Planning Inspectorate

Appeal Decisions

Inquiry held on 19 February, 14, 15, 16, 23, 24, 25, 30 April and 1 May 2025.

Site visits made on 30 April and 2 May 2025.

By Grahame J Kean BA (Hons), Solicitor, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20th January 2026

Appeal A Ref: APP/W2275/Q/23/3333923
Appeal B Ref: APP/E2205/Q/23/3334094
Land at Chilmington Green, Ashford Road, Great Chart, Ashford, Kent, TN23 3DT

- The appeals are made under Section 106B of the Town and Country Planning Act 1990 (as amended) against a failure to determine that planning obligations should be variously discharged or modified.
- The appeals are made by Hodson Developments (Ashford) Ltd; Chilmington Green Developments Ltd; Hodson Developments (CG ONE) Limited; Hodson Developments (CG TWO) Limited and Hodson Developments (CG THREE) Limited (together hereinafter referred to as the Appellant or Hodson).
- Appeal A is made against Kent County Council (KCC).
- Appeal B is made against Ashford Borough Council (ABC).
- The development to which the planning obligations relate is comprised within Outline Planning Permission granted by Ashford Borough Council (ABC) Ref: 12/00400/AS on 6 January 2017 pursuant to an application submitted in August 2012 for a Comprehensive Mixed-Use Development for Permission for a Comprehensive Mixed-Use Development comprising:
  - up to 5,750 residential units, in mix of sizes, types and tenures;
  - up to 10,000m² (gross external floorspace) of Class B1 use;
  - up to 9,000m² (gross external floorspace) of Class A1 to A5 uses;
  - education (including a secondary school of up to 8ha and up to four primary schools of up to 2;1ha each);
  - community Uses (class D1) up to 7,000m² (gross external floorspace);
  - leisure Uses (class D2) up to 6,000m² (gross external floorspace);
  - provision of local recycling facilities;
  - provision of areas of formal and informal open spaces;
  - installation of areas of appropriate infrastructure as required to serve the development;
  - transport infrastructure, including provision of three accesses to the A28, an access to Coulter Road/Cuckoo Lane other connections on the local road network, and a network of internal road, footpaths and cycle routes;
  - new planting and landscaping; and
  - associated groundworks;

  where appearance, landscaping, layout and scale are reserved for future approval and where access is reserved for future approval with the exception of the three accesses on to the A28 and the access on to Coulter Road/Cuckoo Lane.
- The planning obligations are contained within the s106 agreement (s106 agreement) entered into by Hodson with ABC and KCC dated 27 February 2017 in respect of the Outline Permission, the other parties to the agreement were Chelmden Limited, Malcolm Colin John Jarvis, Beverley June Jarvis, Malcolm Jarvis Homes Limited, Pentland Kent Limited, Pentland Homes Limited, BDW Trading Limited, Homes and Communities Agency, Titlestone Property Lending Limited and Close Brothers Limited.
- The applications were made by the Appellant to ABC and KCC on 20 October 2022.
- The applications sought to have the planning obligations discharged or modified as follows: i) changes resulting from circumstances outside of the Appellant's control that critically present viability / deliverability challenges; and ii) consequential changes to the s.106 agreement to enable delivery of the development and wider scheme.

Decision

1. The appeals are allowed to the extent that:

   a. the planning obligations, dated 27 February 2017, made between Hodson and other parties to the agreement and ABC and KCC, no longer serve a useful purpose and are discharged pursuant to the Requests as set out in the Schedule below; and

   b. the planning obligations, dated 27 February 2017, made between Hodson and other parties to the agreement and ABC and KCC, shall have effect subject to the modifications the subject of the Requests as set out in the Schedule below.

2. The appeals are dismissed in so far as the Requests refer to the planning obligations, dated 27 February 2017, made between Hodson and other partes to the agreement and ABC and KCC which shall continue to have effect as set out in the Schedule below.

Preliminary matter

3. The Appellant's evidence included a table[1] setting out for clarity each of the 122 "Requests" to discharge or modify existing obligations, alongside which are annotated the Council's replies and the Appellant's rejoinder (if any). In this decision reference is made to all the numbered Requests, including some which were later withdrawn as indicated in the Schedule to this decision.

Background

4. Development pursuant to the Outline Permission, associated non-material amendments and reserved matters approvals are together referred to as the Development. Deeds of variation of the s106 agreement were made on 29 March 2019 and 13 July 2022 (Deeds of Variation). References to the s106 Agreement are to the agreement as amended by these Deeds of Variation. A section 278 agreement (s278 Agreement) was also completed between the Appellant and KCC on 27 February 2017.

5. The s106 Agreement contains numerous planning obligations. It distinguishes between Positive Planning Obligations To Pay/Positive Planning Obligations To Provide And / Or Construct and Negative Planning Obligations. The Positive Planning Obligations include requirements to make several financial contributions to be paid to ABC and KCC, imposed on Hodson as a master developer (the relevant Hodson companies being referred to in the agreement as the Paying Owners). The Negative Planning Obligations were imposed on the Paying Owners and the other parties to the s106 agreement (defined as the Owners), which obligations limit the ability of the Owners to progress and/or occupy development until certain preconditions are met.

6. The appealed applications (Application No 2) before me were in identical form and made to KCC and ABC after previous unsuccessful attempts to apply to modify and/or discharge the s106 obligations[2]. Application No 2 and Annex A, explained the Appellant's reasoning for the changes and detailed the variations sought (modification and/or discharge) and included a Viability Report dated April 2022

[1] CD2/25, section 5.
[2] Described in section 2.3 of the General Statement of Common Ground (General SoCG).

and appendices (Turner Morum Viability Report) in support of Application No. 1 (as previously submitted); Explanatory Statement and appendices dated 18 October 2022 (prepared by Quod for the Appellant, with contributions from Vectos in respect of traffic obligations) (Explanatory Statement); Viability Report prepared by Quod and appendices dated October 2022 (Quod Viability Report), which included new viability (baseline and sensitivity) analyses and which assessed the viability of the whole scheme. KCC and ABC may be referred to collectively as the Councils.

7. A settlement agreement on 10 February 2023 permitted ABC additional time to consider Application No. 2 but agreement was not reached by the time the prohibition on lodging an appeal expired. Therefore, Application No. 2 was not determined by ABC and this appeal proceeds against ABC for non-determination.

8. KCC and ABC wrote to the Appellant on 13 October 2023 inviting without prejudice discussions on certain matters only. A date of 23 February 2024 was set for an initial meeting but on 26 January 2024 KCC and ABC were advised by the Appellant that the meeting would need to be postponed until after ABC had determined the Appellant's application for planning permission for a waste water treatment works. The Appellant resubmitted Application No 2 to KCC on 15 August 2023, however, KCC failed to determine the application within the statutory time period and so an appeal was also brought against KCC for non-determination of the resubmitted Application No 2.

9. On 31 January 2024 the Appellant withdrew certain requests for modification of the s106 Agreement and on 3 October 2024 confirmed that any change sought as a discharge or in the alternative as a modification, should be considered as a discharge proposal only.

10. A revised Explanatory Statement, Statement of Case and draft s106 agreement reflecting the amendments proposed were issued on 25 October 2024. A further version of Annex A, an Education Statement and submissions on viability, highlighting further proposal changes to the application with a note of the reasons therefor were submitted on 23 December 2024, and on 21 January 2025, a further revised draft s106 agreement reflecting the amendments proposed.

11. On 31 January 2025, the Planning Inspectorate advised that the changes made on 23 December to modifications 97 and 98 in Annex A could not be considered under these appeals as the modifications would substantially extend the scope of the applications on appeal introducing new arguments and issues.

12. On 2 February 2025 the Appellant issued a further version of Annex A (CD2/22) with a revised draft document showing the Appellant's revised proposed modifications to the s106 Agreement following the above events (CD2/20). On 28 March 2025 the Appellant issued a List of Corrections dated 27 March 2025 to its revised draft of the s106 agreement, showing also the Appellant's further withdrawals of two of its proposed modifications from its revised Annex A3. This List of Corrections was superseded by a further version, issued on 2 April 2025 but dated 27 March 2025, in which a third withdrawal of a proposed modification was highlighted (CD14/17).

13. On 28 April 2025 the Appellant issued the final version of Annex A (version dated 25/04/25) (CD 14/42) with a final revised version of the s106 agreement as sought to be modified (version dated 24/04/25) (CD14/40). These documents incorporated:

(1) the corrections and modifications set out in the List of Corrections Note issued on 2 April (CD14/17); and
(2) corrections to some of the amounts paid, for which the Appellant seeks reimbursement (they now correspond with the amounts set out in section 8, Delivery, Monitoring & Council's Costs Reimbursement Topic Paper (table 8.1).

14. On 30 April 2025 the Appellant issued a final redline version of the s106 Agreement (CD14/47) showing all the changes to the s106 agreement which would be made by modifications proposed in CD14/42 (the final version of Annex A).

15. It was generally understood that the Development would be undertaken over a substantial period (the Environment Statement refers to a period of 20 years from 2013/14). The Planning Statement accompanying the planning application predicted an annual build out of 250-300 homes per year with first occupations of dwellings in late September 2019. The exact number of current occupations to date was not agreed, but it was approaching 400.

16. There were 21 pre-commencement conditions attached to the Outline Permission that had to be discharged before works could start on site. Applications were submitted between December 2016 and March 2017 and the last pre-commencement conditions were discharged in June 2017, enabling a start on infrastructure works on site. However, the only works that could be constructed were the detailed access points (A, B and D), approved as part of the Outline Permission. No further works could be carried out until reserved matter approvals had been obtained.

17. No reserved matters (RM) applications could be submitted until Condition 17 of the Outline Permission was discharged. It required a detailed masterplan for each main phase to be approved by ABC. The Appellant applied for approval of the Main AAP Phase 1 Masterplan required by Condition 17 in August 2016 and following submission of additional documents Condition 17 was discharged on 26 September 2017 whereupon the Appellant made its first RM application, granted on 20 April 2018. The first occupations of dwellings occurred in late September 2019.

18. As the inquiry progressed, some modifications to the section 106 agreement were agreed (either in whole or in part)[3]. As well as the General and Transport SoCGs, statements of common ground were submitted for viability (Viability SoCG) and education matters (Education SoCG No1 and Education SoCG No 2).

Main Issues

19. By s106 of the 1990 Act, any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into a planning obligation which is enforceable by the local planning authority. A planning obligation may, among other matters, require sums to be paid to the authority on specified dates or periodically, see s106(1)(d).

20. Having regard to s106A, a person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the local planning authority by whom the obligation is enforceable for the obligation to be discharged. The 'relevant period' if no period is prescribed (as in this case), is

[3] General SoCG, Appendix 2.

five years from the date on which the obligation is entered into (in this case 27 February 2017). Therefore, the relevant period has now expired.

21. It would appear from the legislative scheme that the jurisdiction of the Secretary of State on appeal under s106B is the same as that of the local planning authority under s106A. On an application under s.106A, the local planning authority (and on appeal, the Secretary of State) may determine:

    a) that the planning obligation shall continue to have effect without modification;

    b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

    c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

22. Therefore, in determining an application under s106A(3) there are four essential questions to be asked. What is the current obligation? What purpose does it fulfil? Is it a useful purpose? Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?[4] These tests are to be applied to each individual request made.

23. Broadly speaking, the purpose of the obligations in the s106 agreement is to require some payment or provision in kind in relation to infrastructure, services or similar and/or prevent steps being taken until the payment or provision is made.

24. It is possible to have several obligations within one s106 agreement as in this case. It would appear lawful when determining the appeals to approve the changes to one (or more) obligations within the s106 agreement but refuse modifications to others within the same agreement if it is appropriate to do so having regard to the provisions of s106A.

25. The "useful purpose" in s106A(6)(b) and (c) may, but need not be, the same as the original purpose for entering into the planning obligation. Moreover, the issue is whether the obligation now serves any useful purpose, not just any useful planning purpose[5].

26. It is important to note that the planning merits of the development are not relevant in a s106A application; it is not a new or amended application for planning permission on different terms. Therefore, an appellant cannot by the application, change the basis on which the permission was granted or question the planning balance on which it was granted. For example, if the Community Infrastructure Levy (CIL) tests would not have been met when the obligation was completed, or if they might not be met now, the obligation might still serve a useful purpose.

27. For example, in *R on the Application of Millgate Development Limited and Wokingham Borough Council [2011] EWCA Civ 1062* the Court of Appeal noted that:

[4] See *R (Garden and Leisure Group Ltd) v North Somerset Council [2003] EWHC 1605 (Admin)* per Richards J (as he then was), at paragraph 28.
[5] See also *R (Renaissance Habitat Ltd) v West Berkshire Council [2011] JPL 1209* per Ouseley J, at paragraph 33; and *R (Mansfield DC) v SSHCLG [2018] EWHC 1794 (Admin)*, in which the Court concluded that: 1) s106A does not bring in the full range of planning considerations involved in an ordinary decision on the grant or refusal of planning permission (paragraph 30); 2) the issue is whether the obligation served any useful purpose, not just any useful planning purpose (paragraphs 37-38).

"Section 38(6) does not bite upon the decision [to discharge an undertaking under s106A(1)(a)] *and there is no need to revisit development plan policies…Even if the section does bite, it is submitted, an undertaking in accordance with the development plan when made does not cease to be in accordance with it by reason of a concession that the full amount undertaken to be paid is no longer appropriate (para 29)…There is no principle that a concession that a part of the sum is no longer required for specific planning purposes requires the discharge of the undertaking* [para 33]".

28. It seems arguable whether the power applies to "boiler plate" provisions, such as release from liability clauses. However, there is no power to modify an obligation to repay contributions already paid, whether expended or not. Provided that the obligation to pay is discharged, the question whether sums already paid should be repaid is outside the scope of s106A. That said, a successful s106B appeal may affect accrued rights and liabilities irrespective of when they accrued[6].

Preliminary issue – viability

29. In a judicial review permission hearing[7] related to the appeal site, the court was unconvinced that viability was not a material consideration. It was noted that the Councils had taken into account viability. It was also said in terms that viability as a legally material consideration was a "*somewhat complicated point of law and would involve considering a number of previous cases*" (paragraph 7 of the judgment).

30. The parties agreed, based on the Sosmo case[8] that viability may be relevant when granting or varying a planning permission on a planning application, including on appeal. Obligations are often negotiated on viability grounds. If a subsequent change in circumstances requires changes to obligations based on a revised viability assessment, the developer may seek to vary the planning permission and negotiate a different level of obligations, and if necessary appeal against a refusal.

31. It is also agreed that the CIL rate should balance additional infrastructure investment to support development and its viability, but s106A does not require consideration of whether an obligation would meet CIL tests.

32. The Appellant states that viability of a scheme, and the effect of an obligation and other obligations on viability, may be relevant to whether an obligation serves a useful purpose and is relevant in the present case. It submitted that:

"if an obligation renders a development incapable of being carried out or completed then the decision maker may conclude that it does not serve a useful purpose. On that basis, it is necessary to take into account not only the benefits of the obligation being carried out, but the consequences of [it] not being possible to do so and the effect that has on other desirable matters, including whether a planning permission can be carried out… If an obligation (whether alone or in combination with other obligations) means that a scheme is not viable and so will not happen, then the decision maker is entitled to conclude that it does not serve a useful purpose."[9]

33. Based on my understanding of established case law and the statutory tests expressed, as they are in plain words, I disagree with this view.

