

Dear Ben,

I write on behalf of BHT re. the recent drafts of the s.106 placed on line on 4th and 5th April. This representation is confined to two new key changes to the agreement.

Instead of the document being amended better to secure the Council's objectives pursuant to BHT's representation of December 2018 and subsequent discussions, we find it has been materially worsened to the effect that it is now non-sensical on the development costs, and removes the assessment of valuation and affordability of purchase by the harbour company. Each is a fundamental weakening of the agreement which prejudices delivery of the planning benefits to be delivered pursuant to the committee resolution. These are taken in turn.

Definition of Costs of Development (at 1.1).

The applicant has index linked the Costs of Development as identified in the DVS Report. This non-sensical in terms of the Council's declared intentions, as reported on and as resolved at Committee, and embodied in the previous draft of the agreement, namely inclusion of the actual costs of the development in assessing profit.

The whole basis has always been that the Developer produces evidence of actual costs of development, with receipts, as set out in the definitions of Provisional and Revised Post Development Appraisals for application in Schedule 1 paragraph 7 – the Facilities Contribution. This is the assessment of whether the Developer makes more profit than his estimates of costs submitted to the DVS suggested, and if so for this to be regarded as "overage" and applied to Harbour improvements.

The agreement makes no sense in its current form – the definition of costs of development entails applying indexation to the estimated figures, whereas the definitions of Provisional and Revised...Appraisals entail submission of actual costs, supported by evidence. The indexation is dated to the date of submission for appraisal (of actual figures), so there is no application of indexation to the actual cost figures (as indeed there shouldn't be). The actual costs are the actual costs, and will not be subject to indexation. It is clear, therefore, that the applicants intend to rely on the original estimated figures and not to provide actual costs.

It is seen from correspondence that the applicant now argues that the hypothetical cost figures are a sound substitute for actual costs because standard BCIS build costs were used. This presents only part of the picture in the assessment of costs. First, the DVS noted that the highest BCIS residential building cost rates on the Isle of Wight had been used, which he was prepared to use as a gauge, but only "at that stage" but noted that the DVS had no explanation or detail on many of the cost categories. More importantly, these only comprise some 55% of the total construction costs. The remaining 45% fall under the DVS headings "abnormal" and "commercial" costs. The DVS did not assess these elements. Added to the construction costs, as percentages, are other significant amounts for contingency, professional fees and interest. All of which are highly variable, and are why Russell Chick in his email of 18th March rightly points out actual costs must be assessed.

The assessment of the actual cost when built measured against actual sale price is the whole basis of the "overage" clause. This is clear from the officer's report to committee for 12th December 2017, eg. at 2.32, 2.86 and 2.93 (highlighted extracts below for ease of reference). It is clear from the email of planning officer Russell Chick to the applicant of 18th March this year that he remains of this view (extract below for ease of reference). Actual profit realised can of course be affected by sales price and costs of development. The greatest scope for change is in the cost of development, it is noted that the applicant's own estimates of costs increased by approximately £600,000 between its first submission to the DVS and its second submission. There is clearly huge scope for the actual costs to be very different from the theoretical exercises to date.

The DVS Report heads of costs are to be used in the calculation of costs, not the amounts. This must be spelt out in the definition, after all reference to indexing has been deleted. ..."the actual costs of

development, supported by information in the Provisional and Post Development Appraisals, using the categories of costs set out in the DVS Report”.

The position re. assessment of actual costs has been clear from the report to committee, all previous drafts of the agreement, and in all discussions with you and with Russell that this was your intention, confirmed in Russell’s recent email 18th March to the applicant. Please confirm that our understanding is correct and that the amendment will be made.

Bembridge Harbour New Facilities (also characterised as the “Retained Investments”).

The applicant has deleted provisions for determination of value of the New Facilities for the purposes of any sale to the harbour company.

The report to committee stated that the s.106 would ensure that the new facilities would be let at a fair rental charge. This was at 2.93 (extract below). The report did not address a fair sale price, because the Director of the harbour company had made submissions that it could not afford to purchase, and that it would not contemplate adding to the harbour company’s considerable indebtedness.

The same principle of the Council ensuring affordability to the harbour is equally applicable to purchase price as it is to rental levels, only more so; what was declared unaffordable, is now actively contemplated, and will create the additional significant debt which the Director sought to avoid. The applicant has asserted that the development company’s bank does not like the uncertainty of price or even ability to sell the new facilities. This is not a real or valid issue as a planning consideration; if the parties do not like the sale price, the new facilities can be leased at a fair rental, as contemplated at committee and as reflected in the agreement, and on which the bank apparently has voiced no objection.

It is impossible for the DVS to carry out an assessment of whether the purchase price (or indeed the rental level) is reasonable / affordable pursuant to paragraphs 1.4 and 1.5 in schedule 1 respectively without such an assessment. The original figure for the Retained Investments cannot be relied upon as a base – this was the applicant’s figure which the DVS used for evaluation purposes without any scrutiny or assessment. The DVS specifically advised that they had adopted the applicant’s figure for use “at this stage”. Officers have acknowledged that any figure is meaningless without knowing at what design, or detailed specification and to what level of fit out the buildings are to be provided. Great caution is needed here; officers will recall that pre- determination the director of the harbour company stated that the harbour could not build the facilities for itself because it could not contemplate any further debt beyond the existing £1.2 m. Immediately after determination by committee the director of the harbour company stated that the harbour now *could* afford to buy outright / take on further debt of approximately another £1m. This is in the context of the most recent profit and loss account of the harbour company showing an increase of approximately £11,000, and on the current rent at £18,000 (March 2018, details on request). Officers were right in including provisions to assess for themselves the affordability of buying the new facilities. It is essential that these provisions be reinstated.

