

## **Planning Application, Bembridge Harbour (APP/0637/14)**

### **BHT representation on new matters**

#### **Summary**

- (A) New evidence that the SHA cannot afford the increase in rent from £18,000 to approximately £45,000 as provided for in the draft s.106**
- (B) The SHA cannot afford to pay for the long term management of new proposals for major works of lagoon creation and embankments as provided for in the draft s.106 (nor is it lawful to require this).**
- (C) There is recent clear evidence that approximately £300,000 has been wrongly appropriated from SHA funds and applied to purposes of private developer, BIL. This materially deprives the harbour of funds which could have been applied towards the cost of the new facilities. Such action is not within the statutory powers of the SHA.**
- (D) There is recent clear evidence in confirmation that approximately £334,000 has been wrongly appropriated from SHA funds and applied to purposes of private developer, BIL, in the form of a loan. This materially deprives the harbour of funds which could have been applied towards the cost of the new facilities. Such action is not within the statutory powers of the SHA.**
- (E) It has recently come to light that BHIC has under the current ownership been deprived of a total of £160,000 in its rightful income in fees for the extraction of gravel. This materially deprives the harbour of funds which could have been applied towards the cost of the new facilities.**
- (F) Total funds improperly removed from BHIC just on this new evidence alone is approximately £794,000, which should have been available to the SHA to fund its new facilities.**
- (G) These funds are in addition to other funds improperly removed from BHIC as set out in earlier submissions to the IWC, now totalling at least £1,539,828. This is summarised for ease of reference in the Table in this submission.**

#### **Conclusion**

**From the recent clear evidence it is incumbent on the LPA to make proper enquiries of the SHA and to require firm evidence in the form of full accounts to establish the precise reasons for its loss making and hence supposed qualification for receipt of (alleged) benefits in the form of Enabling Development.**

**This recent evidence is supported by earlier submissions regarding wrongful removal of BHIC funds, and the resulting loss-making position of BHIC.**

### **1. Introduction**

1.1 New matters have come to light, both in relation to the draft s.106 and to the application generally. These require examination by officers and that further enquiries

be made both of the applicant and of BHIC, the recipient of benefits under the “Enabling Development”. In the absence of full and satisfactory responses, BHT argue, officers need to re-assess the merits of the application as Enabling Development, a supplementary report and referral back to committee is required.

1.2 BHT has been very concerned by a number of events since the committee resolution of December 2017, both during the negotiation of the s.106 agreement and in the subsequent supplementary work on the Appropriate Assessment on environmental matters, and its outcomes. As a result BHT commissioned Keystone Law to carry out further analysis of financial matters concerning the statutory harbour authority (“SHA”), BHIC. This was carried out by Corporate partner, Caroline Graham, author of the Legal Report submitted to the Council in 2017, with Partner in Planning and Public law, Oliver Goodwin.

1.3 Findings and conclusions relating to new information are directly relevant to both the s.106 and the basis for granting permission generally.

## **2. Section 106 agreement – new matters**

### **(A)BHIC plainly cannot afford to pay 2.5 times its current level of rent, as provided for in the draft s.106.**

2.1 Current rent is stated as £18,000<sup>1</sup> future rent estimated at £45,000 (Hose Rhodes Dickson’s rental valuations of the offices and wash facilities that the applicant submitted in 2014 in support of the application plus an estimated £10,000 for the proposed car park). BHIC should not have this arrangement imposed on it.

2.2 On the present facts BHIC is indeed in need of financial assistance, showing a consistent pattern, and net losses over the period 2013 to 2019<sup>2</sup>. This is clear evidence that BHIC cannot afford the very substantial increase in rent as provided for in the s.106.

2.3 It is incumbent on the LPA to be satisfied that the purported benefit offered by the applicant indeed is a material benefit, analogous to public subsidy, as stated in the Guidance. Charging 2.5 times its existing rent, in circumstances where BHIC is at the point of insolvency is a clear harmful act rather than a benefit.

2.4 The LPA is in receipt of BHT’s Planning QC’s Opinion (May 2018) that in any event, charging market levels for rent does not represent a benefit and therefore is not “Enabling Development”. Further, BHT have submitted evidence that BHIC in fact owns 2/3 of the land on which its new offices are to be built, so it is wrong in any event for the figure of £45,000 as market rent to be charged. (Submissions April 2020 and most recently on the 16.11.2020).