[6] *The City of York v Trinity One (Leeds) Limited [2018] EWCA Civ 1883.*
[7] R on the application of Hodson Developments (Ashford) Ltd & Ors v Ashford Brough Council & Anor [2022] EWHC 3466 (Admin).
[8] Sosmo Trust v Secretary of State for the Environment [1983] JPL 806.
[9] Closing submissions of Appellant, paragraphs 38 and 39.

34. An obligation must itself be soundly based on established criteria, ie it must be necessary to make a development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind to the development. If, say an obligation fails these criteria but requires some act unconnected to or at odds with the development, the obligation would be liable to be struck down as invalid. However, in a s106A application the question is different from the legitimacy of the obligation itself. As counsel for the Appellant accepted, the obligation must have been entered into for a planning purpose in the first place.[10] It would be rare for the useful purpose not to be a planning one but as noted, the question under s106A is whether the obligation serves any useful purpose, not just a useful planning purpose.[11]

35. The Appellant's counsel claims that "*in the present case, frustrating the development goes to the planning purpose".* Counsel might not have intended to refer to a deliberate attempt to frustrate a development as much as an objectively assessed outcome due to acts or omissions of local planning authorities. At any rate there is no evidence of any deliberate attempt to frustrate the development and if there were, s106A would not be the appropriate way to deal that scenario.

36. Furthermore, if a planning obligation is duly completed, although it may have the effect of "frustrating" the development in the sense that it prevents progress in the eyes of a developer unless and until certain acts are performed, and although ultimately circumstances may obtain such that it is no longer regarded (by some at least) as a viable project, that seems to me a consequence, and not part of the original purpose or reason for exacting the obligation in the first place.

37. The existence of an obligation, in the context of a development scheme, is to make development acceptable in planning terms. That is its quintessential purpose. The statutory criteria are simple and do not refer to the viability of the development. The obligations have a contractual nature, albeit statutorily based, which it is in the interests of the parties to be able to enforce, the one against the other, and subject only to limited exceptions set out in s106 that allow discharge or modification. Since they are limited exceptions that derogate from the principle of contractual enforceability, it also seems arguable that exceptions should be strictly applied.

38. An obligation can have a useful purpose of preventing development or further development until performed. This may make it inherently impossible, for financially viability reasons, to carry out or complete a development, but that does not necessarily deny the usefulness of the purpose in preventing a development that would otherwise be unacceptable in planning terms. Circumstances may throw light on whether the purpose continues to be "useful" but viability issues would not transcend the basic question of whether the obligation continues to meet any useful purpose.

39. The Appellant seeks to introduce a category of proposed changes that it says would meet the statutory test of not serving a useful purpose or would do so only if modified, by virtue of their effect on the delivery of the scheme by:
"(a) rendering it unviable; (b) being a blocker, by imposing a requirement that the scheme cannot meet; [or] *(c) imposing procedures which slow down the development progress...".* However, such criteria cannot supplant those in s106A.

[10]See Good v Epping Forest District Council [1994] 1 WLR 376.
[11] R (Mansfield DC) v SSHCLG [2018] EWHC 1794 (Admin).

There can be many reasons why financial viability of a scheme may be affected, but no additional test of viability is stipulated for.

40. Also, reading in the word "planning" to the criteria invites debate about what is a planning consideration in this context, and leads to uncertainty. A s106B appeal does not result in a grant of planning permission. The Mansfield case clearly stated that on application under s106A, as to whether a planning obligation ought to be discharged on the basis that it no longer continued to serve a "useful purpose", it was held among other things that:

1) a broad consideration of the purposes served by the obligation was required which was not limited to planning purposes;
2) that the critical question was whether the obligation served some useful purpose the absence of which made the maintenance of the obligation pointless; and
3) the determination to be made does not involve a consideration of the full range of planning considerations.

41. Garnham J concluded that the sole test for s106A is the words of the statute, and arguments advanced by analogy with other areas of planning law are only of marginal assistance.

42. The consequences, if the Development does not proceed, are understood by all parties. The site has long been identified by government as a garden village and supported by the development plan. There would be impacts on the district's housing land supply if the site is not developed. On viability it was submitted that:

"*If an obligation in isolation is intended to serve a useful purpose, but individually or collectively stops the development proceeding by rendering it unviable or provides an insurmountable obstruction (such as the bonds), then whether it does serve a useful purpose depends upon whether it is better to stop the development entirely if the obligation is not complied with, or whether the benefits of the development outweigh whatever the obligation is said to achieve*."

43. This is an incorrect analysis, in my view. The tests do not involve a merits-based approach based on the benefits or otherwise of the development. That would introduce an over-arching planning balance within the process. Appraisal of planning benefits and balance should not override the s106A process.

44. Finally, it is said by counsel for the Appellant that if the effect of the obligation is to stall, delay or prevent the development that is a consideration so *"obviously relevant, that it is essential to take it fully into account*." Although this argument seems to repeat what has been said before, it could be possibly taken as a plea to take a different approach under s106A when faced with a fundamental failure of contract, along the lines of impracticality, impossibility and frustration of purpose. It might be possible for courts to entertain applications for appropriate remedies but it would be a novel and in my view inappropriate approach to take under the statutory provisions to be considered. There is no good reason to doubt the sincerity of the Councils' positions when they state it is in their interests that the development proceeds, regulated by appropriate planning obligations.

45. Therefore, as to financial viability, I do not find that it can be an overriding factor when considering the tests to be applied. The submissions of ABC with whom KCC agreed, are generally in accordance with my view.

46. For ABC, in respect of all obligations relevant to these appeals, the useful purpose served relates to the development and in all instances is the original purpose which is not contingent on their being no adverse effect on viability of the development. Viable delivery was not a "purpose" of any of the obligations.

47. ABC also contends that even if viability is relevant generally, it cannot be so for the discharge of negative obligations, as their very purpose is to prevent further development unless and until the obligation is met. Thus, where the obligation serves a useful purpose, it continues to do so even if it makes the development unviable. Also, if viability were a purpose, it could not be the only purpose of the obligations; one also has to ask if the obligations serve any other useful purpose.

48. A decision maker may find that an obligation is not so important for a scheme such that permission could have been granted without requiring the obligation to make the development acceptable yet still conclude that it serves a useful purpose. Therefore, if an obligation is not so important for the scheme that permission might have been granted without it, the conclusion must be that it could still serve a useful purpose even where it might render the scheme unviable.[12]

49. The factors that support or weigh against an obligation's usefulness must be balanced. If viability were relevant to that exercise, ABC says the "viability benefits" must be weighed against the "viability disbenefits", eg the loss to the community for in benefits gained by performance of the obligation, but this was not done.

50. I asked the Appellant at what point the cumulative "viability disbenefits" (to use ABC's phrase) of successive obligations would result in the scheme being clearly unviable but an answer could not be provided. The Appellant intends to progress the development but could only do that, according to Mr Hodson's evidence, if all the discharges and modifications sought were approved. Of course, some developments which are technically unviable may nevertheless go ahead for other reasons, but yet Mr Wheaton's evidence on behalf of the Appellant, was that the scheme would remain technically unviable.

51. His view is summarised in Table 5.2 of his evidence where it is highlighted that the scheme generates a negative land value of £247.1m under the s106 Agreement against a target benchmark land value (BLV) of £109.1m, whereas the scheme incorporating the s106A changes still generates a negative land value of £53.6m, which albeit an improvement of £194m from the base case, is "substantially below the target BLV" as Mr Wheaton puts it. His best scenario is a positive land value with placemaking of £80m which is below the BLV of £109m, but "at a level which offers a positive receipt and some potential for an eventual return".

52. I did not understand it to be disputed that potential placemaking growth is reasonable to consider in a long term and large development. However, the levels of deficit in Mr Wheaton's figures would require funding in some way (if not by further changes to the s106 Agreement) and it is not adequately explained how this gap would be bridged. As to the threshold of viability and whether a benchmark land value should be achieved, ABC claimed, with some justification, that none of Mr Wheaton's appraisals would achieve viability, even with a 2% per annum "place making" premium, where a deficit would obtain of £19.25m.

[12] ABC Response to my questions at Annex to CD14/2.

53. Nevertheless, as counsel for the Appellant put it, "*the planning obligations have to be changed to give the scheme a chance*" and that whilst there is no "pass / fail" test of viability the changes sought would substantially shift the balance towards the scheme proceeding.[13] However, I agree with ABC's counsel that if the public interest (in the form of agreed planning obligations), has to yield in favour of development viability, "*the extent of flexibility granted should be no more than is necessary to facilitate delivery*"[14] which suggests to me that the fulcrum point of change required in the s106 Agreement needs to be identified and related to the financial appraisal, which has not been demonstrated.

54. The parties have produced alternative scenarios of profitability. However, ABC considers that the Appellant has sought to frustrate the process of identifying just how much more value there is in the scheme than its appraisals would indicate. Mr Leahy's evidence for the Councils showed from his placemaking appraisal, without the proposed discharges or modifications, that the scheme can deliver a return of £87M which on the Appellant's own terms would appear to be a viable position.

55. I would also note that general evidence concerning the overall cash flow and deliverability, are matters that must inevitably be related to the detailed timing and extent of various obligations and triggers that are in place in the s106 Agreement and that must be tested individually against the statutory criteria where there is a specific request for discharge or modification.

56. For the Appellant it is said that *"policy does not require the disclosure of particular material as an 'open-book' exercise*". However, in my view if weight is to be given to a viability appraisal here, it should be supported by available evidence which is transparent and publicly available.[15] The comparable information on house sales is limited and the infrastructure costs information was supplied belatedly on 17 February 2025. The Appellant has not produced details of the purchase price of the land bought in 2016 or, importantly, details of the parcel sales to developers. Evidence of parcel sales clearly exists but is not available to confirm the plot developer residual appraisals. It is well understood, for example through the plethora of RICS guidance literature submitted, that comparable market transactions usually provide good, if not the best evidence of value. I see no good reason, given the basis of this part of the Appellant's case, why the completed parcel sales figures should not be excluded on commercial sensitivity grounds.

57. Viability assessments are intended to be objective and focused on the site itself, not the individual position of the developer, however the Appellant's evidence focuses on the viability benefits of the changes sought, rather than the adverse consequences for the inhabitants of Chilmington Green.

58. I note that in the Sosmo case, Woolf J said it was a relevant matter "*that unless an economically viable proposition was given planning permission, it would be unlikely that a change of circumstances would ever occur*."[16] This appears to suggest that, even if the principle were to be applied here, then if the best case for the Appellant is that the discharges and modifications sought would still leave the scheme economically unviable, that would not be a consideration that weighed greatly in favour of granting the totality of the changes sought.

[13] CD14/50, para 92 et seq
[14] Closing, para 70.
[15] See, as an example, PPG, Paragraph: 022 Reference ID: 10-022-20251216
[16] [1983] JPL 806,

59. I do not therefore see how I could find viability to be a relevant factor, even if I agreed with the Appellant, and still assess it in a meaningful way that enabled me to give it appropriate weight to the issue of usefulness of a given obligation. Scheme-wide financial considerations, certainly where it cannot be shown that the sum total of the changes sought will turn a project currently financially unviable into a project that would clearly be financially viable, cannot justify the discharge or modification of an individual obligation as this would make the statutory criteria meaningless.

60. There is another factor that may be relevant to this issue but for the reasons given below I do not think it carries much weight either way. The government recognised in the past that s106 agreements negotiated in differing economic conditions could be an obstacle to house building, so new sections 106BA, BB and BC were inserted into the 1990 Act to enable a review of planning obligations that related to the provision of affordable housing. Obligations that included a "*requirement relating to the provision of housing that is or is to be made available for people whose needs are not adequately served by the commercial housing market*"[17] could be reviewed. The procedure assessed the viability of affordable housing requirements only but did not reopen any other planning policy considerations or review the merits of the permitted scheme.

61. This s106BA process was temporary and ended on 30 April 2016. The general saving for acquired rights in s16(1)(c) of Interpretation Act 1978 enabled local authorities to determine applications made before that date. An application gave a contingent acquired right because s.106BA(5) mandated that the decision-maker dealt with the application so as to make the development economically viable. There was no discretion as to the outcome (see *R (on the application of the City of York) v Secretary of State for Housing, Communities and Local Government [2018] EWHC 2699 (Admin)*).

62. The s106BA procedures did not replace existing powers to renegotiate s106 agreements but were to assess viability of affordable housing requirements only. Given that the concept of viability was given deliberate and express effect, it is arguable that a specific reference to viability derogated from a position assumed to exist in s106A that one could not import viability as a relevant matter to consider (unless that were to be necessarily implied from the words of the precise and specific statutory tests). However, I note that a similar argument might be mounted in relation to the s106BA process which mandated a positive outcome for viability, as opposed to an assumed discretion to take it into account under s106A.

63. Notwithstanding all of this, Mr Collins, the Appellant's planning witness, appeared to accept in his written evidence (para 1.1216) that if obligations are necessary then viability concerns cannot outweigh that necessity. However, he also states that the validity tests for obligations are not the basis to assess whether removal or variation of a s106 obligation is acceptable, but:

"*in view of the viability case, I have where appropriate considered those proposed to be removed or varied in this context to determine whether particular obligations are necessary to make the overall development acceptable. If they are not and they impact viability in a way such as to hold back the development, my conclusion is that those obligations do not serve a useful purpose*."

[17] https://assets.publishing.service.gov.uk/media/5a7ae809ed915d71db8b3533/Section_106_affordable_housing_requirements_-_Review_and_appeal.pdf

64. The Appellants' approach to the issue in my view is highly ambivalent, on the one hand adopting an all or nothing approach yet examining in detail each obligation sought to be varied, on a planning merits basis. The standard of proof would appear to be the normal civil burden of proof on the balance of probability. The evidence is not so clear and unambiguous as to persuade me that unless the obligations in the s106 Agreement were discharged or modified all as requested, the scheme would in fact be rendered financially unviable and unable to proceed.

Requests 1 to 122 inclusive to discharge or modify obligations

65. The Appellant's Requests for various obligations in the s106 Agreement to be discharged or modified, were responded to, some by ABC, some by KCC and others by both Councils who were mutually supportive of each other's case in all respects. The formal decision on each Request is given in the attached Schedule.

Request 1 Definitions

66. The request is to **modify** the definition of "Commence (Statutory) the Development" to correct the drafting by referring to the correct section of the T&CPA, namely section 91 rather than 56. The existing wording continues to serve a useful purpose. It explains what is meant by one of the terms used in the agreement. However, it would serve that purpose equally well if it had effect subject to the modification which corrects the error and, although planning permission Ref 12/00400/AS is already referenced there is no good reason to reject the other very minor amendments to the wording.

Request 2, Definition of CMO

67. This request is withdrawn.

Request 3, Definition of 'Paying Owners'

68. The request is to **modify** the definition by adding as "Paying Owners", Hodson Developments (CG Three) Limited. Shortly before the s106 Agreement was signed, Hodson took over the land purchases of two of the other three consortium members and became the sole paying owner under the obligations.

69. ABC has no objection in principle to the definition having effect subject to the proposed modification, subject to s.106A(5).

Request 4 Release from liability

70. The request is to **modify** Clause 2.2. The clause ensures that Owners are released from liability on completion and disposal of their part of the Development.

71. Institutional investors provided capital to develop homes for long term rental or shared ownership schemes, for key workers. The requested modification would ensure that institutional investors retaining an interest in the site after they have completed "their" development and all the dwellings are occupied, will be released from liability on terms similar to those in existing Clause 2.2, once occupied.

