was unlikely to have a detrimental visual or environmental impact on the surrounding area.

## **Policies considered**

Future Wales 2040 (adopted 2021)

Please note that the LDP2 policies can be viewed on the Policies page of Pembrokeshire Coast National Park website –

### [Local Development Plan 2 - Pembrokeshire Coast National Park](#)

Policy 1 National Park Purposes and Duty (Strategy Policy)

Policy 8 Special Qualities (Strategy Policy)

Policy 10 Sites and Species of European Importance

Policy 50 Housing Development Proposals

Policy 55 Infrastructure Requirements

Policy 59 Sustainable Transport (Strategy Policy)

Policy 60 Impacts of Traffic

Planning Policy Wales Edition 12

SPG – Planning Obligations

## **Constraints**

NPA Property – within 25 m

Biodiversity issue

Historic Landscape

Safeguarding Zone

Rights of Way Inland – within 50m

Ancient Monument – within 500m

Hazardous Zones

Recreation Character Areas

Article\_4\_Directions

Affordable Housing Submarkets

Seascape Character Areas

Conservation Area St Davids

Landscape Character Area

## **Officer's Appraisal**

### **Site and Context**

The application site covers two parcels of land to the east and west of Ffordd Glasfryn / Glasfryn Road, which is located on the eastern edge of the city of St Davids, identified as a Local Centre within the PCNPA LDP2.

The A487 is the main entrance road to St Davids and runs to the south of the site. The western parcel of land has the Grove Hotel and residential development at Maes Dyfed to the west and Ffordd Glasfryn/Glasfryn Road to the east.

The eastern parcel of land has Ffordd Glasfryn / Glasfryn Road to the west and residential development at Melard Park to the east and lower density residential development to the north.

The site as a whole was granted planning permission for the construction of 58 dwellings (40 open market and 18 affordable) under an outline planning permission (NP/18/0575/OUT) dated 1<sup>st</sup> May 2019.

As part of the granting of that planning permission a Section 106 legal agreement dated 1<sup>st</sup> May 2019 ("Section 106 Agreement") was entered to address the requirements of planning obligations necessary to make the application acceptable.

Following the granting of the outline permission, four subsequent reserved matters applications were approved on site.

### **Relevant Planning History**

<b>Application Reference</b>	<b>Description</b>	<b>Type of Housing</b>	<b>Registration Date</b>	<b>Target Date</b>	<b>Permission Date</b>
NP/18/0575/OUT	Outline application for 18 affordable houses and 40 open market dwellings with associated landscaping	Market and Open	27 Sept 2018	30 Jan 2019	01 May 2019
NP/19/0648/RES	Reserved matters planning application for 16 dwellings comprising 3 and 4 bedroom bungalows / dormer bungalows	Market	29 Nov 2019	01 March 2020	26 May 2020
NP/21/0648/RES	Reserved matters for 24 dwellings - details of appearance, landscaping, layout and scale	Market	22 Oct 2021	16 Dec 2021	14 April 2022

NP/22/0230/ RES	Reserved matters application for 10 semi-detached bungalows and 1 detached bungalow (affordable housing) on Land to the East of Glasfryn Road, St Davids	Affordable	11 April 2022	30 September 2022	29 September 2022
NP/22/0028/ RES	Reserved matters - details of appearance, landscaping, layout and scale - 6 x2 bedroom semi-detached bungalows and 1x detached 2 bedroom bungalow	Affordable	17 Jan 2022	13 March 2022	3 October 2022

### Description of Proposal

This application is seeking to vary the terms of the Section 106 Agreement. Section 106A(1)(a) Town and Country Planning Act 1990 provides that a planning obligation can be modified by agreement between the authority by whom the obligation is enforceable (i.e. the Authority), and the person(s) against whom the obligation is enforceable. It is discretionary and a refusal to modify an agreement is challengeable only by judicial review on public law grounds.

In deciding whether to enter into an agreement, the LPA must consider whether the original planning obligation still serves a useful purpose. In *R (on the application of Batchelor Enterprises Ltd) v North Dorset District Council* [2003] EWHC 3006 (Admin), the LPA's refusal to modify a s.106 agreement was unlawful because the refusal was not based on planning grounds. It is also necessary to assess whether the obligation meets the legal tests for a planning obligation, including that of reasonableness.

The planning obligations secured by the Section 106 Agreement were:

- (a) the provision of 18 affordable housing units, either by
  - (i) constructing and transferring the affordable housing units to a registered social landlord or the local housing authority, as nominated by the Authority, or
  - (ii) transferring the affordable housing land to a registered social landlord or the local housing authority, as nominated by the Authority, who would covenant to construct the 18 affordable housing units;
- (b) payment of £268,000 to Pembrokeshire County Council towards primary and secondary education;
- (c) payment of £11,560 to Pembrokeshire County Council towards the provision and/or improvement of open space; and
- (d) payment of £40,000 to the Authority towards future management of The North-West Pembrokeshire Commons Special Area of Conservation.

For the purposes of this report, item (a) is described as "the Affordable Housing Obligation" and items (b) - (d) are collectively described as "the Contributions".

