THE EXTANT - AN EMPTY THREAT

What is the Extant?

"It is acknowledged that, in principle, this application does not meet the local plan policy." (CEG Planning Statement para 9.8)

1.1. This is the crux of the matter. A development of this type on a beach conflicts with not just local plan policies but national and international ones as well. But CEG's justification is that the principle of development has already been established by the existence of an extant planning permission – the so-called "fall back" position in planning law. By this they generally mean that if they were refused any new planning permission, then they could and would go back to this previous, extant permission and build it. An applicant's 'fall back' position (i.e. what could be constructed without planning permission or under an extant planning consent) normally amounts to a material consideration when assessing a planning application.

1.2. *"A very important part of the decision-making process is to carefully consider whether the new proposal is to be preferred to the extant scheme."* (CEG Planning Statement para 5.4)

"The additional benefits of the proposed development are significant in comparison to the extant scheme." (8.15)

"It is concluded that the new proposal more adequately meets the principles for development within the coastal zone, than the extant permission." (13.11)

"On all planning criteria this planning application out-performs the extant." (15.5)

1.3. The above are just a few of the many comparisons made throughout the Planning Application with the extant scheme – CEG clearly wishes to persuade us how much better this new scheme is than the old one which was given planning permission by Restormel Borough Council in 1990. They say there is no doubt they would build this two-decades-old permission but it would be much better for everyone if they were allowed to build this new one – so the threat is of an inferior scheme if they are refused this one.

1.4. But would they really build the now out-dated 1990 extant scheme which does not meet current flood defence requirements and was declared, in part, to be dangerous by their own consultants in a 2002 report? We submit it is an empty threat.

1.5. *"... the extant scheme is not and has never been a viable proposition. But then, from around 2003/2004 it has never been the Applicants' intention to build the extant scheme...* (The opinion of Christopher Boyle QC in his Opening Submission for CCC/EA 2.13 at the 2006 Public Inquiry).

1.6. It is important to remember that this permission was granted in 1990 – getting on for 21 years ago – and it was for 511 holiday homes on Crinnis and Shorthorn beaches along with the refurbishment and extension of the existing leisure and entertainment facilities including the Cornwall Coliseum. (These existing buildings, dating from the 1930s onwards, were the only previously developed part of the beaches and occupied a small part of Crinnis).

1.7. In his report after the 2006 Public Inquiry into a Revised Sea Wall and Beach Recharge Application Mr McPherson the Inquiry Inspector said:

"*....it seems to me that, despite their protestations, they probably share my view that there is no real prospect that the extant scheme would be built out if their proposed scheme were to be refused*". (Report to the Secretary of State for Communities and Local Government by JI McPherson 26 March 2007 page 125 para 12.142)

1.8. The primary question that springs to mind is why, after more than two decades, this extant - and according to the developers viable - scheme remains dormant. Secondly, one asks how this new scheme can be compared with the earlier one. This 2011 proposal is for a totally different scheme in style and character and the whole development would be set further back than previously planned. The outline plans we now see are for residential buildings claimed to be built in the style of a Cornish village. It is the building of a new town on a beach. Even the developers admit that, with their use of the terms Cornish village and Town Square. They talk of *"providing a new community"* (Planning Statement para 4.1) and of a *"modern urban development"* (para 4.14).

The 1990 Permission

2.1. The 1990 permission is itself a follow up to the 1988 permission for 511 single-storey prefabricated holiday homes. This was opposed by the local community and many others.

2.2. Against this opposition, permission was conditionally granted by Restormel Borough Council on 22 October 1990 for 511 multi-storey holiday homes on Crinnis and Shorthorn beaches. The stipulated conditions were never complied with but included the refurbishment and extension of the old entertainment venue - the Cornwall Coliseum - and ancillary buildings, which, we repeat, occupied part of Crinnis, the only previously developed area of the beaches.

2.3. Since then the roof of the Coliseum building has been removed by the developer and consequently the building is in an advanced stage of decay. As part of the 1990 consent was for this building to be refurbished it is hard to see how that is now possible.

2.4. The plan also included a vertical sea wall with rock armour laid on a geotextile fabric.

2.5. Despite massive local objection, the 1990 permission was renewed in 1996. In December 2001, just before the expiry of the five year period, in which development should have commenced, which had been a condition, a certificate of lawful commencement was issued by Restormel. This was on the basis of a few wooden pegs in the ground and some white lines – since then, no construction of the 1990 scheme has taken place. There is no indication that the developer has any intention of building any part of the extant permission which, in part, was declared dangerous to life and property. This was outlined in a report as early as 2002 by HR Wallingford, the experts acting for the developer, and only revealed during the public inquiry in 2006.