72. ABC contests that the scope of s106A includes such a request but in my view it falls for consideration in the same way. Despite being a request for a generic release from an entire range of planning obligations, "obligations" does not expressly exclude provisions related to circumstances in which those bound by those obligations would continue to be so bound. That said however, the existing

obligation serves a useful purpose in requiring the obligations to remain binding on all successors in title to ensure they are fully complied with, whoever is the owner. This avoids transfers of parts of the site which may, intentionally or otherwise, obstruct enforcement of those obligations.

73. The Appellant argues that the restrictions have consequences for the area in that families will miss out on access to good-quality, affordably priced homes. The letter of 31 January 2025 from Man Group has been considered. The s106 Agreement among other things restricts institutional investors seeking to deliver build-to-rent homes. Such investors retain some control over the land for rental or management purposes so the land does not fall under the definition of "Affordable Housing Land.

74. Disparity in treatment between traditional build for sale developers and "long term investors" as Man Group describe themselves, does not, it is said serve a planning purpose and was not the original intention. However, the modification would enable potential owners of parts of the site to benefit from exemptions from enforcement whilst encouraging ownership structures and ultimate transfers in a way that in my view would substantially increase the risk of obligations not being complied with or enforced. That would result in piecemeal compliance with obligations across different parts of the site.

75. Although the Appellant claims benefits for the changes sought in terms of housing delivery and choice of tenure, it might equally be said, for example, that the trend to more institutional investments would make this country's housing crisis worse by excluding families from home ownership, and imprisoning them in rental properties with ever-increasing rents. Neither scenario is definitively proven, but I am satisfied that, if modified as requested, the obligation would not serve equally well the useful purpose of making it binding on all successors in title, whoever is the owner.

Request 5, Index linking (format only)

76. The request is to **modify** Clause 28 to replace all references to "index linking" with "Index Linking" to correct drafting, but it appears that this phrase is not capitalised because Clause 28 itself describes the process of adjustment. Therefore, the modification would not serve the useful purpose (of identifying the process of adjustment) equally well.

Request 6 Base date for indexation

77. The request is to **modify**:

    a. the base date for indexation from April 2014 or the second quarter of 2014 to August 2018 or the third quarter of 2018 as the case may be; and
    b. Clause 28 to add wording such that if an Index Linked payment exceeds the cost of the item for which it is to be paid, then the amount payable should be reduced accordingly.

78. Indexation is a common method of ensuring that the value of any contribution set out in a s106 obligation is maintained in the future so that an adequate sum continues to be available to provide the related service or infrastructure.

79. The base date is 2014 because the cost of the planning obligations was assessed in 2014 when it was resolved to grant permission. Amending the date to 2018 would not serve the useful purpose equally well as it would reduce contributions, the ability to deliver the required benefit to serve the new community and hence the

quality of facilities that the Appellant is required to deliver under the obligations. There is however some evidence that even the costs identified in the s106 Agreement with the current index linking, are insufficient to deliver the quality facilities required.

80. A report (Brookbanks report) was submitted that considered how the specific costs of some elements of the Development were impacted by indexation. It found that the current indexation was causing viability issues, and tested examples which apparently showed how, by amending the base date to 2018, there would still be adequate capital to deliver the facilities.

81. The Brookbanks report costed three items. In reply, appended to the SoCG - Viability (Final), BPC provided a summary comparing the costs of these items with estimates based on the current Building Cost Information Service (BCIS). BPC said that the current BCIS median costs exceeded the original s106 Agreement sum with indexation from 2014, for the three costed items, ie community hub, primary school and sports hub.

82. In my view the findings of the Brookbanks report and the BPC analysis, are somewhat inconclusive. Mr Howson of Brookbanks provided a detailed costs assessment typical of a competent quantity surveyor; however the community hub elements are not compared on the same basis as BPC with the BCIS estimates. Overall, the totals of the three elements based on BCIS produced a shortfall in the existing s106 Agreement as indexed, of £4,399,655 or 14.93%, whereas the costings in the Brookbanks report are lower than either.

83. Whilst the Appellant provides some evidence to suggest that certain elements may be constructed at lower costs, there is no compelling evidence that, using BCIS current costs, section 106 payments and capital contributions calculated at today's date would be significantly lower than the amounts plus indexation being demanded or falling due. I conclude that modifying the base date for indexation as proposed would undermine the useful purpose of securing delivery of the quality of facilities envisaged for the Development and therefore not serve that purpose equally well. The additional wording would not serve a useful purpose as the s106 Agreement already requires unspent or uncommitted contributions to be repaid within 10 years of receipt (Clause 27.1.3).

Requests 100, 101, 102, 103, 104 Viability reviews

84. These requests are to **discharge** the requirements for Viability Phases One to Four (Requests 101 and 102); **modify** the submission of each viability review submission to a date no earlier than when a specified cumulative number of RM Applications have been submitted (Request 103); and **modify** the definition of “Premature Viability Submission” to mean a submission made more than 12 months in advance of each of the cumulative RM Applications totals set out in Request 103

85. For the delivery of affordable housing the Development is divided into ten phases identified as Viability Review Phases (VRP). The ten VRPs dovetail exactly with the four Main CGAAP Phases, to deliver the affordable housing required for each Main Phase in a flexible way through the subdivision of each main phase.

86. The proposed modifications would remove VPR 2, 3 and 4 altogether. The reason given is that "*the evidence clearly shows that the scheme's viability will not improve until viability review phase 5 at the earliest*."

87. Occupation restrictions apply every 500 dwellings or so after the first 851 dwellings until submission of the viability review, which must not be submitted before a specified number of occupations and works cannot commence within each viability review phase area until the relevant review outcome (i.e. whether additional affordable homes can be delivered) is agreed with ABC.

88. The viability review mechanism is argued to create barriers to accelerated delivery by multiple plot developers with differentiated products. Contracts with plot developers or registered affordable home providers must await the review but the timescale between the earliest date a review can be submitted and maximum occupations prior to its conclusion causes a 'stop start' programme and slows overall delivery.

89. Mr Wheaton, an experienced quantity surveyor and expert in planning viability, made a submission for the Appellant under the viability review mechanism for VPR2. His evidence reviewed the scheme's overall viability to support the appealed applications, including an update in January 2025 (Quod Financial Viability Assessment) to account for changes since the original applications. By analysing as an example, VPR3, he concluded that the maximum annual delivery which can occur due to the review process is 100 units.

90. Mr Leahy, the Councils', viability expert said that no increase in affordable housing could be anticipated in reviews 1 to 4. On that basis it is claimed that they do not serve a useful purpose and are a block on development. If modified as requested, viability reviews 2 – 4 will be pegged to the end of phase 2 before then linking reviews to RM applications for each development stage, rather than occupations, so the Appellant can enter more partnerships sooner to accelerate delivery.

91. The modifications also adjust the Premature Viability Review Submission limits to protect against front loading of review submissions by restricting the earliest date at which a review can be submitted and requiring resubmission if more than 12 months in advance of the relevant RM applications. Reviews at each stage of development through to the final review phase 10 would be maintained so that any viability improvement in the scheme enables more affordable homes to be built.

92. However, affordable housing is likely to be limited (the minimum provision is only 10%), and it is plainly a useful purpose to ensure that at each phase of the development, the maximum affordable housing provision is provided by reference to the costs and values of the development to date. ABC does state that it is unlikely that additional provision over the 10% minimum will be secured in VPR phases 2-4, but that this cannot be definitively ruled out at this early stage of the development. Deletion of these review phases would see c46% of the Development (2624 dwellings) constructed with only 10% affordable housing[18].

93. The Viability Review Mechanism may be frustrating land sales, but Mr Leahy explained in answer to my question, that it was indeed possible to structure land deals to accommodate any uncertainty as to the level of affordable housing which will ultimately be required. My concern was to highlight the possibility, where there

[18] CD3/15 para.6.9 p14.

was uncertainty in future provision, of a mechanism or formula that made the quantum ascertainable, so a deal with plot developers could be structured to adjust initial estimates to the actual outturns. Mr Hodson provided a statement but declined to elaborate on the structure of the deals already completed with partners.

94. It was also said that the requested changes would allow viability review submissions to be made without reference to a dwelling occupation trigger, defeating the purpose of the obligation. RM applications can be submitted many years before dwellings are built and occupied and the modified time lag between submission of an application and occupations on site would deprive ABC of its ability to review the appraisal inputs in light of actual costs and values.

95. Furthermore, the viability submission for VRP5 should not be submitted because the cumulative total of dwellings in RM applications was already 2625 dwellings. Therefore, if a viability review were submitted now for VRP5, it could only be based on the costs and values of some 389 dwellings currently complete and occupied which is not an accurate reflection of construction costs and sales values likely to obtain many years in the future. That would deprive Schedule 23 of its practical utility and the test of equivalence would not be met.

96. I agree that the obligations the subject of these requests continue to serve a useful planning purpose having regard to these representations and the local plan policies, notably those set out in Policies CG1 and CG18. I referred to the proposal as bringing about a “concertina” effect whereby, as ABC point out, the next review for a very large number of units would be based on disproportionately limited and historic costs and values which would not be likely to give a true estimate of the value of many such units to be built out in future years. The Appellant’s requests are not approved for this reason because they would not continue equally well to serve the useful purpose of seeking to maximise affordable housing provision in light of 1) the urgent need for it and 2) the already reduced baseline of provision.

Affordable housing (Requests 7,8,9 and 10)

97. Together, these modifications would:

- delete the requirement to construct 70 dwellings as extra-care housing units;
- delay the construction of the 24 affordable housing units from no later than 650 dwelling occupations to no later than 1000 occupations;
- provide as shared ownership units all 24 affordable housing units plus all 6 affordable units being developed separately by Jarvis;
- delay construction and provision of the combined total of 30 affordable units from no later than 650 dwelling occupations to no later than 1300 occupations;
- delay provision of the 10% affordable dwellings in VRP Two to Ten land (inclusive) from no later than the occupation of 75% of the dwellings in the relevant VRP to no later than 95% of the dwellings in the relevant VRP;
- change the tenure split of this housing from 60% affordable rent and 40% shared ownership to 33% affordable rent and 67% shared ownership;
- delete the requirement for all the affordable units in VRP Two to be shared ownership units;

- if a viability review finds that more affordable housing is to be provided in VRP 5-10 (inclusive), delay its provision from no later than the occupation of 75% of the dwellings in the relevant VRP to no later than the provision of 95% of the dwellings in the relevant VRP, and change the tenure split of this additional affordable housing from 60% affordable rent and 40% shared ownership to 33% affordable rent and 67% shared ownership.

98. The general intent of the requests is to facilitate plot sales, improve cashflow and accelerate delivery.

Request 7 extra care housing

99. Request 7 is to **discharge** the obligation to provide 70 dwellings of extra-care housing units (Extra Care provision). Of the 70 dwellings, the existing obligation secures 28 as shared ownership and 42 as affordable rent or intermediate affordable housing. The Appellant states, without supporting persuasive evidence that it is unable to find a provider to deliver the Extra Care units and that the obligation serves no useful purpose because the units are unnecessary and their cost undermines the "*viability of this phase and [is] jeopardising overall delivery*".

100. I am satisfied that the obligation serves a useful purpose in that the 70 units, being 70% of the 100 affordable housing units proposed in VPR1 would help to meet an identified need for Extra Care accommodation, a type of housing that contributes to a mixed and balanced community. Therefore, it cannot be said that the units are unnecessary. Whether their cost causes viability issues is not relevant to the useful purpose that the obligation continues to serve, given the projected population at the Development which will include an elderly community with varying care needs.

Request 8 Trigger points for affordable housing provision in phase 1 (Schedule 1)

101. The request is to **modify** the obligation so that the 24 affordable dwellings in Viability Review Phase One are constructed prior to the occupation of the 1000th dwelling and occupied as shared ownership units prior to the occupation of the 1300th dwelling.

102. The Appellant accepts that the obligation "potentially" serves a useful purpose, but the requirement to construct the 14 units by the 650th open market dwelling is said to adversely affect the Paying Owner's cashflow and compromise the viability of this Phase I - Viability Review I.

103. Mr Collins, an experienced planning professional, on behalf of the Appellant made a detailed statement to "*demonstrate through evidence how and where changes are required to ensure the deliverability of the Development so that it can come forward to meet ABC's housing needs*." The Appellant submits that the financial benefits and the contribution that would thus be made to the "viability and deliverability" of the Development "*more than justify the modifications*". However, there appears to be an urgent need for provision now. The Council currently has 255 households living in temporary accommodation and around 1800 applicants on the Housing Register. There is therefore clear need for additional affordable housing within the borough. The obligation to provide 10% affordable housing in each VRP ensures that affordable housing is delivered regularly throughout the Development, including VRP1.

104. Delaying provision until 1300 market dwellings are occupied would mean that no affordable dwellings are provided in VRP1, given that this phase comprises 1000 dwellings. Therefore, the modification would not maintain the current minimum affordable housing proportion of 10% in each phase as suggested.

105. As to shared ownership, there is an identified need for both affordable rent and shared ownership tenure housing within the borough, as identified in the Strategic Housing Market Assessment (SHMA). I note that the request is made in light of "current market conditions and operator response" but there would appear to be a clear need for affordable rent tenure in the borough. Mr Collins states that the proposed modification serves the useful planning purpose equally well "in that unless the S106 is varied it will not be viable to continue with the development". To argue that the obligation to include Affordable Rents is "non-viable" is a different consideration altogether.

106. The Appellant does not advance evidence of attempts to engage with registered providers to deliver affordable rented units in accordance with the obligation which continues to serve the useful purpose of delivering affordable housing in a timely fashion, the modification of which would delay provision further and therefore not serve that purpose equally well.

Request 9, 10% affordable housing and timeliness of delivery in phases 2-10

107. Schedule 1 requires 10% affordable housing within each viability review phase and additional affordable housing if a viability review establishes that it can be afforded. Schedule 23 sets out timescales and procedures under which each viability review (Two to Ten) will take place.

108. The obligation to provide 10% affordable housing in each VRP ensures that affordable housing is delivered regularly throughout the Development to meet identified local need and ensure a mixed and balanced community of different tenures. There is a need for affordable rent and shared ownership tenures as part of the Development, the timely delivery of which, no later than when 75% of the market housing within the relevant VRP is delivered, ensures that the affordable housing is fully integrated into the Development whose residents are not 'left to the end' of each VRP, thereby ensuring that an integrated mixed community is created.

109. Major housing development has front loaded infrastructure costs but is more profitable in later stages when values are established and infrastructure is largely in place. Outline permission was granted on the basis that the whole scheme could just support a total of 10% affordable housing if all other infrastructure needs are met. It was agreed when outline planning permission was granted that affordable housing would be fixed at 10% for the first 1000 dwellings. Scheme viability would then be assessed at nine specified points during the delivery of the Development to see if more affordable housing could be provided. The review of viability would be essential to ensure the planning obligations are delivered in full as far as possible to mitigate the impacts of the Development.

110. I am satisfied that these considerations continue to form a useful purpose that justifies the structure of the s106 Agreement in this way.

111. Request 9 seeks a **modification** such that the 10% Affordable Housing Units in Viability Review Phases Two to Ten should be completed by the time 95% of dwellings are occupied in each review phase, rather than 75%. The reason given is

that the obligation adversely affects the Paying Owner's cashflow and compromises the viability of each viability phase. The modification would still ensure delivery of the 10% affordable units in any event within each phase.

