

Item 8 - Other Planning Issues

Application Ref: NP/13/0590 **Grid Ref:** SN13140011
Application Type: Modification of Planning Obligation
Applicant: Mr O Griffiths, GVA
Agent:
Proposal Amendment of Section 106 agreement
Site Location Water's Edge, South Beach, Tenby, Pembrokeshire,
SA70
Case Officer Vicki Hirst

Summary

This is an informal request that seeks the modification of the Section 106 obligation imposed on planning permission NP/ 09/064 in relation to the provision of affordable housing. As the section 106 is less than 5 years old, there cannot be a formal application to remove or amend the legal agreement. There is no right to appeal until a formal application is made.. There is therefore no right of appeal in respect of this informal request. However, any decision is still subject to challenge on usual public law grounds of reasonableness and rationality.

It is considered that the request for a modification has not been justified and the original obligation should remain. It is therefore recommended that the request is refused and that the applicant be advised that further financial details be provided for full viability testing to occur and an agreed marketing exercise be carried out to demonstrate that there are no interested purchasers for the development. Both these matters would need to be addressed to the satisfaction of PCNPA prior to acceptance that the section 106 agreement requires alteration.

Public Response

As this is an informal request no consultation has been carried out.

Policies considered

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

<http://www.pembrokeshirecoast.org.uk/default.asp?PID=549>

LDP Policy 01 - National Park Purposes and Duty
LDP Policy 08 - Special Qualities
LDP Policy 15 - Conservation of the Pembrokeshire Coast National Park
LDP Policy 35 - Visitor Economy
LDP Policy 45 - Affordable housing

Officer's Appraisal

Legislative Powers/Policy Framework

Section 106 of the Town and Country Planning Act 1990 includes provisions for the modification of such obligations. These modifications cannot be sought by way of formal application prior to the expiry of five years from the original obligation; in this instance the five years is met on 28 July 2015. However, it remains open to PCNPA to consider informal requests for amendment prior to this.

As the section 106 is less than 5 years old, there cannot be a formal application to remove or amend the legal agreement. There is no right to appeal until a formal application is made. There is therefore no right of appeal in respect of this informal request. However, any decision is still subject to challenge on usual public law grounds of reasonableness and rationality and must therefore be properly considered.

Circular 13/97 – Planning Obligations provides advice on the imposition and subsequent modification of planning obligations and advises that the preferred option for variation of obligations is through agreement with the parties concerned rather than through a formal application and appeal procedure.

Circular 13/97 also sets out the main criteria to be met in requesting a planning obligation and these are similar to those required to be met in imposing a planning condition. Obligations should be necessary, relevant to planning, directly related to the development, fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects. They should also enhance the quality of the development and enable proposals to go ahead which might otherwise be refused.

It is clear that Planning Obligations must continue to meet these tests post any modification and that the modification must not make the development unacceptable in planning terms.

Background

Planning permission was granted in 2008 (ref NP/08/120) for the development of 19 holiday apartments (occupation restricted), associated car parking spaces, beach retail and restaurant facilities. This application was subsequently amended in 2010 (ref NP/09/064) to remove the holiday use restriction in favour of open market units with a requirement (via a deed of variation) to provide 5 off-site affordable housing units. The planning permission relates to two main blocks, with a restaurant/retail use on the ground floor of the southern block with residential units on the upper floors and within the block to the north.

At the time your officers advised that to comply with planning policy and affordable housing SPG, the full residential use was acceptable providing that four affordable units

were provided on-site. Members however approved the full residential use with the provision of 5 off-site affordable housing units.

A planning agreement was signed prior to the decision being issued. This was for the provision of 5 affordable dwellings comprising 2 x two bed units, and 1 x one bed unit (all for shared ownership) and 1 x three bed unit for rent. The agreement recognises that this provision could be adjusted in terms of mix or tenure.

The affordable housing dwellings were to be provided within the Tenby Area ie. the area of Tenby Town Council.

The provision of the 5 affordable units off-site was triggered through the occupation of dwellings on site. The Owners agreed that no more than 10 of the open market housing units would be occupied until 3 of the affordable housing units had been made available, and that no more than 15 open market housing units could be occupied until all 5 of the affordable housing units were available.

Work has commenced on site with the southern block completed and partially occupied.

