

# Affordability in Perpetuity Proposal



Outline of the content of this document:

The purpose of this document is to provide a proposal of the mechanisms which would be put in place in the process of the development of the Pantmaenog Timber Cluster in order to protect the affordability of the housing provided by it in perpetuity.

However, it is worth noting that the good intentions and reputations of Down to Earth and Cwmpas, both long established Social Enterprises, in creating this development model, with support from other advocates of Community Led Housing and the local community of Rosebush, are the strongest mechanisms by which this project will succeed and fulfil its aims.



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## Definitions

**DTE** - Down to Earth

**The Co-op** - Hafan Hedd Cydweithrediad

**Cwmpas** - Wales-based second tier organisation, formerly known as the Wales Co-operative Centre, which provides guidance and funding support to organisations working with co-operative and community-led principles

**Site** - the land and buildings associated with the Planning Application/Appeal, named Pantmaenog Timber Cluster

**Affordable Housing** - “housing where there are secure mechanisms in place to ensure that it is accessible to those who cannot afford market housing, both on first occupation and for subsequent occupiers” TAN 2

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## 1. Commitments: Section 106 Agreement/Unilateral Undertaking

### 1.1 Suggested Commitments

A Section 106 Agreement/Unilateral Undertaking, as agreed between the Local Planning Authority (LPA) and the Applicant could be either a condition or a pre-requisite of Planning Permission. In either case, it would be expected to contain clauses committing to the following:

- 100% of the housing provision to be “affordable housing” according to the definition in TAN 2.
- The “affordable housing” provision will be met by offering affordable rental homes, with rents always set at the Local Housing Allowance rates, as an equivalent to social rented housing for non RSL landlords
- Approval of the Allocation Policy by Pembrokeshire County Council Housing Department incorporating:
  - Requirement that all households are from the Housing Register
  - A ‘Local Needs’ priority cascade

These would be discussed, and acceptable terms agreed with the LPA during formal Section 106 negotiations.

### 1.2 Local Land Charges

Any Section 106 Obligations and certain Planning Conditions would be registered as Local Land Charges by the Local Authority. This would ensure the obligations/conditions would bind all successors in title and people with an interest in the property.

The responsibility for deciding an appeal to remove or alter Section 106 Obligations lies with the Planning Inspectorate (PEDW), who would be unlikely to do so.

### 1.3 Mortgage Exemption Clause

Section 106 obligations often involve a mortgage exemption clause which might give rise to concerns. Although it is acknowledged that finances sometimes require this, it is thought that the business plan means that no such exemption will be necessary. This provides further certainty that a Section 106 Agreement will be permanently enforceable.

### 1.4 Effects in relation to protecting Affordability in Perpetuity

Section 106 Obligations are the strongest mechanism for protecting affordability in perpetuity. They bind each successor in title and person with an interest in the property and are more difficult to remove than a restrictive covenant on title.

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## 2. Title Possession

### 2.1 Freehold Title

In the case of a grant of Planning Permission, the Freehold Title would be transferred to Down to Earth.

Down to Earth would then establish a Co-operative Society (Hafan Hedd Cydweithrediad) to occupy and manage the housing and certain other site elements.

### 2.2 Leasehold Title

The Co-op would Lease the Site from Down to Earth for an original Lease length of 7 years. This does not allow the Co-op to benefit from public ownership rights and the Leasehold Title would not be registerable at the Land Registry.

### 2.3 Effects in relation to protecting Affordability in Perpetuity

DTE would retain primary responsibility and liability for compliance with the Local Land Charges. They will have the only registered title at the Land Registry.

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## 3. Lease Terms

### 3.1 Assignment

The terms of a lease between DTE and the Co-op would explicitly remove all assignment rights, therefore forbidding the Co-op to sell or sub-let the Site or any part of it. Instead, in the case that the Co-op cannot or will not continue with the Lease, it would be terminated and revert to full management/ownership by DTE.