112. Mr Collins considers a balance must be struck "*between the useful purpose intended to be served by any obligation and the ability to deliver the Development*". Pushing back the completion date to 95% no doubt assists with cash flow, reduces peak debt and assists viability. However, in my view, the issue here is that an obligation would continue to serve a useful purpose that ensures affordable housing is built at the same time as the open market housing whereas delaying construction to the point where the market housing in the phase would be built out and occupied to such an extent that it "*would not successfully create an integrated mixed community*" would not serve that useful purpose equally well.

113. The other useful purpose for this restriction is identified as ensuring the timely provision of affordable housing to meet the need which exists. The CGAAP makes detailed provision for several "triggers" for the funding or delivery of infrastructure to ensure each main development phase is as sustainable as possible. However, it does not mention triggers for the phasing of affordable and open market dwellings but states (para.10.35) that a flexible approach to delivery may be required as to the quantity of affordable housing proposed to be delivered early in the development. It notes (para 10.41) that applying flexibility in the phasing of affordable housing, should maintain affordable housing that is not too clustered, well integrated across the development and so forth. This means that lower and upper percentages of affordable housing should be set for the main phases of development to avoid under provision or over-concentration in any one location. A lower limit of 10% and upper limit of 40% is set as a reasonable balance between the need for flexibility and sound planning.

114. The Affordable Housing SPD 2009, beyond advising that for sustainable mixed tenure communities the affordable housing provision must not be visually distinguishable from the market housing, does not mention trigger points or the phasing of open market and affordable housing. The criteria it mentions (build quality, materials, detail, levels of amenity space and privacy) do not touch upon the layout as such of the two types of housing viz a viz one another. Pepper potting need not be an issue with high quality design of all units, and I have no reason to suppose that delaying provision of some of the affordable housing to the level proposed, would undermine overall effective integration of dwellings in a given phase of the Development.

115. Timely provision of affordable housing is a useful purpose of the obligations. The modifications would mean that the need for affordable housing would go unmet for longer which would be a disbenefit to the community and therefore, the useful purpose of its timely provision would not be served equally well by the modification.

Request 10, tenure mix

116. Currently the s106 Agreement requires the Affordable Housing Unit tenure split to be 60% Affordable Rents and 40% Shared Ownership, with 5% of units to have Habinteg fixtures and fittings (see paragraphs 9 and 12 of Schedule 1 to the s16 Agreement).

117. This request was to **modify** the Affordable Housing tenure split so as to provide 30% Affordable Rents and 70% Shared Ownership.

118. There is no dispute that the obligation continues to serve a useful purpose of delivering an appropriate mix of affordable housing to meet need. ABC accepts that some modification could be made that would serve that useful purpose equally well, having regard to assessed affordable housing need. It is prepared by agreement to amend the obligation so that the 10% affordable housing provision comprises 33% affordable rent and 67% shared ownership. The Appellant has indicated that this issue can be dealt with outside the appeal (see General SoCG), ie the provision of 10% affordable housing in each Viability Phase with a tenure split of 10% affordable rent and 20% shared ownership in accordance with Ashford Local Plan policy HOU1, which would continue to serve a useful purpose equally well.

119. The Council is willing to discuss this proposed modification by agreement with the appellant. However, the original request is not withdrawn, and the modification before me does not succeed as the extant obligation continues to serve a useful purpose as stated.

Requests 11,12 Carbon offsetting and combined heat and power (CHP)

120. ABC has no objection to the obligations being **discharged** (Request 11) related to the Building Energy Performance Certificate and Carbon Offsetting Contribution in part for the reasons set out in the Schedule of Responses (CD3/1/1/1). Equally, Request 12 to **discharge** the obligations related to viability submissions and appraisal for a CHP plant or District Heating Plant (DHP), is acceptable given the government's change in approach to energy strategy that means delivery of CHP/DHP for CG is no longer appropriate to deliver the highly sustainable development envisaged. I see no reason to disagree. As noted in the General SoCG there are outstanding consequential issues but the appeals relating to these obligations are allowed.

Request 13 Provision of welcome pack

121. ABC agrees to this proposed **modification** to allow documentation to be provided in electronic form unless the first purchaser or tenant/occupier has no access to e-mail or for another reason requires a paper copy in which case the Welcome Pack should be provided in paper form. This would serve the purpose of this obligation equally well and the appeals related to this obligation are allowed.

Request 14, Provision of CMO First Operating Premises

122. This request is withdrawn.

Requests 15-22

Chilmington Management Organisation (CMO); First and Second Operating Premises; Deficit Grant Contribution; Commercial Estate provision; First and Second Cash Endowments

123. Generally, the Appellant seeks to take responsibilities away from the CMO and reduce its own costs. The CGAAP states that to help establish a strong community at Chilmington Green (CG) a community led management arrangement will be supported. A detailed strategy and business case will establish the governance arrangements, its evolution and long-term financial sustainability. Local Plan Policy IMP4 supports this community stewardship model. Details of the CMO are set out in the relevant Topic Paper. Its aim is to own, maintain and effectively manage the endowed community land, public open spaces, buildings and facilities; coordinate

and deliver community development and cultural activities to create and maintain a thriving community; and support environmental and community sustainability.

124. Schedule 4 to the s106 Agreement requires provision for: the CMO's first operating premises and second operating premises; the CMO Operating Business Plan; payment of the Deficit Grant to the CMO; creation of a residential charge payment mechanism; commercial estate and/or cash endowment; and payment of the CMO Start up Contribution.

Request 15 CMO First Operating Premises (First OP) maintenance obligations

125. This request seeks to **discharge** the obligation to repair the CMO's First Operating Premises where notified of defects. Schedule 4 also includes obligations as to how defects will be dealt with and payment of ABC's legal costs for provision of the CMO's first and second operating premises and the commercial estate.

126. It is not satisfactorily explained why the CMO should have to bear costs of repairing defects identified within the time periods stated in the s106 Agreement. There is no guarantee against the building deteriorating and absent alternative forms of indemnity, the obligation continues to serve the useful purpose of ensuring the building is of the quality agreed in the design brief and defects identified in the period stated after handover are remedied.

Request 16 CMO Second Operating Premises (Second OP)

127. The Request is to **discharge** the obligation to provide the Second OP as the First OP was completed and ready for occupation by March 2020, and as it is said it has remained empty and unused, is more than sufficient for the operating requirements of the CMO on-site. The lack of use is due, according to the Appellant, partly to staff preferring home working after the Covid 19 pandemic, and partly due to the premises being near to building activity. The building is centrally located and the modification would see CMO staying there, with additional room needed to be provided in other community provision, eg for temporary events, in the schools.

128. The First OP is however a temporary building on part of the First Playspace (PS1) area which will be undersized whilst the First OP exists. Discharge of the obligation would delay provision of sufficient play and public space to meet needs of the growing community. The Second OP will be temporary premises in a retail, office or community space in the District Centre serving the needs of up to c4320 residents, at which point permanent premises within the Community Hub in the District Centre would be provided. Schools might be used for some events only outside school hours and at the school's discretion, so would be of limited use to the CMO who hold events during school hours in addition to evenings and weekends.

129. In the circumstances the CMO Second Operating Premises appear necessary to support the growing community and are not surplus to requirements as claimed by the Appellant. The obligation continues to serve the useful purpose of maintaining at all stages of the Development a space for residents to use, enhancing community relations as part of the vision for CG to foster "*a strong community that develops a sense of pride and local ownership with the capacity to help manage Chilmington Green on a day to day basis*", and therefore should not be discharged.

Request 17 Deficit Grant Contribution

130. This is defined as the sum of £3,350,000.00 received by the Council to be transferred to the CMO and used as revenue to defray costs incurred by it in carrying out its functions and discharging its responsibilities such as maintaining and managing the facilities provided to it pursuant to the s106 Agreement, as well as engaging in and facilitating community development activities within the Site.

131. The request is to **discharge** this obligation. The sum payable is envisaged to be paid in ten instalments at various points triggered by numbers of dwelling occupations, with the last being made at 2500 occupations.

132. The CMO business plan adopted a complex financial model which adjusted the transfer of assets to it according to housing trigger points and calculated the forecast spend and income from the point of the asset transfer. The developer consortium is expected in the s106 Agreement to provide cash support through the Start-up Grant totalling £150,000 (Index Linked) and the Deficit Grant Contribution totalling £3.35m (Index Linked).

133. The CMO's 10 year business plan for 2025 to 2035 supports the claim, according to the Appellant, that it has enough resources not to need the deficit grant, therefore the Deficit Grant Contribution serves no useful purpose. Reliance is placed on income from the Rent Charge deeds on each property sold, that goes into the Rent Charge Deed Account which the CMO uses to contribute to the management and maintenance of the Community Assets. The AAP supports this "community trust" model with services provided in return for a "reasonable service charge". The rentcharge deed 2021 identifies all the services which are contributed to by residents and details of the annual rent charge are set out in a residents guide.

134. The CMO charities account is said to be in a healthy position, from which staff, legal costs etc are paid. It is submitted "*there is very little which could be outside the scope of the Rent Charges, given the wide scope of the deed*" (Schedule 31, page 289 'Schedule 1').

135. Both accounts show a healthy surplus in 2034/35 but the modelling undertaken by Mr Hodson does not reflect the obligations contained in the s106 Agreement and, contrary to the CMO 2018 Business Plan, assumes the CMO is not responsible for assets such as the Chilmington Hamlet Facilities which is part of the obligations. It also assumes 2182 dwellings are occupied by 2034/35 but without the facilities in fact obligated to be provided by that occupational trigger, namely: the Second OP, the Chilmington Hamlet facilities, allotments, informal natural greenspace, community hub and some of the parkland and playspace.

136. Reference to a "standard estate management" model appears misplaced as the requested modifications would not create an alternative estate management body and it would be unclear who would be responsible to maintain the Chilmington Hamlet facilities, Discovery Park, Ecology Land, Ecologically managed farmland and the woodland.

137. The business plan is a long term and complex model. Mr Hodson considered none of the major assets that the CMO would maintain and replace over time, and did not run the full Business Plan model over a 20 year period, making it impossible to conclude that the CMO could discharge its responsibilities based on rentcharge income alone. I cannot therefore conclude with confidence that, based on the Appellant's analysis the CMO could discharge all of its obligations in perpetuity

without the Deficit Grant Contribution. I am satisfied from the foregoing, that the obligation continues to serve the useful purpose of enabling the CMO to manage and maintain its assets in perpetuity.

Request 18 Provision of rent charge deeds.

138. This request was withdrawn.

Requests 19, 20, 21 Commercial estate basic provision, second tranche, third tranche

139. The request is to **discharge** the obligations to provide the First Tranche Commercial Estate/Cash Endowment and associated provisions. The Appellant says that the CMO structure is supposed to operate as an independently viable commercial enterprise, but there is little market demand for it and issues over its future profitability. Mr Collins states that "*on any view it is clear that the Commercial Estate no longer serves a useful purpose*".

140. It appears to me to be a useful purpose, in ensuring that a suitable management and maintenance regime is in place for the Development, to oblige the CMO to appropriately manage and maintain the Community Assets in the long term. The s106 Agreement provides for the Community Assets to be transferred to the CMO to meet that objective. The commercial estate/cash endowment is required to ensure CMO is financially viable over the long term so it can meet its charitable objects. The CMO Business Plan identifies sources of income for the CMO including "*income derived from endowed commercial assets (land, property and/or money*", and explains how endowment of the commercial estate is intended to operate.

141. The annual income from letting the commercial estate is to be applied in furtherance of the CMO's charitable objectives, ultimately providing a percentage of its income as a primary source of its funding for community development work and funded activities, providing financial security. The option for the CMO to be paid a cash endowment in lieu of the second and third tranche of the commercial estate enables the CMO to manage the risk of reduced demand and yields from the commercial premises. When the Commercial Estate: Basic Provision is transferred the CMO may take the second and third tranche or a cash endowment instead.

142. A letter from BNP Paribas is submitted by Mr Collins citing the lack of financial benefit provided by the commercial estate. This short letter, dated February 2025, states that no noteworthy interest is evident from occupiers seeking B1 office space, causing BNP to conclude that "*the location of the proposed district centre at Chilmington Green is not a suitable location for large scale, new office accommodation as it does not fulfil the requirements of modern office occupiers*." BNP considers that to be economically viable a significant pre-let would be required but they have not seen evidence that such a pre-let would be achievable and based on experience from marketing another land parcel in the region, for large scale B1 use development, they do not foresee occupier demand being forthcoming.

143. The letter is noted but hardly constitutes robust empirical evidence of the matters claimed. Mr Collins maintains that as the total capital cost of the Basic Provision in the sum of £2,921,000 before indexation undermines the viability of the Development, even if this provision were to be regarded as useful, in practice it is self-defeating. Whether the need to provide the commercial estate should be removed from the s106, depends in my view on the levels of confidence that exist

that: 1) the CMO have the skills to manage the commercial estate, and 2) the floorspace will not end up being a liability rather than an exploitable asset for the benefit of the community.

144. The BNP letter says nothing of substance about the market for retail development on the site. Unless backed by some persuasive substantive evidence it provides little support to the requested discharge. It can fairly be said in my view that it is too early in the development to conclude that there will be no demand for the Commercial Estate, as the Basic Provision bites after 1500 dwelling occupations, some years hence. The "business park" development posited in the letter is not that which is intended or envisaged within the CGAAP for the Development.

145. Elsewhere the CMO is attacked as incompetent or ill-equipped to deal with matters such as halting the occupation of dwellings in a given phase of development if it has identified defects in the facilities to be provided. Mr Hodson gave his experience of working with the CMO board (of which he is a member). He was confident that quality of place making would be guaranteed if he had control over it himself. There are obviously tensions within the board, but the evidence falls short of demonstrating that the board is not fit for purpose or that it would serve the purposes of the obligations equally well if another model were put in its place.

146. I conclude that these obligations continue to serve the useful purpose of securing the long-term financial security of the CMO and the viable performance in perpetuity of the obligations it owes to the residents of the Development. The requests to discharge them are not accepted.

Request 22 Payment of cash endowment

147. The request is to **discharge** the obligations to provide the First Cash Endowment and the Second Cash Endowment. They do not begin to be paid until 2400 dwellings are occupied. The total cost would be 2 x £2,190,750 which is said to undermine the viability of the Development and cannot be sustained.

148. The cash endowments are to be used for the purposes of creating a medium and/or long term investment to generate income for the CMO. This is part of its funding and business plan to render it viable over the long term and meet its charitable objectives as a not-for-profit body, not an estate management company.

149. Following the transfer of the Commercial Estates: Basic Provision to the CMO the CMO would have the option (Option A) to take on the second and third tranche or (Option B) be paid a cash endowment in two stages. It could then invest the endowment in cash deposits or longer-term investment funds, and/or decide to reinvest cash in the purchase of income generating assets.

150. It appears from the Business Plan that if the cash endowment is taken and invested in residential property, yields would at least equate to the commercial yields assumed in the original Business Plan modelling. If so, I do not understand the logic of Mr Collins' stating that a one-off cash endowment does not have a useful purpose in replacing an asset endowment. It is also claimed to be inappropriate that the s106 Agreement funds (as alleged) an unspecified alternative investment, that start-up contributions were not spent sensibly or delivered material benefits to residents and have not served any useful purpose. However, monies expended pursuant to a planning obligation might be spent unwisely or outside the parameters of their intended purpose. That does not mean that the obligation itself

may not have served a useful purpose or that it does not continue so to do. The remedy for misuse of funds lies elsewhere.

