# Section 106 Agreement

## Heads of Terms

1.1. We note that in the proposed 106 agreement, a £5,000,000 conditional grant is to be made to the Council for off-site affordable housing. Therefore we submit that the Council becomes, *de facto*, an interested party to the extent that they have a conflict of interest which must preclude them from reaching a decision in the proposed planning application. We consider that the entire application should be referred to the Secretary of State, for his consideration.

1.2. We have grave reservations about many of the aspects of the current draft 106 agreement which we catalogue below. However, we wish to make our strongest representation with regard to the ineffectual legal framework that we see a 106 agreement having.

1.3. In relation to specific points, e.g. financial contributions, these can be seen as quantifiable liabilities which would have some success of being pursued in the event of a default. There are other, however, less quantifiable parts of the agreement which we fail to see how they could be monitored effectively or indeed enforced. Take the example of the issue of public access. Who is responsible for the monitoring of the number of events and their duration? Who would be liable if the site owner, whoever that may be, denied public access or ignored event agreements?

1.4. This question was put in the form of an e-mail to Mr Paul Banks who offered these following solutions:

*"Dear Peter Price,*

*In brief I advise;*

*If a breach occurred Cornwall Council would have to take a view on the appropriate course of action, this <u>can</u> take the form of legal action to secure compliance.*

*The penalties would be dependant on the breach in question, could be specifically set out in the S106 agreement or at the discretion of the courts, it is difficult to be specific on this.*

*The party subject to agreement or future owner of the site would be liable."*

This is hardly reassuring. There is no indication of how the owner would be forced to comply. There are no penalties written into the 106 agreement for failure to comply. The current site owner "The Owner" is identified as being GMV Nine Limited (incorporated in Guernsey).

1.5. How the local authority intend to make the owner liable, who will not be subject to British law being based as it is in Guernsey, is yet to be established.

1.6. There is a complaints procedure open to the public by way of the Ombudsman. However, even if the Ombudsman were to uphold any complaint their position is made clear on their website:

*"But we cannot dictate what the council should require the developer to do, nor can we compel either party to act in a particular way."*

1.7. We fail to see how any owner of the site, with whom the 106 agreement is incumbent, are to be appropriately obligated?

## We now wish to deal with specific aspects of the draft 106 agreement.

1.8. We note at 5. 'Development to which the agreement will relate' refers to *"511 residential units".* This statement gives no indication that there will be anything other than 100% residential units on site. [The Application itself includes 100,000 square feet of 'commercial space', with no indication as to the design of such an enormous trading area]. Notwithstanding the varied figures for residential occupancy littered throughout the vast documentation that forms the basis of the planning application. This legal document refers only to the 511 as residential. This is a clear indication of the aspirations of this development site. This is further confirmed and strengthened at 6.3:

*"These Heads of Terms are drafted on the basis that there will be no restriction on occupation of the residential units comprised in the Development"*

1.9. To claim, within the planning application that a figure of no more than 25% or 50% residential must surely be seen as nothing other than smoke and mirrors, and causes the figures proffered for traffic movements and other impacts to be nothing more than sheer conjecture.

1.10. At 7.1 under 'Phasing' it is the intention of the owner to remove the unauthorised sea wall within four months of obtaining planning permission which is 'challenge free'.

1.11. We see this as an extraordinary statement given that the unauthorised sea defences have now been in place for well over four years using the claim that - as we understand – this would protect the site workforce. It now appears that the claim for the existence of the unauthorised sea defences has no necessity to be in existence at all given that it will be removed within four months of the planning permission being simply "approved without challenge".

1.12. This statement should be seen as completely removing any legitimacy of the unauthorised structure remaining in place for any further time whatsoever.

1.13. This statement is also an attempt to thwart the Enforcement Notice currently outstanding on this unauthorised structure.

1.14. By agreeing to remove the unauthorised structure only when and if there is a 'challenge free' planning consent will allow the structure to stay in place for an indefinite and indeterminate period. It would invalidate the Enforcement Notice on this site which has already stretched the credibility of such a legal document and the legal enforcement process itself to the limits.

**MAINTENANCE OF SEA DEFENCES**

1.15. This section deals only and exclusively with maintenance of the sea defences. It makes no reference to roles and responsibilities in the event of flooding or storm conditions which may require evacuation procedures. There is no financial responsibility assumed or accepted within this section for that eventuality. It must be presumed, therefore, that these costs will be borne by the local ratepayer.

1.16. This is further confirmed at 8.2 in that service charge receipts will be used exclusively for:

*"the purpose of maintaining, repairing, reinstating and/or decommissioning the sea defences but for no other purpose".*

1.17. We note that within that section that *"the management company shall apportion part of any service charge receipts that it collects from residents of the Development"* for the purpose set out above.