Current request

Attached at Appendix 1 is a letter from the agent GVA setting out the background and request to modify.

The current request seeks a modification of the Section 106 obligation to amend the need to provide off site affordable housing, and to replace it with a financial contribution of £150,000 to the Authority. The request notes that payment would be in two payments triggered by the 5th and 9th units in the second phase, although it makes no reference to the exact amount which would be payable on these 2 triggers. **Officers**

Considerations

Your officers have met with the agent and were appraised of the situation. In brief, the developer is in financial difficulties and it is therefore necessary to sell the site (the part still under construction). The agent confirmed that there were creditors. Officers pointed out that PCNPA's affordable housing requirement could also be considered as a creditor on the scheme. Officers also asked that proof be provided that there were no interested purchasers to the site and that this should take the form of a robust marketing exercise.

The main issues to be considered in this case are:

- Whether the modification of the planning obligation would meet adopted planning policy
- Whether the planning obligation would continue to meet the requirements of Circular 13/97

- Other material considerations - whether a viability case has been made to support the request to amend the section 106, whether the market has been tested, whether there is a reasonable assessment that the affordable housing will be delivered.

Whether the modification of the planning obligation would meet adopted planning policy

The policy framework and the pertinent Policy 45 and Affordable Housing SPG seeks to deliver affordable housing on-site as a starting point in all development over 2 dwellings. Members have already relaxed this position on this site by accepting an amendment to allow for an off-site provision. Financial contributions are only considered to be acceptable by policy with regard to single residential units.

It is therefore your officer's view that the original reasons for the planning obligation were clearly justified in policy terms, there has been no substantive change to policy and the request would not comply with policy..

Whether the planning obligation continues to meet the requirements of Circular 13/97

A planning obligation must meet a number of "tests". As set out above, it is considered that the planning obligation was required on planning policy grounds and as such was relevant to planning. The planning obligation was also considered to be fairly and reasonably related in scale and kind to the proposed development.

As such it is your officer's view that the obligation as existing meets the tests of Circular 13/97 as being reasonable and related to the development. However the financial contribution proposed does not accord with with policy 45 and Affordable Housing SPG.

Other material considerations

The applicant has stated that the viability of the scheme is a consideration, but insufficient information has been provided to indicate that the scheme is actually not viable. Officers note that the residual values in the two development appraisals (with the differing affordable housing elements) submitted by the agent are positive. The agent has provided this background information on a confidential basis as it contains information which is commercially sensitive.

The agent GVA has concluded in its site assessment:

'It is our opinion that the Section 106 Legal Agreement, as signed, makes the site unattractive to the market by creating uncertainties over cost and development timescales. This will at best, result in very low offers being made for the development, at worst, it will result in the site not being sold and remaining a liability.

We will propose that the existing signed s106 is amended to provide an off-site contribution in lieu of existing obligations to provide off-site units. This will allow for

greater certainty of costs, assisting in the marketing, sale and subsequent development of this high profile site.

For the avoidance of doubt, the report concerns only the second phase of the scheme. Therefore this should be considered as a stand alone part-built phase that will be offered to the market with rights of access over phase 1 of the same scheme'

In conclusion the agent confirms:

'amending the section 106 results in a higher land value. More importantly fixed costs will allow for more accurate and less conditional offers to be made, making sale and subsequent development of the site more probable. This will allow for monies to be returned to creditors, a certain contribution being made to the NPA, and the completion of a high profile beach-side housing scheme'

Officers have concluded that the agent has been honest in the basis for their request in so much as it is based on their perceived marketability of part of the original site rather than conducted through a comprehensive viability test of the whole scheme itself.

Whilst there is sympathy with the current difficulties of the Administrator, officers take the view that the section 106 should only be amended if there is substantial evidence to demonstrate that (a) the viability of the scheme is negative and (b) there is no buyer for the site as it stands.

There are other variables within the current Section 106 which could be considered flexibly if the viability case is demonstrated. For example, the actual location of these units of affordable housing could be considered in a wider search area rather than Tenby, the size, quality and tenure could also be possible areas where negotiation could take place. At the time of discussion with the agent, the offer was clearly made in an attempt to reduce the complexity of any sale and this is also evident from the agents letter.

Conclusion

In conclusion, it is not considered that the request for a modification has been justified and the original obligation should remain, having regard to national and local policy advice. In your officer's view there are no overriding other material considerations that have been sufficiently demonstrated to override this point of view.