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<sup>1</sup> [Letter from Hunt and Ptrs 19th June 2017](#) ( See third paragraph)

<sup>2</sup> [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See schedule 1.2 penultimate line profit and loss line , reduction of £22,033 2012 to 2019 and a loss of £17,654 in the year of submission of the application)

## **(B) Wrongly burdening BHIC with expensive cost of management of addition to nature reserve**

- 2.5 In recent months a plan of very substantial works to the former silt lagoon was submitted. This was in response to Natural England's wide ranging and comprehensive objection to the LPA's updated Appropriate Assessment in 2019. The sketch proposes two banks, each of up to two metres high and 70 metres long, and creation of a new lagoon some two metres deep and 70 metres long. This replaces the approved proposals simply to mow the vegetation. This is proposed by the applicant developer as mitigation for the ecological harm caused by works necessitated by the new houses.
- 2.6 Long term management of this new created natural landscape is proposed as part of the mitigation. Planning policy requires that the applicant should fund this mitigation. However, the draft s.106 provides that the applicant passes this burden of the management cost in perpetuity to the statutory harbour authority (and management of non-harbour nature reserves is not one of its statutory functions, being outside its area of jurisdiction). There is no evidence that the LPA has considered the cost of the long-term management of this land, nor whether the harbour authority can afford it (let alone whether it is within its statutory powers to do so).
- 2.7 It is incumbent on the LPA to examine the financial position of BHIC to decide whether it can afford to take on such further financial commitments before entering into the s.106. It is asserted that the LPA should also satisfy itself that it is within the power of BHIC to take on the management responsibility, as the LPA is the body responsible for enforcing the terms of the s.106.

## **3. New information on the application, in relation to the financial position of the Statutory Harbour Authority re. Enabling Development**

**(C) There is recent clear evidence that approximately £300,000 has been wrongly appropriated from SHA funds and applied to purposes of private developer, BIL. This materially deprives the harbour of funds which could have been applied towards the cost of the new facilities.**

3.1 Malcolm Thorpe, Director of the SHA, has recently claimed that BHIC has paid in excess of £300,000 in pursuing development company BIL's planning application. In his letter to BHUG of 17<sup>th</sup> November 2021 he states in relation to the application that *"the cost to BHA in dealing with the various claims made by BHT is actually well in excess of the anticipated cost of repairing the groyne."*<sup>3</sup> Mr. Thorpe is clearly referring to the contractor's quote to BHUG of March 2019, or if a lower quote, total costs of £300,000 as Mr. Thorpe quotes VAT at £60,000. This is an unlawful use of BHIC's funds as they are not being applied for specific harbour uses pursuant to s.31 of the Harbour Act. This statement is contrary

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<sup>3</sup> [BHIC letter re BHUG 17.11.2020](#)

to Mr. Thorpe's previous stated position on BHIC payments for the BIL's application. Mr. Thorpe has stated to the IWC in an email of 25<sup>th</sup> September 2020 that by "BHA" he means BHIC. <sup>4</sup> This is an improper use of SHA funds, it is not towards harbour purposes.

**(D) There is recent clear evidence in confirmation that approximately £334,000 has been wrongly appropriated from SHA funds and applied to purposes of private developer, BIL, in the form of a loan. This materially deprives the harbour of funds which could have been applied towards the cost of the new facilities. Such action is not within the statutory powers of the SHA**

3.2 The BHIC accounts to March 2018 <sup>5</sup> show an increase to a sum identified as a loan to BIL from £15,820 to £350,171, an increase in one year of £334,351. In the absence of a compelling explanation this constitutes use of BHIC funds contrary to section 31 of the Harbour Act.

3.3 As one would expect BIL accounts for that year show an increase in amounts falling due within one year of £328,891<sup>6</sup> a figure which correlates closely with the £334,351 increase in BHIC's loan. The accounts of BIL to March 2018<sup>7</sup> show net assets of £172,388.

3.4 BHT drew this issue to the attention of the IWC in a submission which was copied to BHIC inviting an explanation from BHIC. An explanation was provided by Hunt and Ptrs. accountants to BHIC in a letter of 13th June 2019, which BHIC submitted to the IWC in response<sup>8</sup>.

3.5 Hunt and Partners advised a reduction of the harbour's indebtedness, whereas BHIC 's overall liabilities increased by £80,840 in the period March 2017 and March 2019. BHIC long term debt remained constant at £1,200,000. This is contrary to the assertion by Hunt and Partners that BHIC "*has been gradually repaying that money over the last few years when small amount[s] have become available*". The only possible reading is that Hunt and Partners were referring to BIL and Hawk Property where debts have reduced substantially during the period. This is a further illustration of the muddling of the affairs of BHIC with Other Companies.