151. I find on this request that a useful purpose continues to be served by the obligation, namely to manage any risk of lower than anticipated demand and yields for commercial premises than was forecast when the Agreement was entered into.

Request 23 CMO Start up Contribution

152. The request is to **discharge** these obligations and for the sums already paid to be refunded accordingly because, it is said funds paid to date have not been spent sensibly or delivered material benefits, payment of such a sizeable sum to the CMO serves no good purpose and as evidenced by Quod will adversely impact viability.

153. The useful purpose of the obligation was to fund the creation and establishment of the CMO prior to the first residents moving in and when no other sources of income were available. A total of £150,000 index linked is required to be paid in two equal instalments, at commencement of the Development and then prior to first dwelling occupation. It will cover costs incurred by ABC or the CMO in establishing the latter as a working organisation including staff, equipment and so forth.

154. The first instalment was due by 28 February 2017 but was paid by Homes England on 13 June 2018 without the indexation payment. The second instalment was due on 20 September 2019 and was paid by the Appellant on 8 October 2019 but without the indexation payment. The delays meant that forward funding equivalent to the missed payment had to be obtained by a loan pending the contributions being paid by the Appellant.

155. The Appellant does not seek the discharge of the obligations requiring the creation and establishment of the CMO and even with its proposed modifications the CMO continues to have an important role in the management of community assets in the Development. It cannot therefore sensibly argue that the obligation served no useful purpose or that there is any basis upon which it could legitimately seek the refund of the contribution it made. Therefore the request is not approved.

Request 24 Early Community Development (ECD)

156. The request is to **modify** the obligation by removing the contributions and adding an obligation to repay all past and future ECD obligations (totalling £250,000). At the heart of this request is concern for viability of the Development.

157. The useful purpose of this contribution is to assist in building a strong and vibrant community where residents and other who work in or use the area, share a strong sense of belonging, pride and commitment to its future and well-being, pursuant to policies in the AAP and is a main source of funding for this purpose. The first instalment was due on 5 December 2017 and paid on 3 September 2018. The second instalment was due by 3 September 2019 and paid on 9 February 2021. The remaining three instalments were due on 3 September 2020, 2021 and 2022 respectively but not paid. Under the Settlement Agreement the three instalments were withdrawn from the Developers' Contingency Bank Account on 6 March 2023.

158. In light of uncertainty as to whether all the contributions would be paid, ABC and the CMO applied the funding to larger projects provided by expert local community organisations, supplemented by smaller projects to reflect neighbourhood need.

ABC matched the sums with other funding to assist in meeting resident need over a longer period, as development lagged behind the rate anticipated.

159. I have considered section 8 of the Explanatory Statement and note concern as to how, if at all, the monies have been expended in relation to community activity. ABC has now, instead of and in substitution for these payments, secured £755,000 in funding from DHLUC for such items as improved access to Discovery Park and nearby Coleman's Kitchen woods (upgrading Public Rights of Way) and several other matters.

160. The appellant states that "*it will be more appropriate to limit the scope and budget of the CMO to a list of essential services along the lines of a traditional Estate Management model",* thus the CMO could rely on income from the Rentcharge Deeds". This is at odds with the CG strategy in the AAP. In my view it is too early in delivery of the Development (with c380 dwellings occupied) to conclude that the stewardship model agreed when outline permission was granted, does not work.

161. I can see that if some of the monies are not needed now because the development has slowed, it might be proportionate to work out a method of readjusting payments to make them commensurate with current estimated trajectories of delivery. But that is not what is being requested, rather it is sought to discharge the whole obligation, and I see no justification for that position. Hodson's position seems to have more to do with its assertion that the stewardship model agreed when outline permission was granted, does not work, at least for it. In the absence of agreement on recalibration of the timing of the payments, I cannot conclude that the payments due under the existing terms are disproportionate to some need that will arise in the future if not now, and they therefore continue to serve a useful purpose.

162. I conclude that there is a continuing useful purpose served by the EDC contribution obligation and therefore it should not be discharged. Whether solicitation of funds from DHLUC for various projects is additional to or in substitution for the s106 funding, modification would undermine ABC's and CMO's ability to deliver the activities required to develop community cohesion. This is a main aim of the CMO Business Plan and of AAP Policy CG1. It is also said that if community development work ceased the status of South of Ashford Garden Community and access to further Government funding would be jeopardised, but whether that is true or not, and if so to what extent, is not a good reason not to look to the Appellant to fulfil its monetary obligations which is a main source of funding to fulfil the planning purpose identified.

Request 25 Natural greenspace

163. There is no specific request to modify or discharge an obligation contained in this request, there simply references to other Requests. Therefore Request 25 cannot be approved.

Requests 26 and 27 other obligations relating to greenspace

164. The Appellant requests **discharge** of the obligations to: transfer the Greenspace to the CMO free from defects when provided; repair defects within 3 months of being notified and occurring within 12 months of transfer; and to pay the Council a sum equivalent to any SDLT or tax payable when registering the transfer.

165. The appellant's general position here is that the CMO is not competent to maintain communal greenspaces. Unnecessary limits on transfer serves no useful purpose just as the CMO being able to hold up occupations merely by identifying a defect, which it is not qualified to assess. In the appellant's eyes, the obligations complicate and delay delivery.

166. Adopted Core Strategy Policy CS1(G) seeks timely provision of local infrastructure to meets the needs of development (paragraph 6.43, Public Green Spaces and Water Environment SPD 2012). Paragraph 6.44 requires a balance between when a "significant need has arisen for it from new residents" and ensuring the developer has "financial capacity to provide the facility in question". If the infrastructure costs are unduly front-loaded:

"it may make the development unviable and, hence, undeliverable. Therefore, the Borough Council will take a flexible approach to the timing of provision. The details will be agreed through negotiation, at the time of the planning application or preparation of associated Section 106 agreements."

167. Having completed the s106 deed, the useful purpose of the obligations appears to be that the Greenspaces as community assets will transfer to the CMO at no cost to the public purse and enable their management and maintenance in perpetuity. The CMO is not-for-profit body. If discharged as requested, the Greenspace would remain in the Appellant's ownership with no means to secure its long-term management or maintenance or to retain them as open to the public at all times. The obligation continues to serve that purpose.

168. AAP Policy CG8 requires the provision of public open space based on the parameters and spatial requirements in the Public Green Space and Water Environment SPD, to meet the needs of the development as it evolves, and ensure each phase of the development is sustainable in its own right (CD3/1/1, page 62). (Paragraph 4.2 of Topic Paper on Playspace / Allotments / Cemeteries).

169. A guiding principle for ABC is that the timescales for delivery of the infrastructure, services and facilities should "*keep pace with the housing construction so that residents of the development can access the amenities and services they need on a day to day basis*" (ABC planning evidence, paragraph 3.1).

170. Rendering the Appellant responsible for defects makes sense, it is said as it has a contractual relationship with the designers, suppliers, installers and so forth, whereas discharge would impose liability on the CMO which would have no legal remedy against those responsible for the providing and laying out the Greenspaces whose default has led to defects. That would not serve the useful purpose of the current obligation which continues.

171. The approach taken in the s106 Agreement to transfer of the Community Assets to the CMO and the remedy of defects is very similar across all eight schedules.

172. The requests here are for **discharge**, not modification of the several obligations. It may be possible to find another mechanism to deliver some objectives of the development at less cost, but the obligations enable the CMO to take the Greenspace free from defects and reduce their financial liabilities at transfer and for an initial period thereafter. The CGAAP states that research has shown that communities favour a community-led management approach giving them effective

management over their local assets and adding value to delivery of the public realm and built form, as money can effectively be ring-fenced for such purposes[19].

173. The community stewardship model of governance is supported by Policy IMP4. The Appellant has made no request that would result in the CMO ceasing to exist but the modifications and discharges sought would as ABC's counsel submitted "*emasculate the role of the CMO in the Chilmington Green development*". Focussing on a core role of managing and maintaining facilities through the rent charge deed would not equally well serve the purpose of providing and maintaining that community stewardship model that is fundamental to the s106 Agreement.

Request 28, Payment towards ABC's costs

174. The request seeks **discharge** of the obligation, related to the provision of informal natural greenspace, to pay towards ABC's costs to consider the transfer which the developer wishes to use, but has not agreed with the CMO.

175. I note that the obligation is effective only where the informal natural greenspace facilities have been transferred to the CMO otherwise than in a form acceptable to the CMO. ABC states that a useful purpose would be served by enabling it to take specialist legal advice on the wording given the dispute that would then have arisen between the developer and CMO in order that, if possible, agreement can be reached and the asset transfer can proceed.

176. I am satisfied that this payment would continue to serve a useful purpose as without it the costs would fall on the public purse in connection with the long-term stewardship of mitigation of impacts of the development.

Requests 29,30,31,32 and 33 Chilmington Hamlet Facilities

177. These requests are to **modify** and **discharge** several obligations such that: the trigger to provide the Chilmington Hamlet Facilities (Hamlet Facilities) is extended from 1400 to not more than 3500 dwelling occupations; the design brief would be approved not later than at 3000 occupations; there would be no duty to consult the CMO on the design brief; there would be no transfer to the CMO but a 21-year lease instead; the requirement that facilities are free from defects would be deleted; and to remove the obligation to pay Council costs associated with the transfer.

178. The Appellant's aim is to provide the facilities when sufficient occupations make that viable in terms of level of use. It states that the modifications ensure there is a bigger pool of Rent Charge deed through which the facilities can be managed and maintained. The substituted lease arrangement would, it is said provide control to the developer over maintenance of the facilities during construction.

179. The Hamlet Facilities are to be located centrally at land parcel S1 on the Chilmington Green Open Space Plan (CD6/13) approved as part of the outline planning permission. The facilities detailed in Schedule 7 of the s106 Agreement and the total capital cost is £1,266,000 index linked to the date of the approval of the RM approval for the facilities. The delivery of the Hamlet facilities in the timescales set down in the s106 Agreement is said to be necessary to meet the sporting and recreational needs of the residents of CG. The obligations in Schedule 7 thus continue to serve this useful purpose.

[19] CD3/1/1, paragraph 8.7

180. The Appellant states that the proposed cricket facilities would not be viable until 3500 dwellings have been occupied. The s106 Agreement makes no sports provision at Discovery Park in the early stages of the development but the Hamlet Facilities are required and propose not just a cricket pitch but a community pavilion, tennis courts and a bowling green. The AAP at paragraph 5.62 states that the cricket ground is publicly accessible space should be flexibly designed to encourage a range of informal play and recreational activities with a design approach to give a contemporary impression of the village cricket green.

181. The 1400 dwellings trigger is thus important in terms of meeting need and is linked to other obligations needing an approved design brief and specification no later than 1000 occupations, as set out in the AAP Infrastructure Delivery Plan (IDP). The triggers ensure there is sufficient provision to meet residents' needs in accordance with the quantitative standards of the SPD (CD3/1/1 AAP Policy CG8).

182. The effect of the modifications would be to delay delivery of the Hamlet facilities until halfway through Main Phase 3 of the development when c60% of the dwellings have been occupied, with the first phase of Discovery Park not being delivered until 63% of the dwellings have been occupied (CD3/13 para.6.12 p.18). Alongside the modifications proposed for the Community Hub in the District Centre, 3250 dwellings (56% of the Development) would be occupied before any fully accessible sports facilities are provided for residents (CD3/13 para.6.13 p.18).

183. The first primary school, already open, does not allow community use of its facilities and whilst the secondary school does intend to allow community use outside school hours, they are not of sufficient to serve residents of up to 3500 dwellings and there would be no provision for cricket facilities or a bowling green for which the SPD has identified a need. The proposed modifications would therefore not serve the useful purpose of the obligations equally well.

184. The proposal to remove the requirement that the Hamlet Facilities be free from any defects identified by the CMO (other than those of a cosmetic nature) is not properly justified in my view. It is submitted that ongoing liability for repairs is neither fair nor reasonable, but the liability is for a limited period and those managing the facilities assume responsibility thereafter. The relevant defects relate to matters for which the Appellant will be responsible and should remedy before transfer, or if necessary, afterward, to the CMO. Clearly, the obligation continues to serve the useful purpose of ensuring that the Facilities are free from defects as defined in the s106 Agreement.

185. As to the proposal to substitute a 21-year lease, a purpose of the existing arrangements is that the facilities will be managed in perpetuity in accordance with the CMO's charitable objects. Whereas, if the CMO manages the facilities for this limited period of 21 years, residents will be paying a rentcharge to an organisation that, after the expiry of the lease, is unable to use the monies. It is concerning that the modification request contains no mechanism to give confidence that after expiry of the lease public access to those facilities or their future maintenance would continue or if so on what terms. The proposed modifications do not therefore serve the purposes of the obligation equally well.

186. The level of capital cost (£1.266m) is clearly a concern for the Appellant in terms of viability and deliverability. It wishes to ensure that "*the cost of these Facilities is not so substantial as to undermine the viability of the relevant Main Phases and strike*

at the very delivery of these assets" (5.1.15, Mr Wheaton's evidence). However, if the total capital cost of the facilities were now to include fees etc, less monies would be available to provide the facilities themselves, adversely affecting their quality and/or quantity. The modification would not serve the purpose of providing those assets for the community equally well.

187. In light of my conclusions the linked proposal to delay the requirement for approval of the design brief for the Hamlet Facilities to 3000 dwelling occupations would mean design quality is not embedded in the development at an early stage. This would not continue to serve the purpose of providing timely provision of the facilities, equally well. Issue is also taken with the agreed consultation process for the design brief. The consultation required with the CMO is said to be surplus to requirements and slows delivery, given that the Council may consult interested parties when approving the design brief.

188. This request relating to consultation exemplifies the opposition by the Appellant to any unnecessary, as it sees it, involvement by the CMO in the development. When Mr Hodson gave evidence his antagonism towards the CMO as a body (of which he is a part) was thinly veiled. The CMO is a key stakeholder at CG. It is a useful purpose of the arrangements that they have early input into the design process including costing. They provide a link to residents and other local groups, and as the body ultimately responsible for managing the facilities, the aim of considering their concerns at an early stage is useful, so the proposed modifications to the obligations would not serve the useful purposes equally well.

189. Finally, removing the obligation to pay Council costs associated with the transfer of the facilities ignores the useful purpose that exists in the Owners paying such costs, rather than being met by public expenditure, since they are connected to the long-term management of facilities that mitigate the impacts of the development.

190. Mr Collins regrettably ignores this consideration in stating "*it is clear that clauses such as this serve no useful purpose as they simply impact on the viability of the scheme* (my emphasis)." In supporting his client's requests based primarily on a generic viability concern, there is too little consideration of what useful purpose is served and continues to be served by the obligation in question.

Requests 34, 35, 36, 37, 38, 39 Children and young people's playspaces

191. It is undisputed that the obligation to provide playspaces (PS) serves a useful purpose in line with good placemaking and planning policy (see CD2/13 para.8.38). Playspaces are proposed in five locations: PS1, PS2, PS4, PS5 and PS7[20] at a total capital cost not exceeding £2,585,143.00. PS1 and 2 are to be provided at 500 dwelling occupations, PS4 and PS5 at 1100 occupations, and PS7 at 1500 occupations. Triggers for approval by the Council of design and specification briefs are set correspondingly before actual provision which is to be free from defects identified by the CMO, other than of a cosmetic nature.