Heads of Terms for lease or sale

An updated version of these has not been published since August 2018 and the planning officer has stated is long since superseded. The applicant’s submission of February with a draft s.106 included revised Heads of Terms. These Heads of Terms and associated plans are essential to the question of the new facilities to be provided, and their value. The s.106 cannot be understood and interpreted without this integral part of the agreement. There is no basis for not publishing the draft which the Council has been in possession of since February, this must be published now and please confirm when this has been done.

Other Matters in the s.106

Key points on the s.106 in the BHT submission of 13th December 2018, as subsequently discussed with officers, have not been addressed. These points stand and are not repeated here.

Review by the Council's Planning QC

It is understood from the planning file that you are to submit the draft s.106 to your planning QC for review and advice. Please submit this representation to him for his consideration, together with our submission of 13th December, as BHT asserts that the issues it raises go to the legality of any permission and therefore potential for legal challenge, as stated previously.

You have confirmed that Michael Bedford QC has not been asked to look at any issues since before the committee decision in December 2017. Please confirm that you will be presenting to him an update on other matters, as discussed, and that you will be supplying to him the following for his consideration and advice ;

Advice to BHT of Richard Kimblin QC of May 2018 –regarding the committee decision and new factors since that decision – in particular the following;

- the fundamental point that the harbour company now states it can afford to fund the new facilities so legally the proposal no longer qualifies as Enabling Development.
- the failure of the Council's Appropriate Assessment to address flooding and contamination of the new car park, including the context of IWC's refusal for a car park on the same site due to the same risk of flooding and contamination.
- flood risk assessment failure on sequential test (again).
- new funds from the sale of house boat plots, and the application of such funds . There have been in 2019 planning applications and contracts for two further houseboat plots. The director of the harbour company has stated that it is intended to apply for five more houseboat plots as soon as possible. The planning officer reported that he did not take these funds into account because the director of the harbour company stated that such funds were earmarked for dredging and repairs to a groyne. The director has recently advised that the harbour company does not now propose spending on those items, so the new funds are potentially available to fund new facilities (copies of correspondence can be supplied on request).

BHT requests your confirmation that the two matters in the s.106 highlighted above will be corrected.

Please also confirm that the Heads of Terms will be made available.

Please also confirm that the material as set out will be placed before the Council's planning QC for his advice.

Yours sincerely

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Reference: Mr Chick email to the applicant 18th March 2019

*"I agree that the Post Development Appraisal should reflect real-time figure. The DVS report is a prediction based on BCIS information, but that is only ever a snap shot in time ,Clearly, the time delay since the DVS report was written and until the development is completed will mean that **the actual***

costs will be different and so the appraisal will not simply act as a rubber stamping exercise but show the actual costs for the development as report by QS.”

References: Committee reports:

References in the report to committee: 12 12 2017:

2.32 Members will note that during the course of development, there is the potential for costs to alter and potentially realise a greater level of profit, given the predicted nature of the District Valuer’s assessment. The District Valuer’s assessment set a reasonable developer profit level for the development however, should real-time profits exceed this figure, the quantum of the housing development could be brought into question. To address this possibility, Officers have required the inclusion of a clause within the legal agreement, which would secure any additional profits for use in relation to further improvements within the Harbour. The Planning Authority would monitor this matter.

2.86 Officers consider that the proposed improvement works that are listed at paragraph 1.1 of this update paper would be beneficial to the harbour and also Island’s tourism economy, for the reasons outlined within the principle section of the original Officer report. Officers consider that the proposed housing has been justified as a form of enabling development whereby the projected profits from the housing would be used to fund the improvements to the harbour. The resolution to grant outline planning permission is subject to the satisfactory completion of a Section 106 agreement. The purpose of the agreement is to secure the funding from the housing development towards the harbour improvements and to ensure that the improvements are undertaken. Moreover, the legal agreement would include clauses to ensure that any profit from the housing development that exceeded that projected by the applicant, would be secured and used for additional harbour improvements. The legal agreement would limit the works for which any additional profit could be used in order that the development would be beneficial for the harbour.

2.93 Since the Committee resolution Officers have been involved in detailed negotiations with the applicants in order to secure suitable clauses within the agreement that would secure the funding for improvements to the harbour. The current draft agreement would secure the following:

- An SPA contribution of £2236
- The completion of improvement works at Bembridge Marina including the provision of the proposed car park, prior to the demolition of the existing facilities at the Bembridge Marina site and occupation of any dwelling on the Bembridge Marina site.
- The completion of improvement works at Duver Marina prior to the demolition of the existing facilities and the occupation of any dwelling on the Duver Marine site
- The carrying out of habitat mitigation works and the silt lagoon mitigation works prior to the occupation of any dwelling and the requirement to continue to manage the silt lagoon in accordance with

the submitted ecology report

- A marketing period to be carried out for the dwellings to secure a priority period for persons with a local connection
- The provision of an overage clause that would collect profits above the agreed developer profit level and direct monies to be spent on further improvements to the harbour, including dredging.
- A clause to ensure that the improvements are let to the Harbour Authority at a fair rental charge, the method to be agreed between the Council and the applicant.

3. Recommendation

3.1 For members to note the content and recommendations within this update paper and to endorse the previous committee resolution for outline planning permission to be granted, subject to addition of the revised conditions and the execution of a legal agreement under s.106 of the Town and Country Planning Act 1990, to contain the clauses outlined above.

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