3.6 Though invited by IWC to do so, Hunt and Partners' response does not explicitly address the loan. The letter appears to suggest that the sum was not in fact a loan as stated in the accounts but rather represents repayment by BHIC of a debt owed to BIL. There is nothing in the accounts of either company to support this statement. There is no indication in the accounts of BHIC of a loan to it from BIL. It is unequivocal from the accounts that the opposite is true.

3.7 Subsequent to that submission and Hunt and partners letter there is **new information**: BHIC accounts published 31<sup>st</sup> December 2019 confirm the amount of £350,004 is a loan to BIL. The BIL accounts published 11<sup>th</sup> December 2018<sup>9</sup> (not previously referred to by BHT) have a corresponding entry where their indebtedness increases by a similar amount. The subsequent 2019 BIL accounts

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<sup>4</sup> [BHIC email to Ben Gard 25.09.2020](#)

<sup>5</sup> [BHIC Accounts to March 2018](#)

<sup>6</sup> [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See schedule 1.3)

<sup>7</sup> [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) (See Schedule 1.3 line shareholders funds)

<sup>8</sup> [Letter from Hunt and Ptrs. to BHIC 13th June 2019](#)

<sup>9</sup> [BIL 2018 accounts](#) ( note change in amounts falling due within one year increasing fro £47,378 to £376,269)

show a similar position<sup>10</sup>. The intercompany position is clearly stated in BHIC accounts of 2018 and now reaffirmed in 2019 £350,004 is a “*current account loan*”<sup>11</sup> to BIL and not a repayment of BHIC’s debt. These funds should be available for improvements as such a loan is contrary to Section 31 of the 1963 Bembridge Harbour Act.

3.8 There has been one more subsequent development. Despite the loan to BIL apparently being repayable within one year, the reduction in amounts due within one year had only reduced marginally to £373,054 in March 2019 accounts of BIL and BHIC. This demonstrates a further misuse of funds of BHIC the Statutory Harbour Authority in breach of the Harbour Act.

**(E) It has recently come to light that BHIC has under the current ownership been deprived of a total of £160,000 in its rightful income in fees for the extraction of gravel. This materially deprives the harbour of funds which could have been applied towards the cost of the new facilities.**

3.9 In a lease<sup>12</sup> from BIL (as landlord on acquisition of the freehold from M&L), HJ Bennett and Sons Limited (“H.J. Bennett”) agreed to pay rent of £32,000 pa for an area land with a rateable value of £12,000. The rateable value is based on an assessment of the market rental value at the valuation date. BHT believes that this disparity is explained by parallel arrangements provided for HJ Bennett to extract aggregate from land within jurisdiction of BHIC, without making any payment to BHIC in respect of those arrangements.

3.10 In the lease (at 3.25) it is made clear that no sums for the right to extract are to be paid to BHIC “*no such royalties will be paid or due on materials dredged from the seabed owned by the landlord or Bembridge Harbour Improvements Company Ltd*”. The amounts are very significant at over 20,000 cubic metres pa and only permissible by use of the powers granted under section 23 of the Harbour Act<sup>13</sup>. It is plainly wrong that BIL receives more than the rental value of the site if that money represents value provided by BHIC, which receives no reward. This arrangement stopped in late 2019 as the lease was not renewed.

3.11 The level of apparent over charge by BIL of £20,000 p.a. appears to have been constant for the 8 years to and including 2019 – if so it amounts to £160,0000 of funds that should have been paid to BHIC.

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<sup>10</sup> [BIL 2019 accounts](#) ( note a virtually unchanged level in amounts falling due in within one year)

<sup>11</sup> [BHIC Accounts to March 2019](#) ( See 4 related party trans actions )

<sup>12</sup> [Lease between M&L and HJ Bennett](#) (Note BIL stand in the place of M&L on acquisition)

<sup>13</sup> [The Pier and Harbour Order \(Bembridge Harbour\) Confirmation Act 1963](#) (See section 23)

## Conclusion

From the recent clear evidence it is incumbent on the LPA to make proper enquiries of the SHA as to its finances to establish the precise reasons for its loss making and hence supposed qualification for receipt of (alleged) benefits in the form of Enabling Development. This recent evidence is supported by earlier submissions regarding wrongful removal of BHIC funds, and the resulting loss-making position of BHIC.