Recommendation

That the request for a modification of the planning obligation be refused for the following reasons:

1. The modification of the section 106 agreement would make the development contrary to the provisions of the LDP, and affordable housing SPG. It is not

considered that there are any overriding material considerations that would justify the modification of the obligation.

2. The viability assessments provided show that the residual values of the site remain positive with the section 106 agreement in its current form and do not justify the amendments proposed.
3. Until such time as there has been a reasonable marketing exercise of the site (reasonable being described in terms of time on the market, full marketing documentation and promotion) it is premature to conclude that there is no prospect of a purchaser of the site as it stands.
4. The provision of a financial £150,000 contribution is not comparable to the provision of 5 affordable housing units within Tenby, and falls short of what a comparable financial contribution should be as an in lieu contribution.
5. The trigger points for the payment have not been specifically identified and in any event the 5th and 9th occupation trigger may not provide sufficient equity remaining in the scheme to require the provision of the affordable housing financial contribution.



Your Ref: NP/09/064
Our Ref: OPG/07B311080/291113

29th November 2013

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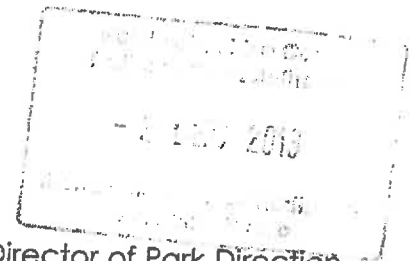
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Dear Vicki,

NP 13 5 90

BY EMAIL

**WATER'S EDGE, SOUTH BEACH, TENBY
SITE OF FORMER FOUNTAINS CAFÉ
PLANNING PERMISSION REFERENCE: NP/09/064**



Introduction and Context

- 1 Further to my recent meeting with yourself and Jane Gibson (Director of Park Direction & Planning), we write with regard to the scheme viability and deliverability associated with the development of Phase 2 of the Water's Edge development site, which is also known as the site of the Former Fountains Café in Tenby.
- 2 As discussed, GVA acts on behalf of Opus Restructuring LLP (Opus) who were appointed as Joint Administrators of South Beach (Tenby) Ltd for this site in June 2013.
- 3 As you know, the site benefits from full planning permission (LPA Reference NP/09/064) for a mixed use scheme, including 19 No. apartments, which was granted by Pembrokeshire Coast National Park Authority on 28th July 2010, subject to a number of planning conditions and a Section 106 Legal Agreement (hereafter referred to as 's106') requiring the provision of 5 No. off-site affordable housing units in Tenby.
- 4 Phase 1 of the approved scheme has been built and comprises 9 No. apartments on the 1st and 2nd floors together with a restaurant unit on the ground floor (which is occupied by S.A. Brains and trades as South Beach Bar and Grill) and a separate retail unit (which is occupied and trading as South Beach Shack). The finished apartments are to be sold with the net proceeds of sale returned to the creditors of South Beach (Tenby) Ltd.
- 5 Phase 2 of the scheme will comprise 10 No. apartments over two floors with undercroft parking below. This phase is not complete with only ground works and a metal frame in place. It is this part-built development site which is to be brought to the market by GVA on behalf of the Joint Administrators of South Beach (Tenby) Ltd.

Pembrokeshire Coast National Park Authority
Development Management Committee

19th February 2014

- 6 As discussed at our recent meeting, it is our opinion that the s106 currently hinders the site's development as it makes it unattractive to the market by creating uncertainties over cost and development timescales. This will at best result in very low offers being made for the development site and at worst it will result in the site not being sold and remaining a liability and an eyesore in this prominent location on South Beach.
- 7 It is on this basis that we are instructed by our client to hereby formally request an amendment to the s106 in order to achieve a scheme that is both viable and deliverable and would make for a marketable development that would attract buyers to take on the project and see it through to completion. This would facilitate and allow for the completion of the second and final phase of this strategically important and prominent residential development site in Tenby that is identified within the Authority's Joint Housing Land Availability Study (JHLAS).
- 8 Considering the commercial sensitivity of this development site and the existing challenges that are already facing the realisation of the site's completion, it is essential that the supporting Viability Report and Schedule of Sites remain confidential and out of the public domain. We would also seek your assurance that the provided information would not be disclosed to third parties (other than to consultants instructed by the Council) under the Freedom of Information Act or under the Environmental Information Regulations.