192. The requests would remove the duty to consult the CMO; delay the submission of the design briefs; set back the actual provision of PS2, PS4, and PS5 to respectively 700 1200 and 1300 occupations; remove the defects liability clause; expand the definition of total costs to include fees, contingencies, etc, landscaped

[20] PS6 will be located in Discovery Park with delivery secured under Schedule 10 of the s106 Agreement. 'PS6' is therefore part of the Sports Facilities and Strategic Parkland topic

buffers and screening around play areas; substitute for transfer, a long lease to CMO; and to remove duty to pay the Council's costs.

193. The modifications aim to bring provision of the facilities into line with occupation levels in a policy compliant manner. However, it appears that some requests are aimed at the CMO who are alleged to have excessive powers, including in respect of consultation and to demand that repairs are carried out and it is said that the CMO is not competent in these matters. It is further alleged that the CMO has slowed down the process of engagement on the PS1 design brief, has not helped to resolve issues and has no value in terms of community engagement, whereas it should be left to the Appellant to undertake consultation as it sees fit.

194. A key aim of the CGAAP is to make each phase of the Development sustainable in its own right so properly planned infrastructure delivery is achieved alongside new housing and any significant shortfall in provision is avoided. The 4 main phases of the development comprise 1501 dwellings in Phase 1, 1124 in Phase 2, 1559 in Phase 3 and 1566 in Phase 4.

195. Moving the trigger for PS2 to not more than 700 occupations in Phase 2 means that a combined total of 2201 households (1501 for the full phase 1 and 700 during phase 2) would only have access to PS1. I noted earlier that PS1 is currently partially occupied by the CMO first temporary premises. PS1 is among the smallest area of the playspaces at 1ha. In accordance with the SPD, the dwelling threshold for the provision of equipped play space on a site is 415 dwellings and provision for playspace should be made at the level of 0.5 hectares per 1000 population. As pointed out in the topic paper presented on this subject, initially and in the medium term there would be a deficit of provision in AAP Phases 1 and 2 which is made good overall in Phases 3 and 4, with no alternative provision in the local area that would be accessible to residents of the Development.

196. The Appellant's Quod Planning Report Explanatory Statement Updated October 2024 (Quod Statement) gives revised realistic forecasts of housing delivery which is expected to accelerate from c100-125 homes per year in 2020-2024 to c300 homes after 2028 with final completion by 2048. Appendix A of the topic paper on this subject provides a detailed appraisal of the proposed modifications alongside AAP and SPD requirements. Moves have been made to remove and vary the conditions attached to the CMO building to separate it from the delivery of PS1 but the Appellant complains of delays in having to consult with the CMO.

197. Given the anticipated future housing delivery, ABC argue that the proposed triggers would reduce the timescale between approvals of the design brief and delivery of the relevant PS to 6-8 months. This is the period during which the PS in question must be actually constructed, laid out and so forth to the approved specification. I agree that this is too short a period to be confident that the modification would continue to serve the useful purpose of the obligation equally well, given that a more realistic period of c12-18 months is implied by the current arrangements. Furthermore, given that access and site safety could be secured with the current provision triggers specified in the Agreement, there appears to be no reason why construction activity would prevent delivery of PS in the current timescales. The timely delivery of PSs to meet need as it arises is a useful purpose which the proposed modifications would not serve equally well.

198. Including fees etc in the total capital cost of the PSs reduces the sum available to deliver the facilities. The design brief has already been submitted for PS1 indicating fees etc of £88,441 which would be 38% of the PS1 budget of £235,013. The request would therefore likely lead to a diminution in quality and quantity of provision if the total available for actual build had to be reduced in that proportion. Therefore, the statutory test of equivalence for modification would not be met.

199. The requests that the PSs be leased to the CMO free of the obligation to repair defects and to contribute to the Council's costs on transfer, do not serve the useful purposes that I have described in relation to the dealings with the other assets.

Requests 40, 41, 42, 43, 44, 45, 46, Allotments

200. These requests seek to defer triggers to provide Main Phase 1 and 2 allotments to the point at which demand for the minimum viable size of allotment is reached; discharge provision of Main Phases 3 and 4 allotments at 1400 occupations; modify and discharge conditions attached to the provision of allotments in each main phase; discharge repairing liability; and discharge payment obligation.

201. Request 40 is to **modify** the obligation to provide the Main Phase 1 allotments which is acknowledged to serve a useful purpose but for the requirement to do so by occupation of the 1000th dwelling which it is said will adversely affect the Paying Owner's cashflow. The revised trigger requested is based on occupation of 1450 dwellings, although Mr Collins' evidence also refers ambiguously to the point at which the Appellant says demand for the minimum viable size (20 plots/0.66 ha) of allotment would be reached (1,375 homes).

202. Given that timely provision of allotments is essential to support community engagement and well-being it appears that there will be demand prior to when it meets the minimum viable size which will increase as residents move in. The relevant planning supplementary guidance[21] is to have the allotments laid out before completion of 400 dwellings so provision is already agreed to be delayed as provided for in the s106 Agreement, within Phase 1. Although the evidence base for the guidance appears to be several years old, the allotment provision for the development was shown on the approved plans[22] as part of the outline planning permission for the development. The Appellant suggests that allotments become available n a reasonable period and need for them is neither pressing nor acute.

203. The variation sought is fundamentally based on the Appellant's viability concerns and it is said that the purpose of providing allotments will be equally well served by the proposed modifications, and the requirement for Main Phase 3 allotments is over-provision, serving no useful purpose.

204. 0.2h per 1000 persons is the adopted standard yet it is said no evidence exists for an increased number of allotment pitches. Further it is argued that provision of allotments does not require transfer of the asset to the CMO, it could be licenced bi-annually which would serve any useful purpose equally well.

205. The CGAAP states that allotments will be promoted at CG in line with the aspirations set out in the green space and water SPD[23]. The Quod report acknowledges (paragraph 8.14) that allotments are required based on 0.2ha per

[21] Public Green Spaces and Water Environment SPD 2012 provides, in Table 5, page 24
[22] Chilmington Open Green Space Plan (CD 6/13)
[23] Ashford Public Green Space and Water SPD July 2012 (CD3/1/5)

1,000 people with a minimum viable size of 0.66ha per 1,375 homes pursuant to the SPD but says that based on the minimum viable size of allotments - 20 plots meeting the needs of 1,375 homes, the trigger for completion of these allotments should come no earlier than that (and for each further tranche of allotments).

206. The SPD sets out that allotments should be a qualifying size before completion of 400 dwellings, so the proposed trigger would fail to enable use as the population of the new development grows, delaying provision beyond the point at which even the Appellant considers there would be a viable population (1375 units). The same reasoning applies to **modification** Request 41 to delay Main Phase 2 Allotments.

207. Mr Collins' justification for the proposed delay is anecdotal and otherwise based on the absence of evidence rather than cogent evidence that might displace the adopted standard that is underpinned by the Ashford Local Plan 2030 Policies SP1 and COM3. Requests 42 and 43 to **discharge** the remaining provision obligations would therefore fail to recognise the useful purpose that such obligations ensure that there is sufficient provision to meet the needs of the residents of the Development.

208. As to Request 44, **discharging** the obligation that the allotments be transferred to the CMO would not fulfil the useful purpose of community stewardship detailed in the business plan by which the CMO will ensure the long-term management of the facilities to a consistently high standard. Request 45 is to **discharge** the obligation to repair defects in the allotments transferred to the CMO but no good reason is advanced as to why it should not be responsible for remedying defects. The Appellant's Request 46 to **discharge** payment of ABC's costs related to the transfer which the developer might wish to adopt, would remove a continuing useful purpose of enabling ABC to take specialist advice on its wording given the dispute that would by definition then have arisen.

Requests 47, 48, 48, 50, 51, 52, 53, 54, 55, 56, Discovery Park

209. Request 47 is to **discharge** the contribution towards masterplan work and repay it. As noted previously, there is no power to discharge or modify an obligation to provide for repayment of contributions already paid which is a separate matter outside the scope of s106A. However I note also that the Council has undertaken to demonstrate how the contribution paid has been and is proposed to be spent. Request 56 is linked to this request since it seeks to **modify** the obligation to publish the masterplan by deferring publication to 2000 dwelling occupations, but it is clear to me that sufficient time should be allowed for the masterplan to inform the design briefs and specifications and future RM applications, therefore the current obligation continues to serve a useful purpose, which the modified proposal would not serve equally well as it would be too late to inform these documents.

210. Request 47 is to **modify** the obligation to submit for approval design briefs and specifications for the Discovery Park Sports Pitches and Sports Hub by 2650 rather than 1000 dwelling occupations. These community assets have a capital cost of up to £2,782,000.00 and £4,976,157 in stages. To submit the design briefs and specifications by 1,000 is denied by ABC as premature since in its view the delays to approval of design briefs and specifications would not be likely to allow time to enable the facilities to be delivered by the required deadline.

211. I note that the associated proposals to **modify** the delivery triggers from 3,200 and 5,000 to 3,650 and 5,500 dwellings (Requests 50 and 51) is not a substantial

difference and it is unclear how the Appellant has justifiably demonstrated that such a delay in the initial submissions would provide sufficient time under the current or proposed delivery timescales.

212. Request 49 seeks ostensibly to modify, but in reality to **discharge** the obligations to consult with the CMO but this is linked to the obligation to transfer the assets to the CMO and if discharged would not fulfil the useful purpose of community stewardship which runs through the various elements of the s106 Agreement. The CMO's management and maintenance of the sports pitches and sports hub is a useful purpose as its ability to input at an early stage into the design process.

213. Neil Shorter, a board member of the CMO gave evidence. He considered that the CMO has been portrayed by Mr Hodson as inefficient and ineffective. Mr Hodson is a CMO director and charity trustee. He represents the master developer and is entitled to his own views of the difficulties he has encountered in working with the CMO. However, as stated the alternative mechanism advanced has inadequate detail to give confidence as to the long-term management and maintenance of the facilities at CG.

214. Request 52 is to **modify** obligations to provide DP3 and PS6 to the following occupations 2650, 3500, 5000, 5750 rather than 1500, 2500, 4000, 5500. However, the relevant Schedule 29D was confirmed by the Appellant as desired to be deleted (see Request 116). Payment into the DCpBA prior to the trigger point for delivery of the sports facilities continues to serve a useful purpose because it ensures that, if the Council is required to remedy a breach of this obligation, the Council can do so as quickly as possible following the breach occurring. The delay proposed would result in a delay to delivery that would not serve the purpose of the obligation equally well.

215. Request 53 seeks to **modify** the trigger to provide a design brief for DP3 and PS6 at 2100 rather than 1000 dwelling occupations but for the same reasons as apply to Request 47 in that delays to the approval would endanger delivery of the facilities by the required deadline for which contracts need to be let prior to commencement of construction.

216. Request 54 is to **modify** the obligation to transfer each of the first phase and second phase of the Sports Facilities and the DP3 so as to substitute an obligation in each case to grant a lease of 21 years at a peppercorn ground rent. It is common ground that these areas are managed to a high standard. The Appellant complains that the CMO to date has not demonstrated competence to do this but the transfer of the facilities to the CMO is an essential part of the approach to community stewardship being delivered at CG and detailed in the CMO Operating Business Plan submitted by the Owners. Even if the criticism were well-founded, which on the evidence is far from clear, it remains unexplained how retention of assets in its ownership would affect the CMO Business Plan or how facilities would be managed and made available to the public for use (and by whom) at the end of the lease.

217. Request 55 seeks to **discharge** the 12-month repairing obligation after transfer of Sports Facilities phase 2 and DP3, on the grounds that the Appellants are responsible only for building defects at handover and it is unreasonable where viability is an issue for it to have this liability. In my view the obligation continues to serve the useful purpose of ensuring defects are dealt with promptly to the benefit of the community. I note the lack of a dispute resolution mechanism, and ABC's

willingness to agree a variation to introduce such a procedure which could satisfy the tests in s06A(6)(c). The Council is willing to discuss this proposed modification by agreement with the appellant but as there is no proposed modification that sets out such a procedure, that is outside the scope of the appeals.

218. For these reasons the Appellant has failed to show that the tests for the discharges and modifications it seeks are satisfied.

Request 57, Cemetery provision

219. The request is to **discharge** entirely the obligation to pay £800,000 as unnecessary and representing an over provision of cemetery facilities given those available off-site. ABC has no statutory obligation to provide burial space for its residents, but it is normal practice under local government powers to provide and maintain public cemeteries.

220. ABC's Green Space Standards state that cemeteries are required based on the rate of 0.6ha per 1,000 people. If the £800,000 obligation is based on this metric, it must be adjusted downwards. Based on publicly available assumptions on death rates and burial rates, evidence presented to ABC's cabinet, the need appears to be more in line with 0.6ha per 10,000 people (without adjusting for the declining rate in burial rates (vs cremation)). Need from CG is estimated to be 400-800 graves over 30 years. The evidence base for the cost of new provision does not justify costs of £800,000 for a 1ha cemetery. Based on an example in Cherwell, of which brief details are given it is suggested that it would be half that cost although it is undisputed that the development will entail the need for burial space which the current obligation continues to serve a useful purpose in providing for. Moreover, the sum of £800,000 is less than if calculated pursuant to the SPD (£1,978,000) and on that basis discharge of this entire obligation has not been demonstrated to be justified.

Requests 58, 59, 60, 61, 62, 63, Community Hub

221. These requests seek, with reference to the Explanatory Statement[24], to deliver the facilities in two tranches at 3,250 and 4,250 occupations rather than 1,800 occupations; to have the design briefs approved by 2,850 and 3,850 occupations rather than 1,400 occupations; to transfer the building by lease on terms acceptable to them; cap the cost at £2m and amend specific requirements; enlarge the scope of "costs" to include fees etc; dispense with the need to consult the CMO; discharge the obligation to make parts of the Community Hub building available for use by KCC; to require public sector leases to be in place prior to construction of the building instead of transferring the freehold to the CMO.

222. Along with the Chilmington Hamlet facilities, the obligation to provide the Community Hub facilities is acknowledged "potentially" to serve a useful purpose, save for the community learning space which the Appellant states is not needed, mainly because, seemingly, the costs of c£5m undermines the viability and deliverability of the Development. The Brookbanks Cost Report (Brookbanks) seeks to demonstrate that the facility can be built for £2m. On the other hand, BPC costed its provision using BCIS data at c£7.3m[25].

[24] Section 8.
[25] CD14/27 Appx D Viability SOCG

223. The nature and extent of provision secured was informed by consultation with service providers including Ashford Clinical Commissioning Group and KCC. The floorspace required and triggers for delivery of the Community Hub ensure there is sufficient facilities to meet the needs of residents of the Development, which are undoubtedly useful purposes. It is unclear what the evidence is to support the claim that the facilities are not expected to be needed until much later than the current triggers. Delivery of at least part of the Community Hub within the timescales in in the s106 Agreement is said to be integral to meeting the social and community needs of the residents of CG.

224. Delaying provision until 56% of dwellings are occupied and then only providing a proportion of the provision required would not serve that useful purpose equally well as a large proportion of the community (up to 56%) having no access to health, social and recreational facilities on site, would have to travel elsewhere in the district to seek provision. It is also argued by ABC that the proposed modifications would result in piecemeal design of a single land parcel with no certainty over how or whether the second tranche would integrate with the first tranche. The capital cost is expressed as a maximum subject to indexation and based on the infrastructure delivery plan submitted by the Appellant.