### 3.2 Limiting Uses

The Lease would contain terms limiting the use of the site in accordance with the commitments above and other key features of the employment/housing/community operational model being established by this development.

### 3.3 Forfeiture

Breach of the terms of the Lease, in a worst-case scenario, would enable DTE to seek forfeiture of the Lease and regain full management/ownership of the Site.

### 3.4 Effects in relation to protecting Affordability in Perpetuity

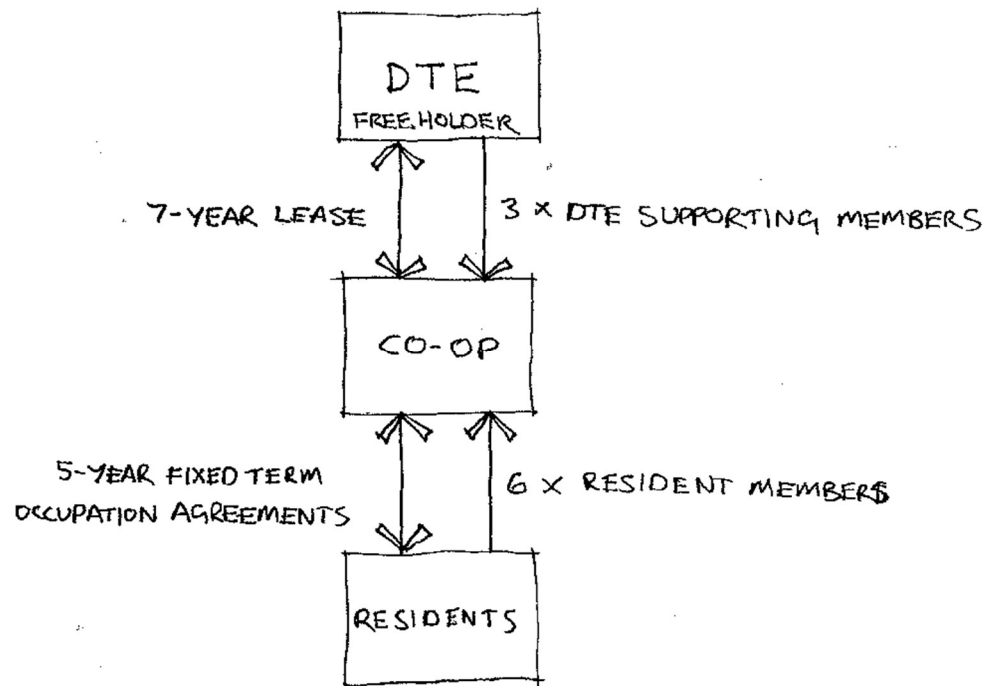
As set out above, the primary responsibility and liability for Local Land Charges would rest with DTE as Freeholder. Therefore, the terms of the Lease between DTE and the Co-op are the principal mechanism for ensuring that the Co-op are also bound by the same obligations and follow the operational model as it would be approved by the LPA.

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## 4. Legal Structures

### 4.1 Organisational Diagram



### 4.2 Down to Earth (DTE)

#### 4.2.1 Incorporation

DTE is a Social Enterprise and incorporated as a Company Limited by Guarantee, with a board of Executive and Non-Executive Directors who have overarching responsibility for all activity but have no shareholder interest in the company.

#### 4.2.2 Asset Lock

DTE's articles of association include 'Objectives' - the set of socially driven purposes that all company activity – including the construction, management or sale of property - must contribute to, and 'Restrictions' which prevent assets from benefitting company members. This forms the asset lock.