1.18. We consider that an indication of the anticipated monies to be raised should be given within the s.106 agreement to ensure to assure that this means of raising the necessary funds is a realistic one. We point out that the amounts raised will

depend considerably on the eventual 'take up' of the units and if there is a very slow market response then there could be a markedly large shortfall in this money raised.

1.19. Whilst the agreement places ultimate responsibility on the owner, their financial ability to maintain the site is inextricably linked to the success of the site itself. Without any commitment to a financial bond there is no guarantee that any owner now or in the future will find itself capable of meeting what could be significant maintenance charges.

1.20. Given the possibility (however remote) that perhaps in the lifetime of our children or grandchildren there were no solvent party available to meet the Sea Wall maintenance costs, how then is it proposed that the on-going obligations of the Section 106 Agreement be met ? We are sure you would agree that it would be pointless to rely upon any charge on the registered title to the site if, by then, through incursion, degradation, dilapidation or other natural processes, the site had become virtually worthless.

1.21. At the very least, the Section 106 Agreement must provide "loud and clear" that liability for the full cost in perpetuity of maintaining the sea wall shall be made absolutely a charge upon the Owner and all successors in title. It must also bind in due proportion the mortgagees of the property and such of the mix of companies or persons as may be or become mortgagors, owner-occupiers or tenants of property within the development whether in part or whole, and whether by lease or any other disposal of the land the subject of these permissions and any and all buildings thereon, and further shall provide that any and all disposals, leases or other such agreements in respect of the said land or buildings shall contain a clause clearly indicating the burden of the said liability. That said, even this provision could possibly become worthless, for the reasons stated above.

1.22. Equally, and for the sake of clarity, a further strong clause to the effect that the County Council as party to the Section 106 Agreement shall not be liable for the provision of any goods or services of any nature or description except where provided within the terms of a separate contract for the supply of any such goods or services.

1.23. We also submit that before any planning approval or acceptance of a 106 agreement is reached that the definitive management manual, referred to at 8.1, should be submitted and approved as a pre-requisite.

**Community Space**

1.24. We express concern at the potential liberal interpretation of the terms of creation of works of art. We seek reassurance that this will not lead to the site becoming a regular concert venue. Whilst not expressly objecting to concerts, the proposed activities may form the core of 'events' that are then used to restrict public access on a regular basis.

1.25. We note at 12.2 the total area of the creative space is to be determined within the planning application. However, as this is a hybrid application the determination of such a space is merely speculative. Because the Application is in 'outline' only on the landward side of the sea wall, the full extent of the 'community space' should be specified in the Section 106, and should be 'ring-fenced'. Further, the developer should be excluded from putting it to any use which is incompatible with it being 'community space'.

**Public Access**

1.26. The issue of public access has been one of the most contentious issues surrounding this site. Whilst the developer has been keen to reassure that public access is assured, historically they have done everything they can to oppose any public rights of way. It has taken approximately seven years of argument which held up the addition of the public right of way, down Beach Road, to the definitive map. The remaining section of that right of way to access the beach continues to be held up and there is no indication on the part of the site owners that they may simply dedicate that remaining section. Thus we remain highly sceptical in relation to the various promises that public access is assured.

1.27. Even the site plans submitted as part of the planning application give scant regard to what is a legally defined route. The plan shows a severe width restriction at the turn from Beach Road into the site. It shows a width restriction across the site. It includes steps which are not part of the right of way. Inclusion of the steps immediately precludes disabled access. It reduces the level of amenity that the existing right of way has. Its width restriction is illegal. It is also

illegal to place any psychological barrier at or on a public right of way. A gated secure community with guards 24/7 at the entrance is a psychological barrier and is another indication of a lack of commitment by the site owner to allow public access.

1.28. The 106 appears to create agreements that such access will be permitted during the lifetime of the development; although such period is not defined. We consider that these agreements are an illusion.

1.29. At 13.3 a (vi) the developer clearly sets out the restrictions to its much vaunted public access. The site can be closed completely for a total of 32 days in the year. However, the owners of the site want further restrictions. With the approval of the council the site could be closed for an indefinite period purely on the strengths of arguments by the site owner in the promotion of exhibitions and events. These events, in the main, will occur during the peak holiday season. It is clear that access to the beach will be curtailed at exactly the time it would be most sought by the public.

1.30. To say that access will be maintained to one of the three beaches fails to illustrate the restriction which will occur simply by design. If Crinnis and Shorthorn are closed, then access to Polgaver will only be by the able bodied and fit by way of the coastal footpath and proposed steps at Polgaver. If Polgaver and Crinnis were closed then how will access be created to Shorthorn which would be effectively cut off between the two?