225. Brookbanks does not use BCIS data. BPC has it that using BCIS data the maximum specified with indexation will be insufficient and the claim that construction costs would not be much less than assessed in 2017, does not equate with the Appellant's position as to other costs it is obliged to pay under the s106 Agreement where it argues that costs have materially increased (e.g. natural green space and PS1) (see CD3/9 para.6.7 p.19 & 6.22 – 6.24 pp.22-23)).

226. I have noted earlier that the evidence suggests certain elements could be built at lower cost, but no compelling evidence exists to show that, using BCIS current costs, s106 payments and capital contributions calculated at today's date would be significantly lower than the amounts plus indexation being demanded or falling due. Furthermore, if indexation is excluded but fees etc are included, such a variation provides no confidence that the £2m is a robust estimate of the likely capital cost of the facilities required.

227. As to the proposals for leases to occupiers the terms and responsibility for maintenance and repair are unstated and unsecured and if a potential occupier declined to take a lease there would be no obligation to provide any of the Community Hub under the modifications proposed[26].

228. Given the above factors, the proposed modifications would not serve equally well the useful purpose of ensuring in accordance with the CGAAP, a properly planned infrastructure delivery is achieved alongside development of the new housing so that any significant gaps or shortfalls in provision are avoided. Nor would the discharges and modifications sought serve that purpose equally well given the risk of the Community Hub not being delivered at all, should an offer of a public service lease (not defined in any detail) not be taken up, and the obligation to construct and provide the Community Hub thereby cease to apply.

Request 64, Orchard Village Facilities and Chilmington Brook Facilities

[26] see CD3/9 para.6.10 p.20

229. This request purports to reserve a right to apply to discharge or modify obligations in Schedule 13 related to these facilities. However, no specific detail is given, therefore as it stands the Request is not approved.

Request 65, District Centre

230. The requested **modifications** would permit a revised planning application for the District Centre (DC); require the DC design brief and specification to consider any RM approval or alternative planning permission for the DC facilities; and delete the floorspace requirements for the supermarket, small retail units and office building, including the requirement for at least five small retail units with floorspace greater than 150 sq/m.

231. Mr Collins said that in the current retail market, a focus on small units was unsustainable. He states that the Appellants "*have canvased the market, but there are no operators who will contemplate the present scheme*". However, no evidence has been provided by the Appellant to demonstrate that.

232. ABC argues that deleting the reference to the amount of floorspace and removing the obligation that the retail provision should include small retail units would undermine the sustainability of the development and the basis upon which planning permission was granted.

233. This may be so but the request is premature as it cannot be known with any reasonable certainty what alternative provision is feasible unless and until a revised planning application has been determined. The appraisal that informed the planning permission, Environmental Statement and DC objectives provides the basis for the useful planning purpose of enabling the local community to access facilities and services within CG. Since there is no replacement obligation to ensure the new application is made or for what type of development, there is no guarantee that the DC would be brought forward. Consequently, the modification requested would not continue to serve that purpose equally well.

Request 66 (withdrawn)

234. The DC design brief should be provided by 950 dwelling occupations. This trigger was proposed to be relaxed to 1500 occupations and the facilities provided by 2700 rather than 1250 occupations. However, given the appeal decision in Possingham Farm[27] this request was withdrawn.

Request 90, Ecology

235. The request is to **discharge** in their entirety the obligations in Schedule 17 to the s106 Agreement. These obligations deal with the transfer of the ecological enhancement areas to the CMO and provides for the management of these areas in perpetuity which is a useful purpose of the obligations according to ABC. The appellant asserts they are unnecessary since such matters are covered in the CMO framework agreement and covered by conditions.

236. However, the Quod Statement considers this proposal does not have any important contextual, policy, legal and other justification that calls for expanded explanation. Transfer of the ecological enhancement areas to the CMO forms part of the community stewardship to be delivered as detailed in the CMO Business

[27] Appeal Ref APP/E2205/W/24/3345454 dated 22 November 2024.

Plan. Requiring the relevant land to be transferred to the CMO cannot be enforced by condition alone.

237. I can see how it might be a duplication for the Appellant not to control the ecologically managed farmland when the CMO has to make similar arrangements. Chilmington Farm may be farming the land at CG under a tenancy agreement with the Appellant but this cannot be a permanent arrangement as and when land becomes needed for development. The discharge request is not accompanied by any modification that specifies how these assets, if so retained would actually be identified and secured for ecological mitigation. CG sits in a mainly arable farmland landscape. Chapter 10 of the AAP sets out the policy approach to protect existing habitats and protected species by suitable mitigation, including "*effective management arrangements, in perpetuity for these important areas*."[28] The discharge of these obligations would be contrary to the approach set out in the CGAAP and inconsistent with other planning policies such as the Ashford Local Plan 2030 Policies SP1, ENV1 & IMP4. The CMO community stewardship model provides a way of ensuring mitigation is managed in perpetuity. Therefore, discharge would unjustifiably remove this continuing useful purpose.

Requests 95, 96 bus services and vouchers

238. The proposed **modifications** comprise delays to the provision of various items, ie the temporary bus stop, the commencement and frequency of bus services, and related infrastructure. Also included would be removal of the need for the Council's agreement to tendering for an alternative service, and travel vouchers for first occupiers. The subsidy that the Appellant must give to the bus services would be removed, and an obligation inserted that the bus related infrastructure for Main Phase 2 should be transferred at nil cost to the specified body.

239. The Quod statement makes clear that, for the Appellant the main reason for the modifications are "*current market conditions and the actual building trajectory which, together, mean that the proposed services are unviable and unsustainable*".

240. The s106 Agreement secures delivery of a bus service and associated infrastructure. The obligations therein serve the useful planning purpose of providing a bus service to deliver the modal shift in transport required for a sustainable development. The Appellant relies on the approach adopted at Possingham Farm but the scale of that development at some 655 dwellings is not comparable with development of a community of 5750 dwellings. The Outline Permission was granted on the basis that a subsidy would need to be secured for the bus service to be viable and self-sustaining in early years of the development.

241. As to the removal of the subsidy obligations no evidence has been provided to demonstrate that a subsidy would not be required, merely it is claimed that the subsidy is unaffordable. For the Appellant Mr Dix, an expert in designing and assessing highway and transport schemes, referred to the Possingham Farm appeal which discussed the need to "*balance the desire to trigger a modal shift, as against actual demand*". That may be a relevant matter to have weighed in the planning balance when deciding that appeal, but that is not the issue here.

242. The useful purpose of the obligations is early provision of bus services to establish sustainable patterns of travel at an early stage in the development. They provide for

[28] AAP, paragraph 10.69

bus related infrastructure to increase in line with numbers of dwelling occupations. The proposed modifications would not serve this purpose equally well because if the necessary infrastructure, timing and frequency of bus service is delayed, greater reliance would have to be placed on the private motor vehicle to meet residents' daily transport needs, resulting in a car dominated and unsustainable community. There already exists provision to address the situation if no tender bids are successful and an alternative service may be required. The Appellant's submissions are essentially an attempt to re-argue the planning merits and balance on which planning permission was granted and the s106 Agreement completed.

243. In any case, there is no evidence from which I can with confidence conclude that with the modifications in place, there would be no adverse impacts on the development in terms of modal share or on the local highway network, nor have details of tender responses from bus service providers been provided. The related obligation to fund the designated bank account prior to the trigger point for delivery continues to serve a useful purpose in ensuring, if the Council has to remedy a breach, it can do so timeously. In my estimation the modifications would result in unacceptable delays to delivery if there were a breach of the obligation.

244. As to Request 96, to no longer provide vouchers for first occupiers, the cost of provision is the only reason given, accompanied as it is by the generalised assertion that it would undermine the viability and deliverability of the scheme. Bus vouchers are not the same as subsidy for other provision. They fulfil a distinct purpose in encouraging in a direct fashion, individual occupiers to engage in modal shifts in their daily transport. Removal of this obligation would undermine that aim.

245. Therefore, the proposed modifications would not serve the useful purpose of the obligations equally well.

Request 92

246. This request is withdrawn.

Requests 91, 93, Provision of Bond for highway improvements (Schedule 18, 18A)

247. Request 91 is to **discharge** the obligation to provide a bond in respect of the A28 Improvement Works in the total sum of £28,988,800. It is claimed that the obligation no longer serves any useful purpose and should be discharged because it has ceased to be possible in the financial markets to obtain a bond of the `on-demand' kind required.

248. The outcome of the appeals cannot directly modify the s278 agreement which requires the Appellant to provide an on-demand bond for the full cost of the A28 Improvement Works and other matters. It may be that appropriate modifications would be made to the s278 agreement following the decision of the Court of Appeal in *Warwickshire v Powergen (1998) 75 P & CR 89*. I note that the form of the deed securing the on-demand bond states in terms that the Issuer agrees that the "*s106 Agreement and s278 Agreement does not form part of this Bond, which contains freestanding obligations and is not to be construed by reference to the Section 106 Agreement and Section 278 Agreement*."

249. Request 93 is to **discharge** the obligation to pay Pre-Contract Costs and Post-Contract Costs and any shortfalls. It would effectively remove the need to fund the A28 works themselves for reasons of viability and deliverability. The immediate

issue with delivery at CG is that failure to comply with these obligations is preventing parcel sales and occupations beyond 400. Somewhat incredibly, it is submitted that although there would be a severe impact on the A28 at certain times if the whole development is built out, that has to be balanced against the consequences of it not proceeding at all, and on balance whilst there would be delays to some journeys as a result, the social and economic benefits of the scheme, if the Appellant is not required to contribute to the A28 improvement works, would follow. That is a planning merits judgement not relevant here.

250. The evidence, such as it is, that a bond cannot be obtained, is not compelling. Mr Collins produced a letter[29] from a financial broker engaged by the Appellant to secure funding to develop various parcels of land in the scheme by way of a loan against the entire site. Basically, it states: "*in the absence of you depositing the equivalent amount of cash as supporting security there is no bond market open to you."* It is a brief letter and ends by informing the developer: *"I am unable to provide any further help in your search for a bond for the A28."*

251. During the inquiry, Mr Dix eventually accepted the overwhelming evidence highlighting the need for the A28 improvement works to mitigate the impact of the CG development, and that such works were necessary to avoid a severe residual cumulative impact on the A28. Only when cross-examined did he concede that the restriction on occupations served a useful highway capacity purpose.

252. Under Schedule 18, occupations are limited to 400 unless and until the required bond is delivered to KCC under the associated section 278 agreement to secure the post-contract costs. In this way the A28 improvement works are provided at the cost of the developer without risk to KCC as highway authority. When the bond is provided, KCC must let a contract for construction; KCC then delivers the works with forward funding; the Appellant is obliged in the s278 agreement to pay pre- and post-contract costs secured by the bond, and the Appellant is to pay any shortfall in the funding, together with, at the end of the project, any overrun costs up to a defined cap. KCC's forward funding is thus secured, the highway improvement works are paid for by the developer and there is no risk to KCC. Under that framework the restriction on 400 occupations would be lifted whilst KCC would let the construction contracts, knowing that it could do so at no cost or risk to it.

253. Clearly in my view, the obligations fulfill a useful purpose in that they would deliver highway improvements whether or not connected with the development, but they are so connected, to avoid severe residual cumulative impacts on the highway network. Restricting further than 400 occupations without securing the works ensures that the costs and risks of provision do not fall on the public purse. Removing the bond obligation would in effect permit the development to proceed without the infrastructure required to make it acceptable in planning terms, posing a risk of developer default and repayment liability transferred to KCC and the public.

254. It is submitted (in relation to the education obligations) that a bond is "*outside the realms of what is usually necessary when agreeing planning obligations, which is that payments are made at appropriate trigger points*".[30] However in this case, the bond is required at the point when the development passes the agreed trigger of 400 occupations. There is no request to put back the triggers or evidence or modelling to support such a case. KCC states that absent the bond it would not and

[29] SPF letter to Hodson Developments Ltd 30 January 2025.
[30] Appellant's closing statement, paragraph 117.

could not contract for the works. KCC's highways expert Mr Hogben gave undisputed evidence that KCC could not fund the works itself, and that there were no other available public sources of funding.

255. Other development schemes have contributed in a proportionate way to fund the A28 improvement works. However, there are no other identified or even hinted allocations in this area. The 400-unit occupation limit is imminent, if not by now surpassed and KCC and ABC made clear their intent to enforce the obligations due to the severe highway impacts that would arise if it did not do so. KCC had suggested an approach whereby the limit might be increased, derived from the number of units with RM approvals. Whilst this does suggest that the highway capacity calculations might be varied, it is a moot point: the evidence does not support any clear conclusion that the requirement for a bond at 400 units does not serve a useful purpose and there is no modification request to increase the limit.

256. A duty to pay might be enforced under contract or statute and is a local land charge. Thus, a s278 agreement is enforceable against the parties and those with a legal interest in the land for which the works are being carried out. However, these may be hollow remedies depending on the financial status of those against whom enforcement may eventually be sought. From experience, a bond is very much within the realms of normal practice and generally accepted as a form of surety to put in place to secure successful completion of highway works deemed necessary, such as the A28 improvement works, to enable the development to proceed.

257. Counsel for the appellants states that I must weigh the "benefits" of the bonds (if any) against the "harm" caused by stopping the scheme. That is not so in my view. The language of benefits and harms reflects the planning balance, not relevant here. I recognise that in the judicial review permission hearing, the issue of restricting further development by imposing the bond requirement was confined to its rationality, ie whether no public authority properly directing itself on the law and facts would do so. Nevertheless, the comments of Lieven J provide insight into the propriety of the principle. I quote from her judgment at paragraph 20:

"*Ground 4 is in respect of bonds which the developers were required to produce in respect of various parts of infrastructure, including at least one new school. The developer said, in its submissions to the Council, that it now could not produce such bonds because they were no longer available to it. When I asked Mr Letman about why, he accepted that is because his client at the relevant time was not a good enough covenant to be given such a bond by the market. Mr Letman suggested that it was irrational in those circumstances for the local planning authorities not to discharge the bonds. I disagree with that argument. It seems to me that where the local planning authorities are legitimately concerned to ensure, for example, that educational facilities are provided, to simply discharge the bonds in circumstances where the developer no longer is a good enough covenant, is leaving the local authority wide open to the possibility that the developer will not provide the educational facilities, and the local authority will have to pick up the tab. That is why a bond is provided. So there is nothing arguably irrational about continuing to require such a bond*."

258. Commonly, the amount of a construction related bond may be a percentage of the contract value which decreases after milestones are met up to practical completion. The ability to obtain a bond is subject to a number of variable factors. Among these are current market conditions and the contractor's financial strength. Accordingly,

bonds may not only be available at face value but their effective cost can fluctuate commensurate with interest rates, creditworthiness, and supply and demand. I do not accept that the evidence provided by the Appellant demonstrates that it would not ever be possible for the required bond to be obtained but clearly the Appellant's financial strength may be a relevant factor. I note that the bond that was provided by the Appellant in respect of the primary school obligations in the s106 Agreement, had to be called in by KCC and action taken for unpaid contributions.

259. A developer might fund and deliver infrastructure being restricted as to stages of development and/or provision of security in the event of his defaults. Or a developer might forward fund a third party to deliver the infrastructure with payments tied to occupation limits. Here, the mechanism freely agreed and entered into is that infrastructure is forward funded and built out by KCC, the Appellant pays in instalments, and the repayment obligations are secured by a bond to ensure the risk does not fall on the public purse. This is not unusual in my experience and with respect to Mr Dix's evidence, bonds are not only used if it is the developer who completes the works under a s278 agreement.