## 4.New evidence added to evidence in previous submissions to the IWC

Table. Summary of funds improperly extracted 2012 – 2019 visible in accounts or based on written statements from BHIC

Issue	Amount	Non-compliance with
Sales of houseboat plots to 2016 (issue already identified to the LPA, 2017)	£171,027	Harbour Act s.31 Companies Act s.172, s175
Interest on Hawk properties loan calculated at average of declared interest payments in accounts. (issue already identified to the LPA, 2017 )	£574,450	Harbour Act s.31 Companies Act s.172, s175
BHIC loan to BIL (increased loan already identified to the LPA 2019 , but <b>further evidenced</b> in BHIC and BIL's subsequent accounts see 3.2 -3.8 above)	£334,351	Harbour Act s.31 Companies Act s.172, s175
Payments for BIL's planning application ( <b>new matter</b> see 3.1 above)	£300,000	Harbour Act s.31 Companies Act s.172, s175
Depriving BHIC of gravel extraction income 2012 -2019 ( <b>new matter</b> see 3.9-3.11 above)	£160,000	Harbour Act s.31 Companies Act s.172, s175
Other transactions (not quantified)	£ [---,---]	
<b>Interim total</b>	<b>£1,539,828</b>	

4.1 Such financial matters would normally be outside the scope of consideration in a planning decision. However, guidance on Enabling Development is clear that full financial disclosure is required. “Enabling Development and the Conservation of Significant Places, 2015” states (Summary, Section 3) :*“It is a type of public subsidy, so it should be subject to the same degree of financial scrutiny, transparency and accountability as cash grants from public sources”*. The information made available by the applicants, and responses to further questions asked by the case officer, falls far short of this standard.

4.2 Keystone Law have concluded that, were it not for the unlawful transfers of funds out of BHIC, it would be better off by at least £1,500,000 over the last eight years alone. BHIC would be solvent, well able to afford its own improvements and not in need of, or qualifying for, subsidy in the form of Enabling Development.

4.3 It is incumbent on the LPA to call for full accounts, these matters having been drawn to its attention, to satisfy itself as to qualification for Enabling Development.

4.4 Guidance is clear that full transparency is required. There is no sound basis for arguing that the National Policy does apply to harbours but that guidance does not apply to harbours, as has been asserted.

4.5 Similarly, National Guidance in the Ports Good Governance Guide (5<sup>th</sup> May 2018) requires that all SHAs operate in an open, transparent and accountable manner. The conduct of BHIC fails to comply with Guidance in major and significant respects. The provision of information is set out in Section 3 – Principles are ( at 2.18) “ SHAs shall present a fair, balanced and understandable assessment of the port’s position and prospects through the annual accounts.” It is clear from both the summary abbreviated accounts and from the Director’s conflicting explanations that this standard is not met at all. Another principle is that “SHAs should generally operate in an open, transparent and accountable way”. Again, it is clear from the conduct of the Directors that this principle is not met in any meaningful way.

4.6 It is incumbent on IWC officers to require full disclosure of accounts, in order to assess the merits of the claims for Enabling Development, in light of the new information in this submission, and in order to comply with the Guidance on Enabling Development. This is in addition to ensuring that BHIC complies with the Guidance for ports in PGGG relating to openness, transparency and accountability.

## **5. It is essential that the IWC call for full accounts of BHIC, for transparency, in line with Guidance for ports; PGGG and in line with Guidance for Enabling Development;**

5.1 Irrespective of the guidance, the LPA has been given repeated instances of inconsistent and conflicting information and responses to the LPA questions, to make it essential to require full accounts from BHIC as the SHA, and making it patently unreasonable to fail to do so. The IWC has been put on notice that the Directors and professional advisers to BHIC and BIL have given conflicting and contradictory explanations of financial transactions which go to the heart of the case for subsidy through Enabling Development. Some examples are listed below;