The agreement provides that no more than 50% of the open market housing units could be occupied until the Affordable Housing Obligation was satisfied and payment of the Contributions made.

As referenced above, clause 19 of the Section 106 Agreement provides that the Contributions "shall be increased by an amount equivalent to the increase in the Index from the date hereof until the date on which such Contributions are paid".

The definition of Index in the Section 106 Agreement is as follows:

*Index: means the All In Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors or any successor organisation.*

Provision for index linked payments is usually standard and is usually provided for in all the section 106 agreements entered into by the Authority. The purpose is to ensure that any planning obligation is contemporaneous with potentially rising costs of provision as a result of inflation.

The original sum of the Contributions was £319,560. However due to rises in the All In Tender Price Index since 1<sup>st</sup> May 2019, the total now due amounts to £368,197.03. This is an increase of £51,481.11 approximately 16% on the original Contributions.

Whilst the applicant has stated that they are keen to meet the terms of the original legal agreement contributions, they contend that a significant proportion of the delays with bringing their site forward have been due to events over which they have had no control. These events include delays both in the determination of planning applications by the National Park Authority and delays from Pembrokeshire County Council with regards to the acquisition of the Affordable Housing land. Payment of £100,000 towards the Contributions was received from the applicant by Pembrokeshire County Council in December 2023.

## **Key Issues**

The application raises the following issues

- The policy and principle that applies to Section 106 agreements and variations and whether the planning obligation including indexation still serves a useful purpose
- What delays have occurred with regards to the planning applications and land transfer of Affordable Housing on the site
- Whether delays with the site development provide justification for the removal of all of the index linked payments requirement

- Any other material considerations

### ***Policy and Principle***

Policy 55, Infrastructure Requirements of the adopted LDP2 for the National Park states that planning permission will be granted for proposals that have made suitable arrangements for the improvement or provision of infrastructure, services and community facilities made necessary by the development. It notes that arrangements for provision or improvement to the required standard will be secured by planning conditions attached to a planning permission, or in some cases planning obligations. The policy specifies that where it can be proven that a proposal is unable to deliver in terms of the policy requirements of the Plan, priority will be given to the delivery of affordable housing in any further negotiations, provided that it can be demonstrated that the proposal would not unduly overburden existing community infrastructure provision.

More guidance on Planning Obligations is set out in the Authority's adopted Planning Guidance Supplementary Planning Guidance (Planning Obligations SPG) document. This document states that the Local Planning Authority will secure Planning Obligations in order to ensure that local services and infrastructure have adequate capacity to meet the additional demands arising from new development. The SPG notes that in cases where Section 106 contributions cannot be met fully these will be expected to demonstrate the economic viability of a scheme is impacted through a Development Appraisal Toolkit.

In this case no viability evidence has been supplied by the applicant. The applicant does not contend that the planning obligations as originally agreed have an impact on viability, instead they suggest that the application of an index linked payment is unreasonable in the context of the delays that the site has experienced.

Welsh Office Circular 13/97 "Planning Obligations" and Regulations 122 and 123 of the Community Infrastructure Levy Regulations 2010 also apply to the consideration of planning obligations.

The Tests in Circular 13/97 Planning Obligations apply to all Planning Obligations, including those not covered by the CIL Regulations. The tests make it clear that a Planning Obligation must be:

- Relevant to planning;
- Necessary to make the proposed development acceptable in planning terms;
- Directly related to the proposed development;
- Fairly and reasonably related in scale and kind to the proposed development; and
- Reasonable in all other respects.

In addition, Regulation 122 of the CIL regulations stipulate that: “A planning obligation may only constitute a reason for granting planning permission if the obligation is:

- a) Necessary to make to the development acceptable in planning terms;
- b) Directly related to the development; and
- c) Fairly and reasonably related in scale and kind to the development”.

Regulation 122 of the CIL Regulations places into law the Welsh Government’s policy tests on the use of Planning Obligations. The CIL Regulations reinforce the purpose of Planning Obligations in seeking only essential contributions to allow the granting of planning permission, rather than more general contributions that are better suited to a Community Infrastructure Levy (CIL). The Authority does not charge CIL. If a Planning Obligation is capable of being charged to CIL, even in cases where CIL is not in operation, it is unlawful for a Planning Obligation to be taken into account when determining a planning application for a development, if the obligation does not meet the three tests. In such a circumstance, the decision to grant planning permission would also be unlawful. For all other developments (i.e. those not capable of being charged CIL), the tests in Circular13/97 will continue to apply.

The Authority is satisfied that the original requirement for contributions met the tests set out above. The contributions are still considered necessary in the context of the site and the indexation is considered a normal and appropriate mechanism to ensure that these contributions remain contemporaneous in terms of rising costs.

***What delays have occurred and do they justify the removal of the requirement to pay an index linked uplift of the Contributions?***

It is important to note that under the terms of the Section 106 Agreement, it would have been possible for the applicant to pay the Contributions from the date of the agreement. Payment at this point would not have incurred any index linked uplift.