*"5(a) The income and property of the company shall be applied solely towards the promotion of its objects and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise however by way of profit, to the members of the company;"*

*6 If upon the winding up or dissolution of the company there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the company but shall be given or transferred to some other charitable institution or institutions [nominated receiver/s] having objects similar to the objects of the company, and which shall prohibit the*

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*distribution of its or their income and property among its or their members to an extent at least as great as is imposed on the company under or by virtue of Article 5(a) hereof, such institution or institutions to be determined by the members of the company or before the time of dissolution.”*

The asset lock does not restrict the sale of the Site by DTE, so long as the income is used in line with the Objectives<sup>1</sup>.

## **4.2.3 Nominated Receiver**

DTE would identify a suitable organisation to be the nominated receiver and benefit from transfer of the Freehold Title (as set out in the asset lock) if Planning Permission was granted. This would have to be a similar organisation and so would ensure a similar commitment to the Site continued.

## **4.2.4 Variation**

The Articles of Association may be changed by agreement of the directors, and may remove the asset lock articles, since it is not a statutory element of a company's incorporation.

The removal of the asset lock is a highly unlikely scenario and would severely undermine both DTE's 17-year track record in promoting social and environmental justice and its definition as a Social Enterprise.

## **4.2.5 Effects in relation to protecting Affordability in Perpetuity**

The Social Enterprise model ensures that, whilst the Site is in the possession of DTE and during the process of any future transfer by DTE to another organisation, social benefit, rather than profit from speculative development, is the motivation, since company members cannot profit individually and must adhere to the social objectives in the Articles of Association.

Unless in the highly unlikely scenario that the asset lock is removed or the Site sold to pay debts upon dissolution of DTE, the Site is assured to be owned by an asset-locked organisation in perpetuity. In any case, the Section 106 Obligations would carry forward to any future owner.

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<sup>1</sup> Refer to Appendix 1 for an extract of the relevant parts of DTE's Articles of Association.



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## **4.3 Hafan Hedd Cydweithrediad (the Co-op)**

### **4.3.1 Incorporation**

Hafan Hedd would be incorporated as a Co-operative Society and would be bound to abide by the 7 Co-operative Principles<sup>2</sup>. The membership will comprise the Resident members of each of the 6 Live-Work households and up to 3 members of DTE staff as supporting members. Decision-making for all co-operatives is based on the democratic principle of '1 member – 1 vote'.

### **4.3.2 Asset Lock**

A co-operative's activity is governed by its Rules in a similar way to the Articles of Association for a Company.

Hafan Hedd would include a similarly worded asset lock to that of DTE (as above).

### **4.3.4 Variation**

The asset lock would be entered as a fundamental rule, therefore requiring 100% agreement of all members (consensus) to alter or remove it. This is the highest level of protection available under the co-operative legal structure.

### **4.3.4 Effects in relation to protecting Affordability in Perpetuity**

Whilst the Co-op would initially be bound to housing affordability by the Lease and have no registered ownership rights, there is potential that it could hold a registered Leasehold Title in the future. The asset lock within the Co-op's Rules ensures that if this occurs, there can be no speculative financial gain in the use or transfer of the Leasehold Title to the Site.

As DTE will have membership representation in the Co-op, this can be seen as both the training support mechanism that is its main intention, but also a voice of guidance as regards use of the Site in accordance with the wider goals of the project.

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<sup>2</sup> Refer to Appendix 2 for the 7 Co-operative Principles



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## 5. Summary

In summary, the Section 106 Obligations, setting out mutually accepted definitions of affordable housing in perpetuity, are overarching restrictions that will apply regardless of ownership. Beneath that, the intended owners of the site are DTE, a reputable, long-established Social Enterprise which will be answerable to the Local Authority for those Obligations.

The affordability in perpetuity model proposed contains several mechanisms by which DTE are restricted in both their use and transfer of ownership of the Site. In turn, several mechanisms are in place to enable DTE to control the ownership and use of the Site in order to meet those Obligations.

Should the Co-op gain further control of the Site by acquiring a registered Leasehold Title, it will have been set up and managed in such a way as to protect the affordability in perpetuity.

Both organisations are set up to deliver affordability in perpetuity and intend to do so.