Housing Land Supply

- 9 The development site (known as the Former Fountain's Café) has been included within the JHLAS and therefore contributes to the 5-year supply of land for housing at the present time. There was debate over the inclusion of this site within the JHLAS on the basis that the s106 had not been signed for the scheme. However, by the time the Hearing took place the s106 had been signed and the National Park Authority (NPA) and House Builders Federation (HBF) had agreed that the site should count towards the future housing supply for the area. This is considered to add weight to the need to continue with the site's development and provide the full complement of units as identified in the JHLAS.
- 10 Technical Advice Note 1 (2006) is the foremost guidance document governing the preparation of JHLAS and states that local authorities must ensure that sufficient land is genuinely available to provide a 5-year supply of land for housing. This particularly important given that the Inspector reviewing the JHLAS found that the NPA's total number of years supply amounted to 3.81 (a dwelling requirement of 1,600 units for the Local Development Plan period (to 2021)). In view of this shortfall, the deliverability of existing site commitments is vital to achieving the continued growth and prosperity of the area.
- 11 A proportion of the JHLAS Hearing discussion was given over to development viability issues in relation to rising build costs, changes to the building regulations, and rising house prices since the market peak in 2007. These are all contributing factors to the difficulty in finding and securing suitable sites within the confines of Tenby to comply with the terms of the existing s106.

Existing s106 Obligation & Reasons for Proposed Amendment

- 12 As you know, the s106 obligation associated with this full planning permission requires the provision of five affordable units (DQR complaint) within Tenby, three of which are to be provided and transferred to a Registered Social Landlord (RSL) following the occupation of the tenth market unit and two further units to be provided and transferred to an RSL following the occupation of the fifteenth market unit.
- 13 The 5 No. affordable housing units can either be new build or refurbished units, but must be provided within the defined Tenby area and are to comprise of the following mix:
- 1 No. three bedroom (social rent);
 - 2 No. two bedroom (social rent);
 - 1 No. one bedroom (social rent), and
 - 1 No. one bedroom (shared ownership).
- 14 As discussed and explained at our recent meeting, the level of contribution and terms for delivery set out within the s106 are considered to be prohibitive to progressing with the development beyond the trigger point for the provision of the affordable units. The s106 is considered to be onerous and hinders the ability to achieve best value by drastically reducing the number of parties who would consider purchasing the site.
- 15 In light of the difficulties that have been experienced by this site to-date, and as we are sure you will appreciate, our client has carefully examined and evaluated the commercial reality of the development proposal in order to understand whether it can be delivered. In this instance, we have undertaken an examination of the viability issues affecting the site (outlined in the enclosed Viability Report) and it is clear that the continued development of the site is not viable as things currently stand. It is on this basis that we are seeking agreement to modify the s106 agreement in order to bring forward the development of this important and prominent site in a manner that is commercially viable.
- 16 Notwithstanding this, we consider there to be three main issues standing in the way of site progression: (1) viability, (2) deliverability and (3) marketability. These are explained in detail below.
- (1) Viability**
- 17 To-date no suitable site(s) or building(s) have been identified for this required affordable housing provision. As such, prospective purchasers have no way of knowing the cost implications of such a provision. For that reason, developers will be risk averse and will attribute a high cost to the provision of the 5 No. affordable housing units (which would need to include site acquisition, planning permission, build costs and transfer to an RSL), not to mention the amount of time it would take to fulfil this obligation. Consequently, this will have a very significant adverse effect on the price of the land and potential interest in the South Beach Phase Two development site.

(2) Deliverability

- 18 It is important to reiterate that we are instructed to dispose of the site on behalf of the Joint Administrators of South Beach (Tenby) Ltd who are not developers and are in no position to fund the purchase of third party land or buildings in order to satisfy the current s106 obligation to provide off-site affordable housing units. As such, any prospective purchaser will be obligated to find a suitable site(s) or building(s) within Tenby to deliver the 5 No. affordable units before being able to commence building out Phase 2 of the development and securing any revenue.
- 19 We have approached Pembrokeshire Housing Association in order to determine whether they have any sites within the defined Tenby area which could satisfy the current affordable housing obligation. Unfortunately, they do not have any sites available. However, they have indicated that they have other sites within the administrative area of the National Park Authority that would certainly benefit from additional funding.
- 20 In summary, given the level of uncertainty and, therefore, risk associated with the purchase of this part-built development site, the ability of any future purchaser to deliver both the development site and the obligated affordable housing units, to a high standard, is greatly diminished.