In fact, the index did not increase above its base value at 1<sup>st</sup> May 2019 until the third quarter of 2021 (July 2021) and accordingly payment up to this point would not have attached an index linked uplift. Any delays in processes up to July 2021 would not have resulted in a index linked uplift. Further detail and explanation of the time period under consideration is set out below.

The developer in meetings with Officers has advised that he was unable to pay the Contributions at an early stage because of the need to balance the cash flow of the development as a whole, however no financial information has been supplied in support of this. The developer suggests that they required the ability to dispose of a certain number of market homes before being able to pay the Contributions and their ability to build the market homes depended on the outcome of planning decisions relating to the determination of reserved matters applications.



The applicant's covering letter sets out that as a consequence of Covid and other issues associated with resources, PCNPA were unable to issue the Reserved Matters consents for the open market homes within the timescales prior to which a non-determination appeal is permitted. It will be noted from the table above that there was a delay of 15 weeks, 3 days in determining application NP/21/0648/RES, between 16<sup>th</sup> December 2021 and 3<sup>rd</sup> April 2022, which was the Authority's target date. However, the target date is simply a date on which, if the Authority has not determined the application, the applicant may appeal. It is used for monitoring purposes and is recorded so that the Authority can manage risks. Beyond that date it was open to the applicant to appeal. Officers of the Authority consider that the onus falls on the developer to plan and consider timescales for achieving Reserved Matters consents as part of a development and also plan for build timescales associated with a development. They should be aware that there is no statutory requirement for an LPA to determine applications within target timescales and they should also be aware that there is a possibility of time scales extending. They have the ability to appeal in those circumstances and can choose to do so.

No viability information has been provided to indicate how the increased index linked payment has affected the overall viability of the site. Without this information, the Authority does not consider it reasonable to vary what is a standard requirement on all legal agreements. Importantly a viability assessment would also indicate movements in house prices over the relevant period which could lead to an increase in revenue to counteract any movement in the relevant indices to some extent. Without any viability assessment it is not possible to conclude whether any viability concerns are valid.

The applicant also contends that a delay in the transfer of the Affordable Housing Land to Pembrokeshire County Council caused a delay in the payment of the Contributions, resulting in increases to the indexation of Contributions due during that period. Officers of the Authority have considered this point and liaised with PCCs legal team on this matter.

With regards to the purported delay with agreeing the transfer of affordable housing land with Pembrokeshire County Council, the terms of the Section 106 Agreement mean that a number of Registered Social Landlords could have taken the land and accordingly satisfied the terms of the agreement. In this case, the owners of the affordable housing land (who were a different party to the developer) specifically wanted to deal with Pembrokeshire County Council and it is understood that they did not approach other Registered Social Landlords such as ATEB or Wales and West Housing. This was a specific choice made by the landowners which led to associated delays for the developer. A different landowner choice could have mitigated against the long delays in negotiation with Pembrokeshire County Council. This argument is therefore not accepted by Officers and it is not recommended that the Authority consider delays in the negotiations over the affordable housing transfer as being an element of time requiring cessation of index linked payments.

The developer has suggested that uncertainty over the affordable housing land transfer meant that he could not risk commencing construction on the open market housing element of the build, which therefore delayed his ability to pay the Contributions due, however again no financial evidence in the form of a viability appraisal has been provided to support this statement has been provided.

### ***Other Material Considerations***

The need for affordable housing and other planning obligations is a material planning consideration. Information regarding viability is also a material consideration, however no viability appraisal has been provided in support of this request for a modification at the stage of this report being drafted.

### **Conclusion**

This application seeks a modification to the existing Section 106 agreement for Glasfryn by agreement.

The suggestion that the Indexation clause 19 of the section 106 agreement should be removed is not supported by Officers.

Whilst it is recognised that some delays took place in the determination of Reserved Matters application and the transfer of land to Pembrokeshire County Council, the developer had the option to appeal or pay the financial contributions from the day the legal agreement was signed and incur no index linked payment charge. Delays in the transfer of affordable housing land were a result of a specific choice to approach Pembrokeshire County Council only, rather than liaising with a range of Registered Social Landlords. No viability information on the site has been provided.

### **Recommendation**

Refuse the request to modify Clause 19 of Section 106 legal agreement NP/18/0575/OUT.

Annex A: RM Timescales
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	Reference	Registration Date	Target Date	Officers Report	Date of Permission/S106	Difference
Outline Date of S106 Agreement	NP/18/0575				1st May 2019 £319,560	
Reserved Matters for 16 Initial Building Control Notice	NP/19/0648/RES	29-Nov-19	01-Mar-20	26-May-20	May-20 Jul-20	2 months
Reserved Matters for 24 East	NP/21/0648	22-Oct-21	16-Dec-21	03-Apr-22	Apr-22	4 months
<b>Possible to physically delivery 50% market housing on site from April '22</b>						
Transfer of Affordable Land * 11 Affordable East	NP/22/0230		11-Apr-22		Nov-22 Sep-22	5 months 10
7 Affordable West	NP/22/0028		17-Jan-22		Oct-22	months