2.6. An application in 2002 for a different scheme – still 511 holiday homes but a bigger retail and leisure element and including a hotel was withdrawn when it was called in for a public inquiry. Again there was massive opposition - including from the then Cornwall County Council.

2.7. In 2004, the developer built, without planning permission, a so-called temporary sea defence made up of steel shuttering and rock armour in part some 40 metres out into the tidal zone. After pressure was put on Restormel Borough Council, the developer was forced to make a planning application for a revised design and location of the permitted 1990 sea defence which was for a recurved sea wall and included beach replenishment and recharge as part of the flood defences. This application was "called in" for a decision by the Secretary of State on 12 January 2006 and a Public Inquiry was held between 7 November and 8 December that year.

'Fall Back' Issue Raised at Public Inquiry

3.1. Numerous issues were examined before the inquiry Inspector, Mr J I McPherson, including the safety of both the permitted and proposed sea defences. But the key issue was whether or not the developers could build the 1990 extant permission. In planning law, did they have a "fall-back" position? Why this was such a 'key consideration' is outlined in the following extracts from that Inquiry.

3.2. *"The inability to build out the extant scheme, if the proposed sea defences are permitted, is an absolutely key consideration in this case … It also explains why the characteristics and performance – physically and financially, of the extant scheme, were explored in such detail rather than the application which was before the Inquiry."* (7.19 – 7.21 CCC and EA evidence).

3.3. The Opening Submissions on behalf of the Local Planning Authority (Restormel Borough Council) stated:

"...the Applicant has already taken steps, apparently at considerable expense, towards construction." (Para. 4.)

3.4. No construction of the extant scheme has taken place on the site since its approval in 1990.

"....the Applicant assures us that he will implement the permission – see, for example, the evidence of Mr Woods which reports an unequivocal commitment on the part of his Directors in this respect (Proofs of Evidence, 10.15 – 10.16)." (Para 4.)

"Others at this inquiry go to substantial lengths to demonstrate that this commitment is a false one. This is an unattractive suggestion in itself, for obvious reasons, and will be difficult to establish given the extent and quality of evidence to the contrary." (Para 5.)

3.5. We repeat - no construction of the extant scheme has commenced since that Public Inquiry.

3.6. Closing Submission on behalf of the applicants, Ampersand, by William Hicks QC:

"The extant wall will be built if the proposal is not permitted. This is not a case where the possibility is theoretical. It is real and almost certain." (Para 193.)

3.7. He repeats:

"The extant wall will be built if the proposal is not permitted. This is not the case where the possibility is theoretical. It is real and almost certain." (Para 335.)

3.8. Mr Tim Renwick, the Construction Director for Ampersand stated;

"If however planning permission is not granted for the proposed sea defences, these temporary works will be repositioned on the line of the sea wall as permitted under the extant planning permission." (Summary of Evidence 4.7)

3.9. Four years later and the extant wall has not been built and the *"temporary works"* of metal shuttering put in place without planning permission in 2004 have still not been repositioned despite an enforcement order.

3.10. The importance of the fall back for the proposed revised sea wall was very clearly expounded by Mr Hicks.

"If there is no fall back then we accept that the proposal will be refused." (Para 265.)

"If the fall back is not realistic we accept that the proposal will not get consent and the "alternatives" are again not relevant to the determination of this case." (Para 295.)

3.11. In his opening submissions on behalf of Cornwall County Council and the Environment Agency, Christopher Boyle QC covered the circumstances of how the GMV element of Ampersand was 'Sold a pup' when they purchased the shares in Ampersand in December 2003:

"Thus Ampersand (corporately) purchased the site in ignorance of H R Wallingford's opinion of the performance of the sea wall ('impractical to build satisfactory sea defences'/ 'extensive overtopping,' 'dangerous'). (Para 2.7.)

3.12. Mr Boyle continued:

> *"£49 million had been spent to date, £8.5 million on the purchase price alone. Without making the assertion that there is a fall back in the extant scheme, the site is virtually worthless (Woods X)."* (Para 2.8.)
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> *"That it will be built out,* (the extant development) *in the absence of grant of this current scheme,* (the revised sea wall) *is a core contention of the Applicants. It is the burden of Mr Renwick's and Mr Wood's evidence and it is the foundation of the Planning case presented by Mr Thompson."* (Para 2.2.)
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> *"It does not appear to Cornwall and the EA that the Applicants dispute seriously or at all the fact that a major leisure proposal of the sort previously granted planning permission is contrary to current policy and would not, today, be granted planning permission."* (Para 2.4.)