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## 6. Appendices

### 6.1 Down to Earth Project Articles of Association

#### “Part 2 OBJECTS

##### 3 OBJECTIVES

The objectives for which the company is established are to:

Offer educational and well-being opportunities, particularly for disadvantaged, vulnerable and ‘hard-to-reach’ young people and adults;

Promote equality and social inclusion through opportunities that tackle poverty;

Demonstrate and promote sustainable development and global citizenship

Provide opportunities for volunteering

Provide diverse activities through the outdoors

Provide diverse activities through the arts

Provide training programmes for continuing professional development and other professional activity.

##### 4 POWERS

The company shall have the following powers exercisable in furtherance of its said objects but not otherwise, namely:

To purchase, take on, lease or in exchange, hire or otherwise acquire real or personal property and rights of privileges, and to construct, maintain and alter buildings or erections;

To sell, let, mortgage, dispose of or turn to account all or any of the property of assets of the company;

To undertake and execute any trust or any agency business which may promote the company’s objectives;

To borrow or raise moneys on such terms and on such security as may be through fit;

To invest the moneys of the company not immediately required for its purposes in or upon such investments, securities or property as may be thought fit, subject nevertheless to such conditions (if any) and such consents (if any) as may for the time being be imposed or required by law and subject also as hereinafter provided;

To establish and support or aid in the establishment and support of any charitable organisations or institutions and to subscribe or guarantee money for charitable purposes;

To construct, alter and maintain any building or structures or parts thereof;

To accept any gift of property or other things;

To print or publish anything;

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To apply for, seek, obtain and accept government of other grants;

To join with any charitable companies, institutions, societies or associations whose objectives are the same as or similar to its own;

To transfer any of the company's property, assets, liabilities and engagements to any of the charities, institutions or associations with which the company is authorised to join;

To open and operate banking accounts and other banking facilities in its name;

To enter into any arrangements with any governments, government departments, local authorities, other authorities, or any person, company or association necessary to promote any of the company's objects;

To do all such other things as are incidental to the attainment or furtherance of the said objectives.

## **5 RESTRICTIONS**

The income and property of the company shall be applied solely towards the promotion of its objects and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise however by way of profit, to the members of the company;

Nothing in the above paragraph 5(a) should prevent any payment in good faith by the company of reasonable and proper remuneration to any member or officer of the company for any services rendered to the company in accordance with Article 24.

## **6 DISTRIBUTIONS OF PROPERTY**

If upon the winding up or dissolution of the company there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the company but shall be given or transferred to some other charitable institution or institutions having objects similar to the objects of the company, and which shall prohibit the distribution of its or their income and property among its or their members to an extent at least as great as is imposed on the company under or by virtue of Article 5(a) hereof, such institution or institutions to be determined by the members of the company or before the time of dissolution."

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## 6.2 The 7 Co-operative Principles<sup>3</sup>

### 1st Principle: Voluntary and Open Membership

Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept responsibilities of membership, without gender, social, racial, political or religious discrimination.

### 2nd Principle: Democratic Member Control

Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote), and co-operatives at other levels are also organised in a democratic manner.

### 3rd Principle: Member Economic Participation

Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.

### 4th Principle: Autonomy and Independence

Co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

### 5th Principle: Education, Training and Information

Co-operatives provide education and training for their members, elected representatives, managers and employees so they can contribute effectively to the development of their co-operatives. They inform the general public – particularly young people and opinion leaders – about the nature and benefits of co-operation.

### 6th Principle: Co-operation Among Co-operatives

Co-operatives serve their members most effectively and strengthen the Co-operative Movement by working together through local, national, regional and international structures.

### 7th Principle: Concern for Community

Co-operatives work for the sustainable development of their communities through policies approved by their members.

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<sup>3</sup> <https://www.co-op.ac.uk/co-operative-values-and-principles> (accessed 16.06.22)