(3) Marketability

- 21 The s106 restricts the provision of the 5 No. affordable units to a very small and already built-up area. The availability of land is very low and prices of existing built-form are very high. For that reason, it is highly likely that affordable housing land values will match open market land values in Tenby. Therefore, any bid for land to provide the affordable units is likely to be uncompetitive in the local market. Moreover, the local market is aware of the s106 commitment that must be fulfilled prior to commencement of Phase Two of the development and will therefore increase values to exploit this position.
- 22 We have carried out a market research exercise with a view to finding suitable, affordable and deliverable sites within the defined area of Tenby to satisfy the section 106 obligation. This evidence has been set out within the Schedule of Sites which is enclosed with this letter to demonstrate the potential and excessive cost of providing the off-site affordable housing obligation. We appreciate that this information only represents a snap-shot in time, with the assessment being carried out in mid-October of this year. However, this information provides clear justification regarding the lack of suitable and currently available affordable sites (within the development's cost parameters and constraints) within Tenby to satisfy the s106 obligation.
- 23 As things stand, successful marketing of the site is therefore dependent on an interested party either taking a risk in acquiring the land with the hope of being able to find a site for the affordable housing or an interested party who has existing development land within Tenby. As such, it is our opinion that a successful sale is unlikely given these factors and should offers be received it is likely that they will be significantly below what we consider to be the residual price of the site as discussed in the Viability Report.

Proposed Amendment to the s106

- 24 In light of the above, we propose that the existing s106 is amended to provide an off-site financial contribution in lieu of the existing obligation to provide off-site affordable housing units. This will allow for greater certainty of costs, assisting in the marketing, sale and subsequent development of this high profile site.
- 25 As detailed in the appended Viability Report, we are seeking to modify the s106 in order to ensure that the scheme is both financially viable and deliverable so that it can be sold to a developer in the not too distant future.
- 26 Having considered the difficulties associated with the current s106 that binds the development site, and in the interests of reducing the level of uncertainty that potential purchasers of this part-built development site currently face, we suggest that the terms of the legal agreement are altered to allow for:
- the provision of a **financially commuted sum of £150,000** to be used by the Authority for the provision of off-site affordable housing within the Authority's administrative area; and
 - the payment of the commuted sum to be staged to allow for a reasonable amount of revenue to be gained through unit sales. To achieve this, we propose that the trigger point for payment would be **on the occupation of the 5th and 9th units** of the second phase respectively.

Conclusions

- 27 The Water's Edge development benefits from a spectacular and prominent position at the foot of the cliffs on South Beach itself with excellent views of the beach and out to sea. However, as things stand, this part-built development site is an eyesore both for existing residents of Phase 1 and members of the public using the beach and visiting the South Beach Bar and Grill or the South Beach Shack.
- 28 Whilst the provision of affordable housing is an essential requirement of the National Park Authority, the mechanisms for its provision must be balanced with the commercial deliverability of development. In this instance, and in our considered opinion, the existing s106 impedes the sale of the site and therefore its future development. This in turn serves to prevent the deliverability of affordable housing within the area.
- 29 Our proposal to amend the s106 would result in the financial contribution of £150,000.00 by the future developer of the site towards the provision of off-site affordable housing units within the administrative area of the National Park Authority. Moreover, this will allow for the site to be marketed without serious constraints that we believe will hinder the sale of the site and the future delivery of this important development.
- 30 We trust that the information within this letter, and the enclosures, allows you to register and determine this important application swiftly and we look forward to receiving confirmation of this in due course. If, in the meantime, you require any further

29th November 2013

information and/or clarification with respect to the enclosed proposals please contact me on 029 2024 8920 or by e-mail at owain.griffiths@gva.co.uk.

With kind regards

Yours sincerely,



Owain P. Griffiths MRTPI MRICS
Planning Development & Regeneration
For and on behalf of GVA

Enclosures

cc: Mr Trevor Binyon Opus Restructuring LLP
 Mr Paul Hennelly Opus Restructuring LLP