- 5.2 In response to the IWC to the question “Has BHIC paid for the developer BIL’s planning application?” In a reply May 2017 Mr Thorpe said no i.e. “not shown in accounts of BHIC”<sup>14</sup>. **NEW INFORMATION.** In a letter dated 17.11.2020<sup>15</sup> Director of BHIC stated to BHUG that “*The cost to BHA in dealing with all the various claims made by BHT is actually well in excess of the anticipated cost of repairing the groyne* “ and by reference to £60,000 VAT cost estimated the cost of Groyne is £300,000 incl. all fees. On 25.09.2020 Mr Thorpe had confirmed to Ben Gard that BHA was the trading name of BHIC.<sup>16</sup>
- 5.3 In a letter to Mr Thorpe of 13<sup>th</sup> June, Hunt and partners (accountants to BHIC) suggest that a sum of (approximately) £334,000 was a repayment by BHIC of a debt owed to BIL. **NEW INFORMATION** Transactions clearly show a loan in BHIC accounts and reflected by a debt in BIL accounts. BHIC accountant implied it was a repayment of BHIC debt to BIL<sup>17</sup> “*The actual facts of the case are that Bembridge Harbour Improvements Company has borrowed money in total from the other companies in the group and has been gradually repaying that money over the past few years, when small amounts become available*”. Publication lags with BHIC year end of March reported in late December. New information from the review of the published accounts. The 2019 published accounts reveal that: BHIC do not show any reduction in its “Creditors amounts falling due” in less than or in more than one year, However BIL and Hawk accounts do show a reduction in their long term borrowings (from Handelsbanken) and BIL’s accounts do show an increase in liabilities that reflect the amount of the loan from BHIC. <sup>18</sup>
- 5.4 This new information goes to confirm that (approximately) £334,000 was a loan from BHIC. Which would be a breach of Section 31 of the Harbour Act as it is not in pursuance of the undertaking. These funds should be recovered from BIL and be available for improvements.
- 5.5 Re. new evidence on ability to afford future increased rent. BHIC failed to answer on first request from the IWC in 2017. On further prompting from the IWC, BHIC’s accountant stated rent in total £18,000 for all premises (17/6/17). Subsequently, the solicitor acting for BHIC stated £18,000 for one marina only – (28/7/17). Clearly one (or possibly both) of these professionals is wrong. No figures are supported by published accounts.
- 5.6 Malcolm Thorpe, as BIL Director, asked if would grant new lease at a discount (to give some measure of benefit to BHIC). Mr. Thorpe advised that bank would not permit this ( 5/7/17). Yet in the same letter he confirmed that the current rent of £18,000 was “substantially below the current rateable value”.

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<sup>14</sup> [Email BHIC to IWC 08,59 16th May 2017](#) ( see section H)

<sup>15</sup> [BHIC letter re BHUG 17.11.2020](#) ( See penultimate paragraph)

<sup>16</sup> [BHIC email to Ben Gard 25.09.2020](#) ( See para a)

<sup>17</sup> [Letter from Hunt and Ptrs. to BHIC 13th June 2019](#)

<sup>18</sup> [Analysis of accounts of BHIC,BIL,BBS and Hawk Property](#) ( See schedule 1.3 BIL’s current liabilities and see Schedule 1.2 BHIC ( increased ) amounts due within one year and unchanged longterm liability of £1.2m )

- 5.7 Re. new evidence, Mr. Thorpe stated that over the four years ending March 2016, BHIC made “net operating trading “profits totalling £216,099, and stated that “...BHIC has become a viable commercial business during the past 5 years” (letter to IWC6/7/17).<sup>19</sup> However, accounts show that BHIC made a loss over those years, totalling £97,518. Leaving the unexplained difference in figures of £313,408. These figures are highly relevant to the ability of BHIC to afford a dramatic increase in rent (see 2A, above) or to afford to buy the accommodation outright.
- 5.8 In representations on the application in 2017 Mr. Thorpe stated that BHIC could not afford to pay for the construction of, or to buy, the new accommodation. Yet in the changes to the draft s.106 put forward by Mr, Thorpe in July 2018, just this was proposed.
- 5.9 These are all important issues relevant to the judgement of whether the recipient qualifies for Enabling Development. They are all examples of why it is essential to require submission of full accounts for review.
- 5.10 Keystone Law’s conclusions were fully informed by Mr Thorpe’s responses on behalf of various companies and accounts published at Companies House. **“There are multiple examples of the directors of BHIC using artificial means to divert value away from BHIC and into their own commercial companies. In addition to legitimate payments, there are reasonable grounds to conclude that at least £1,539,828 has been extracted from BHIC since 2012. In the case of BHIC these transactions give rise to a breach of the Harbour Act, and cannot be rendered lawful by being ratified by BHIC’s shareholders.”** Officers will note that these sums exceed the total cost of the proposed harbour related works in this application. Some items are already reported to the LPA , but new issues involving over £460,000 are reported here, as is proof of the relevance of a sum of £334,000.
- 5.11 The reason for the financial state of BHIC the SHA is a chronic pattern of financial transactions between BHIC and other companies which are beyond the normal scope of review by the Local Planning Authority and the level of enquiry to date. However, Enabling Development guidance clearly provides scope and clear direction for further enquiry to justify consideration and the proof of need, such as rightful insistence on sight of full accounts. Reliance on simple assertions by the applicant is insufficient and these have been proved to be inconsistent, contradictory and on occasions simply absurd.

**KEYSTONE LAW**  
**28<sup>th</sup> December 2020**

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<sup>19</sup> [Email BHIC to IWC 6th July 2017](#)