3.13. Further confirmation of the views held by Mr Hicks QC for the Applicants and Mr Boyle's submission for Cornwall County Council, that the previously approved leisure scheme would not get planning approval today was given in Mr McPherson's report:

> *"Further it is acknowledged that the permitted leisure scheme is in substantial conflict with current planning policy and would not get permission if sought today."* (Inspector's Report Para 7.149. CCC evidence conclusions)

3.14. The developers accepted that the extant wall would provide a lower standard of flood protection – that's why they put forward a revised scheme with beach recharge which was the subject of the inquiry. A report in 2002 by their own consultants, HR Wallingford, expressed considerable reservations about the design of the extant wall. It said it was impracticable to build satisfactory defences at the western end and there would be extensive overtopping, damage to property and danger to pedestrians along the whole length – especially the western part.

3.15. As the Inspector pointed out in his report, many people who placed deposits on holiday units when they were marketed "off-plan" in 2002, probably assumed the development would be protected from flooding to a 1 in 200 year standard.

(Ampersand returned those deposits when withdrawing the 2002 application.) Mr McPherson continued:

"*A considerable number of units would be protected to this standard, but there would still be 49 with less than 1 in 75 year protection ... some of those would be at risk from storms with a 10 in 1 year return period. Added to this the storm warning system would most likely generate a large number of false alarms, when the storm gates and the promenade would be closed and the storm shutters deployed in the units. This situation hardly conjures up the applicants' image of a modern world class beachside resort."* (Inspector's report 12.134)

3.16. These 49 units would not comply with the minimum necessary to get insurance and so, the developers admitted, would not be sold but retained as holiday lets.

3.17. With the extant scheme, there would be a large area of rock armour – some visible above beach level. At high tide plans indicate no beach west of Crinnis Rock and for some distance to the west of the Sandy River outfall and access from the promenade to the foreshore would be over the rock armour. Another blow to the developers' image of a "world class resort" calling itself "The Beach"

3.18. Evidence at the Inquiry showed that at the end of December 2004, Ampersand's company accounts showed the site to be worth only £3 million. As the Inspector pointed out:

"*... which does not appear to ascribe any material value to the planning permission and the company's accounts do not appear to show any anticipation of future profit." (*Inspector's report 12.140)

3.19. The statutory accounts of Ampersand for all years, up to and including the 2009 accounts (the last filed at Companies House), continue to deny any realistic anticipation of profit from development at Carlyon Bay in the absence of a viable planning consent. Those accounts are required by law to show "a true and fair view" and the company's auditors have confirmed that the accounts comply with the law.

3.20. *"The applicants rely, therefore, on the extant permission as a 'fall-back', i.e. that there is a real likelihood of its being built if permission for the proposed sea wall is refused. … On the evidence, however, there is no real likelihood of the extant scheme being built because it would not be a commercially viable proposition; its level of sea defence is such that it would not be attractive on the open market, and the internal arrangements described within GMV would not be commercially sound."* (Inspector's Report on Cornwall County Council evidence 7.151 and 7.156)

3.21. This was acknowledged by the Secretary of State who agreed that:

"...in general, the standard of flood protection is significantly below that which should be provided." (Secretary of State for Communities and Local Government APP/Q830/V/1197748 18 June 2007 para 29)

3.22. She went on to say: *"She considers the standard of flood protection, the proposed storm warning system and access to the beach over rock armour are factors that may diminish investor confidence and shares the Inspector's doubts that the development would turn out to be as attractive to visitors as envisaged by the applicants". (para 33)*

3.23. The Secretary of State turned down the application for the new sea wall, but she disagreed with the Inspector's view of the fall-back position. She said: "*Whilst she shares the Inspector's reservations about the viability of the extant scheme ... on balance, the availability of finance for the development and the ongoing preparatory work at the site indicate that there is a real possibility, however small, of the applicants building out the extant permission were this proposal to be refused." (para 34)*

Extant is not viable

4.1. Since that decision in June 2007, no further work relating to the 1990 consent has been undertaken and in fact all effort in the intervening (nearly four) years seems to have been concentrated on this new planning application now submitted.

4.2. This surely confirms the developers have no confidence in the extant permission. This 1990 consent included a vertical sea wall in the tidal zone with rock armour laid on geotextile fabric.

4.3. As we have seen, expert consultants concluded this sea defence would not protect the development adequately so a revised scheme was drawn up. This application, which was refused after the 2006 Public Inquiry, was for a recurved sea wall with rock armour and a replenished beach in front of it.

4.4. Both this revised scheme and the permitted Extant scheme were examined in a report by Mr S Burstow, the Principal Engineer for Restormel Borough Council in August 2003. He expressed severe doubt about the viability of the Extant scheme because he predicted the eventual loss of the beach in front of the wall.