1.31. How will either of these situations permit the disabled or families with young children and associated beach accoutrements to visit and enjoy the beach? They simply will not come. Thus the beach will become private by design.

1.32. We also consider that the following should be included under public access:

*"Always provided that nothing in the Agreement is intended to be nor shall in any way be restrictive of the existing rights of public access to and egress from that part of the beach and foreshore held on its behalf by the Duchy of Cornwall."*

1.33. We question the caveat at 13.3 a (iii) in relation to the terms 'development or redevelopment. What circumstances are being anticipated that this site, during its lifetime, will require development or redevelopment?

1.34. Are we to assume that this anticipates a complete change of use over time? Or even a complete reconstruction? If so this presents us with a particularly worrying future. The planning application, notwithstanding its so-called 'parameters' as outline, not only gives a 'blank cheque' for the developer, but the 106 appears to leave open possibilities of complete redesign in relation to the development or its use.

**Sea Road and Beach Road.**

1.35. The current state of Beach Road calls for it to have remedial work done even before the development begins. The surfaces are breaking up and the speed humps are in many cases in serious decay. The developer may, with some justification, refuse to contribute to the reinstatement of a road surface which was itself already in a very poor state of repair.

1.36. However, the residents of Sea Road and Beach Road will bear the brunt of the development traffic during the build and of course for decades to follow. Whilst the draft Heads of Agreement allows for the making good of Beach Road and Sea Road after the construction phase, there is minimal consideration to what will happen once the local traffic is increased by some 2,500 journeys per day. The part of Sea Road which runs from the Beach Road crossroads to the Railway Arch is a privately-owned road with public access. This road is not adopted but most unusually for a private road connects two public highways and is on a bus route. By the developers' own figures this small section of road would – by this single development – suffer an increase of 44% in traffic over its current usage. The developers have 'promised' about 1/3$^{rd}$ of the money it would cost to bring this section up to adoption standards with conditions attached, whereas the full cost would only equate to the price of 1 of their 511 apartments. It is noteworthy that section 15.2 is hedged around with sufficient restrictions that make it quite possible the developers will never have to pay a penny of their 'promise'.

1.37. There must be a more robust clause to ensure that the damage done to the roads is properly recoverable.

**REGIONALLY IMPORTANT GEOLOGICAL SITE (RIGS**)

1.38. In recognising that RIGS exist we consider that access to and protection for these sites should also be part of this agreement.

**Car Parking**

1.39. At 20.1, with regard to the top car park, will there be exclusivity to the general public in order to park their vehicles? Or will third parties, such as The Carlyon Bay Hotel or its associated Golf Course be able to dominate the space under a mutually beneficial contract? CBW had sight of such a contract which was drawn up between the Brend Hotel and The Ampersand Group Ltd, in respect of the making up of Cypress Avenue. If this is the case then once again public access will be denied by design. Although now time-expired it was for five years a part of the Brend-Ampersand agreement that the Hotel and Golf Course could use the top car park.

**Traffic Management**

1.40. At 22.1 (a) we would request that any private roads, not maintainable by the local authority, such as Appletree Lane, be also included.

1.41. At 22.4 There must be a clear statement as to how many civil enforcement officers are currently employed by Cornwall Council with specific duties in the Carlyon Bay area and how many additional officers are to be allocated to deal with identified problems.

1.42. With regard to the provision of off-site parking facilities, we are at a loss to see where these will occur within the immediate neighbourhood. As this is a proposal within the 106 we believe these sites should be identified so as to clearly show that this is a feasible and economic solution.

**Off-site construction and Vehicle Parking.**

1.43. At 25 The Section 106 should clearly identify where the off-site construction parking area is proposed. This is particularly relevant with regard to the travel plan as any site will have to accommodate the routes as agreed.

1.44. We question why this proposal is not to 'prevent' the use of residential streets but simply to 'minimise' such use.

1.45. At 26.1 we reiterate that because of the contents and far reaching implications of the site management plan, that this should be prepared as part of the planning application. It is incumbent upon the local authority to ensure that the safety of the residents of this site should be properly addressed. To include 'emergency procedures' within the site management plan after such planning permission is approved fails to meet that responsibility with which the local authority is charged.

1.46. At 26.1 (b) (i) is the reference to 'beach management' simply litter picking or is it in relation to the overall structure of the beach as a defence mechanism for the site? Lives may depend upon the different interpretations.

1.47. We also note that it is the responsibility of the Site Manager to prepare the site management plan. Given that the plan has such a broad reach and implications we consider that this plan should be drawn up by experts in the particular fields and presented now and not later.

1.48. Finally, we repeat our earlier reservations about the application of this agreement in the event of a default. We would seek clear and unequivocal procedures and penalties that could be applied in the event of any of the parties failing to meet their obligations under this agreement.