4.5. He also pointed out that: *"... the land proposed to be developed is equally as vulnerable as the visible beach to removal by the sea and that the whole area should be regarded as beach."* (Burstow report 3.3)

4.6. He continues: *"The present steep beach is eroding at a slow but steady rate … there is a slow loss of material, which, because there is no replenishment by either natural or unnatural means, will result in the eventual loss of the entire beach.... the effects of rising sea level and change of weather patterns combined with the increasing risk of severe storm events lead to the conclusion that erosion rates will increase and that the risk of serious storm events and the*

consequential rapid loss of sand is much greater. Loss of the fronting beach will inevitably lead to losses of material behind." (Burstow report 3.4)

4.7. The revised scheme, which included beach replenishment, was designed as a solution to these predictions of beach loss. Mr Burstow concluded it was *"probably a workable solution"* but suffered from the flaws of continuing cost throughout the life of the development and the use of numerical models which led him to view the *"design assumptions"* with *"some caution".* (Burstow 3.8. For full report see Appendix AP6)

4.8. These flaws were also examined at the 2006 Public Inquiry into the revised sea wall, which it must be remembered was still designed to protect the permitted or Extant development behind it. The sea wall was on a similar but different alignment to the permitted wall with parts seaward and parts landward of the permitted line. At the inquiry it was shown that the western end would have to be set back by 60 metres in order to be effective. This meant the whole of the western apartment block (consisting of 94 units) on Crinnis Beach could not be built – which must have put the viability of the extant scheme into doubt.

4.9. The Extant scheme, without beach replenishment, is not viable because the beach in front of the wall will be lost completely (according to the Burstow report) and in any case is dangerous along parts of it (according to HR Wallingford).

4.10. With beach replenishment, nearly a fifth of the development could not be built and in any case it has been rejected as unsustainable by the Secretary of State.

4.11. As Mr Boyle said in his opening submission for CCC and the EA:

"... the extant scheme is not and has never been a viable proposition. But then, from around 2003/2004 it has never been the Applicants' intention to build the extant scheme (and before then any such intention was founded on ignorance of the 2002 report)." (Boyle Opening Submission for CCC/EA 2.13)

4.12. Now the new sea defence in this 2011 application has retreated, according to the developers, to the vegetation line, greatly reducing the available land to accommodate 511 residential units. This "squeezing a quart into a pint pot" must be detrimental to the developers' aspirations so moving the sea wall back up the beach must have been considered vital to protect the site.

4.13. Mr Boyle went on to point out:

"... it is clear that the Applicant company (as opposed to the Applicants' planning case) looks forward, in fact, to developing a different leisure scheme than that currently permitted. This, as yet unformulated and necessarily unpermitted, scheme would include new-build leisure not refurbished leisure and 12 month occupation." (Boyle Opening Submission for CCC/EA 3.5)

4.14. As Mr Boyle predicted, now we have this new application which aims for 12-month residential accommodation and associated new, not refurbished, leisure facilities.

4.15. These homes are proposed on a beach, at sea level, backed by a sheer cliff with only one access road in and out. As we detail elsewhere (CBW Conflicts with Policy) and as was stated many times at the Public Inquiry, the permitted (i.e. extant) scheme conflicts with so many national and local policies that it would not now receive planning permission.

4.16. The developers therefore are relying on it as a fall-back – they insist that they will build it if permission is refused for the current application. If there is no fall-back and the extant has no prospect of being built, then the proposed new plans must be considered as a stand-alone, new application which has to be determined in the light of current policy.

Conclusions

5.1. The applicants, Commercial Estates Group, (acting on behalf of the web of companies in the Versteegh group – Ampersand, GMV9 etc. – the offshore freeholder of the site) claim they have a fall-back, as confirmed by the Secretary of State. They insist this is a material consideration in their application and allows them development of at least the scale of the abandoned 1990 consent.

5.2. But after more than four weeks of scrutiny at the 2006 Public Inquiry by learned counsel and world-renowned experts, the Inspector concluded there was no fall back.

5.3. In fact Ampersand themselves "wrote off", in their statutory documents filed at Companies House, any financial value in the extant consent and any development value in the site.

5.4. The Secretary of State did not agree on the absence of fall back, but she did question investor confidence in the extant development before concluding that the extant did not represent significantly material consideration to affect the decision to refuse the application for the revised sea wall and beach replenishment.

5.5. We submit that if the Secretary of State were to have had the knowledge we have today of the lack of commitment shown by the developer to build out the extant and that they have proposed yet another planning application which bears no relation to the extant then she would have come to an entirely different point of view.

5.6. It is clear, therefore, that this planning application is a new, stand-alone application to which the discredited 1990 permission bears no relevance. It is

now such a different plan from that drawn up 21 years ago that little or no comparison can or should be made.

5.7. This application should be decided in the light of current local and national policies which clearly do not support such a development in this location.

5.8. We submit that this application should be refused in its entirety.