260. The useful purpose of the bond is to provide security to KCC that its forward funding will be repaid. The inability to secure the bond points up the need for this security. If the funding structure in the s106 Agreement were removed, it is unexplained how the works would be funded by other routes. The Appellant insists that stopping the scheme from proceeding does not serve a useful purpose. The bottom line here is: 1) the obligations may indeed have that effect; and 2) if the scheme has to be stopped or delayed unless and until made acceptable in planning terms by providing security for the A28 improvement works to mitigate the impact of the CG development, then that continues to be a useful purpose.

Request 94, off-site pedestrian and cycle links

261. The request is to **discharge** these payment obligations entirely. The Appellant's formal position at the end of the inquiry was that if a deed of variation is entered into or a separate s 106A application approved then the request would be withdrawn.

262. The obligations serve the useful purpose of ensuring that the Development is a proper urban extension to Ashford town and provides sustainable transport means. A statement of common ground dated 22 April 2025 between KCC and the Appellant (SoCG (Highways)) included consideration of these matters. The amendments to the s106 Agreement needed to reflect the matters agreed are revised from those sought under Request 94. As further consultation would be required to deal with the revisions, the mechanism for achieving this would need to be agreed between the parties outside these appeals.

263. However, in the circumstances of the useful purpose continuing to be served, the Request to discharge the obligation before me cannot be approved.

Requests 97, 98, off-site traffic calming

264. The Appellant's formal position at the end of the inquiry was that if a deed of variation is entered into or a separate s 106A application approved then the modification would be withdrawn.

265. The SoCG (Highways) included consideration of the off-site traffic calming obligations. The amendments to the s106 Agreement required to implement the matters agreed would be modifications to Schedule 19 which are revised from those sought under Requests 97 and 98. The mechanism for achieving this would need to be agreed between the parties outside these appeals.

266. The current obligations appear to serve a useful purpose in ensuring that traffic flows from the Development on unsuitable roads are addressed by a traffic flow monitoring regime and payments towards traffic calming measures will improve the safety of roads with the greatest increase in traffic levels due to the required monitoring. I note the variation sought from the requested modifications before me, but I can only consider the latter. It makes sense for contributions to be directed towards roads where traffic calming measures would be most effective, whereas the modification proposed includes that funding should be evenly split, which does not reflect the reality of the traffic levels across the roads given that some have significantly higher traffic levels due to their road classification and geometry.

267. In the circumstances I am not persuaded that the useful purpose can be equally well served as by the current obligations, therefore the Requests are not approved.

Request 99, Regional Infrastructure Fund (RIF) contribution (Schedule 22)

268. The Request is to **discharge** the RIF payment obligations because the highway works have already been undertaken so non-payment of the obligation would not prevent delivery, albeit others will need to fund the RIF re-payments. It is also submitted that payment undermines the viability and deliverability of the CG scheme, so cannot serve a useful purpose.

269. Payment of £5,622,589 to ABC is to be made in four equal instalments to fund infrastructure and road improvement works at the Drovers Roundabout and junction 9 of the M20 and the Eureka Skyway footbridge. The trigger of 3999 occupations to make the first payment, has not been reached. Contributions towards the RIF repayments have been and are being sought from relevant developments, including CG but sufficient monies fully to reimburse the forward funding are not yet secured.

270. The methodology for calculating the contributions has been considered[31]. A shortfall of some £3.3m still exists to be met by other developments coming forward in the future. The calculations for the RIF contributions were provided to ABC via email from Mr Dix in June 2014.

271. In the Possingham Farm appeal, the Appellant did not dispute the requirement for the RIF contribution and (CD7/1, paragraph 136) the Inspector said there was no dispute about the principle of the RIF contribution.

272. It is established however, that securing repayment of public money, expended by way of forward-funding necessary highway infrastructure, is a useful purpose which can justify a planning obligation being retained for many years after the works have been carried out[32]. The impact was mitigated by early delivery, forward funded at public expense in 2010/2011 to unlock development, including the CG development. Mr Dix states that if all forward funding is collected further

[31] 'RIF Repayment Contributions for Developments April 2014 (CD10/19). The specific approach which the Local Plan took is explained in 'RIF Repayment Contributions for Developments Update Note, October 2024 (CD10/20).
[32] R. (on the application of Mansfield District Council) v. Secretary of State for Housing, Communities and Local Government [2018] EWHC 1794, Administrative Court.

contributions are not needed and the obligation would not serve a useful purpose, however, taking into account the CG contributions and the contribution accepted as necessary in respect of Possingham Farm, there appears to be a residual deficit of some £3.37m.

273. Discharging the obligation would mean that the shortfall in monies secured to repay the forward funding would increase significantly. The useful purpose of the obligation is to ensure that the Council complies with its legal obligations under agreements with SEEDA (now Homes England) and KCC which require forward funding for the improvements to be refunded through developer contributions collected as relevant development schemes come forward. The variations discussed related to contributions payable by other developments are somewhat moot, given there is no proposed modification. As it is, the obligation continues to serve the stated useful purpose.

Requests 105, 106, 107 and 108, Public Art

274. The requests seek to **modify** the obligations to retain public art but give the Appellant responsibility for its procurement. Therefore, it is sought to refund £150,000 already provided, delete the contributions to ABC and push back triggers for delivery to 999, 1999, 2999, 3999 and 4999 dwelling occupations, rather than 99, 999, 1399, 2,599, 4,099 dwellings, make the CMO maintain the public art, remove the obligation for ABC to commission and install the art

275. It is unnecessary to rehearse the general planning policy backing for the obligation but, for example the CGAAP requires public art to be integrated into the public realm in the District Centre and Local Centres and the strategic east/west pedestrian/cycle way. Locations where public art would be appropriate are identified in design guidance. The Appellant accepts that the provision of public art "potentially" serves a useful purpose in placemaking and to develop a sense of community pride in CG. However, it asserts that considerable monies have already been paid under the obligations with no public benefit.

276. A total of £750,000.00, index linked, is payable in six instalments, calculated in accordance with the Arts Council England "Arts, Museums and New Development – A standard charge approach" (2010). A second instalment has been received but according to the Infrastructure Funding Statement 2023/2024 the monies are not yet spent, however, ABC is working on a brief to commission and develop a programme of public art initiatives and installations for CG in accordance with the public art strategy, over a three-year period. The first instalment was spent on preparing the brief, just as provided for in the s106 Agreement[33]

277. The payment triggers, based on dwelling occupation limits, align with the delivery timetable and a delay in payments would undermine delivery of the strategy, without knowing, if responsibility transferred to the developer, an alternative strategy would obtain. The Creative Chilmington Strategy includes art installations as well as building opportunities for the growing community to engage with and take part in creative activities.

278. The appellant focuses on public art provision in the CG site which is not the only intended purpose of the contributions. The modifications would reduce the scope of

[33] Schedule 24, paragraph 1.1.

the strategy and lessen positive benefits to the community. Therefore, I am satisfied that the modifications would not serve the continuing purpose equally well.

Requests 109, 110, Archaeological and heritage contributions

279. The requests are to **discharge** each of the contribution obligations, refund monies paid, and discharge remaining payments of archaeological contributions. For the Appellant it is said that there is no archiving other than that carried out by the Appellant's consultant and the obligation serves no useful purpose as it overlaps with the conditions of the Outline Permission. In addition, it is said that Appellants employ a consultant archaeologist directly. Otherwise, it is argued that payment of this contribution undermines the viability of the scheme.

280. The Appellant's consultant, however, has a different role from that stipulated for in the obligations. The archaeology scheme funded under the s106 Agreement is a community project which will engage understanding of the heritage of the wider CG area, distinct from the matters secured under condition 97 on which the consultant currently is responsible for the professional work focussed on the conditions attached to the planning permission, not the community work. Therefore, there is no overlap. I find that the obligations serve a useful purpose in that the community archaeology work will produce an archaeological archive as of Chilmington's heritage available for future generations, in accordance with good practice and planning policies of the Development Contribution guide

281. The Appellant also complains that KCC should evidence the expenditure on payments already made as part of an audit process. I am satisfied based on the information provided, that these obligations continue to serve the useful purpose as stated. The monies received appear to have been defrayed in accordance with the fiduciary duty placed on KCC, however that is a separate matter from these appeals, which might be pursued for example through further interrogation of the Infrastructure Funding Statements[34] and action upon a contractual and/or fiduciary basis in accordance with the terms of the s106 Agreement.

Requests 111, 112 Quality monitoring

282. Request 111 is to **discharge** obligations to pay £40,000, then £80,000, then 19 x £40,000 in stage payments and as a consequence repay £200,000 already paid, for staff and related costs to monitor the quality of the development. Request 112 is to **modify** the obligation to pay separate monitoring fees by removing the requirement to pay £25,000, then £50,000, then 19 x £25,000 in stage payments and repay £45,000 already paid. It is acknowledged that the monitoring fees serve a useful purpose, but they are said to be disproportionate in scale.

283. Firstly, modification to repay sums already paid to ABC is outside the scope of s106B. Secondly, ABC acknowledges that the two different payment regimes could be simplified into one payment regime which would serve the useful purpose of the obligation equally well.

284. Nonetheless the requests are not withdrawn. It is pointed out that the Possingham appeal decision, as corrected, stated: "*Ensuring that development comes forward in accordance with the approved plans and details, is part of the day-to-day functions*

[34] See for example, CD3/11 Appendix B - Ashford Infrastructure Funding Statement 2023/2024.

of a planning department. Accordingly, the Quality Monitoring Fee is not considered to meet the statutory tests".

285. I have noted above that s106A does not require consideration of whether a given obligation would meet the CIL tests. The payments are said to be more than necessary to mitigate the impact of the Development. Clearly there is a dispute about how if at all the monies have been effectively deployed for their stated purpose which is to reflect the actual costs of monitoring[35] and the evidence to date shows that the quality monitoring is identifying issues of build quality which need to be addressed going forward[36].

286. Quality monitoring ensures that a high-quality environment is delivered, and I cannot agree that there is no useful purpose to the obligation. If monies are spent outside the limits of that purpose the obligation itself may still serve a useful purpose, but the remedy for misuse of funds, as noted previously, lies elsewhere. The modifications propose overall reduced payments, but I cannot see where these figures are quantitatively or qualitatively justified other than by selection of alternative sums based on a "common sense" (but subjective) view and as such would not serve the useful purpose equally well as they would clearly increase the risk of a diminution of quality in outcomes.

Requests 85, 86, 87, 88, Other KCC services

287. These requests seek to discharge: the library services contributions, youth services contributions, community learning contributions, and family social care and telecare contribution. KCC policy for seeking the contribution is set out in its Developer Contributions Guide 2023 plus the relevant technical appendices.

288. Request 85 seeks to **discharge** entirely the obligation to pay 4x £225,000 contributions to the provision of a library in the Community Hub Building. Library premises are included in the delivery of the Community Hub with substantial capital expenditure, therefore the obligation is said to be surplus to requirements, duplicative and serves no useful purpose.

289. Provision of library services is stipulated for in the s106 Agreement and this in my view serves a useful planning purpose in accordance with the CGAAP, Policies CG1, CG10 and CG17 and NPPF and Ashford Local Plan 2030 Policies SP1, COM1 and IMP4. The Appellant proposes itself to provide a fully stocked and equipped library. However, as noted by KCC, the obligation includes that a library access point should be provided at 0.0012ha or 12 sqm in area. Given that the request is to discharge and not modify the obligation, it is unclear what the library service to be provided for would include in terms of space allocation and equipment, how provision would be secured or ongoing funding maintained. Discharge of the financial obligation would leave the development served by a library access space only. I do not consider that the obligation fails to continue to serve a useful purpose.

290. In his closing submissions counsel for the Appellant picked up on the fact that the Brookbanks Review[37] proposed a library design with an area of 69m2 within the Community Hub. This appears to be a unilateral variation not supported by any

[35] CD3/8 para.6.1 p.13
[36] CD3/8 Appx A
[37] Community Hub, Chilmington - Costs Review Expert Report, Appendix 5 to Collins PoE.

request to modify the s106 Agreement accordingly. Mr Howson, the author of the report considers that the area of 69m2 is "*in line with standards provision*" but no details are given. I note KCC has stated that libraries located in small villages and suburban communities generally operate from facilities of 80 sqm (minimum)[38].

291. As mentioned in Recital Q to the s106 Agreement, KCC is the statutory library authority for the area (see Public Libraries and Museums Act 1964). In my view the obligation continues to serve a useful purpose to assist in ensuring that a comprehensive and efficient library service is secured for everyone working, living, or studying in the area.

292. KCC is willing in principle to discuss proposed modifications around the principle of delivering the Community Hub in two phases with the first phase delivered at 1800 occupations, with more flexible multi-purpose space referring to the facilities. As these matters are not before me the parties would have to discuss these proposed variations by agreement with the Appellant.

293. Request 86 is to **discharge** entirely the obligation to pay the £239,000 Youth Services Contributions to KCC as it is said they amount to a substantial over provision principally because a 220 sqm facility provided for youth services in the Community Hub Building. However, the contributions are additional to the requirement to provide space, not duplicative of it.

294. KCC has a statutory duty to provide Youth Services under section 507B of the Education Action 1996. The Development will give rise to c1610 young people, of which, Youth Services would target 25%, creating approximately 403 additional Youth clients which cannot be accommodated within the existing service provision.

295. The purpose of the obligation is to prevent the Development proceeding beyond the specified triggers before the payment of monies which can be used "…*for the provision by the County Council or its nominees of youth services Serving the Development but excluding the provision of infrastructure*…." to mitigate the impact of the development on Youth Services. The reasons why that is, and continues to be, a useful purpose are fully stated by KCC in its topic paper[39]

296. KCC tax payments facilitate on-going service provision and it is also said that contributions from the Kingsnorth scheme could support youth service provision in the South of Ashford Garden Community, rather than off-site. However that part o council tax revenue that is available is not said to be sufficient to cover the additional investment which the CG development will require, hence the policy requirement for contributions youth services as well as libraries, community learning and adult social care. There is no duplication at all.

297. All new residents will pay council tax but it is too simplistic to argue thereby that the youth service provision is already addressed. I am satisfied that the current obligation serves the purpose of providing additional capacity within the service to meet the needs of the growing population resulting from this significant development.

298. Requests 87, 88, seeking to **discharge** entirely, respectively the £213,000 Community Learning Contribution and £272,000 (plus £26,450 telecare) Family Social Care Contribution to KCC, is supported by similar arguments made by both

[38] Collins PoE, Appendix II, p95.
[39] Topic Paper – Schedule 16 Other KCC Services, CD/39.

parties. In relation to KCC's comment on the latter contribution, that the additional 531 adult social care clients arising from the CG development is the "tip of the iceberg" for adult numbers who will benefit from the obligation, I disagree that CG's viability is relevant here. I see nothing in the material provided that persuades me that these obligations fail to continue to serve a useful purpose, including a useful planning purpose for reasons similar to those that KCC advances for the Other KCC Services described above.

Request 89

299. This Request was withdrawn from the appeals.

Requests 113, 114, 115, 116, 117, 118, 119 Bank accounts

300. The s106 Agreement requires payments into the Developer Contingency Bank Account (DCyBA) and the Developers Capital Bank Account (DCpBA) to provide ABC with secure funding for timely delivery of infrastructure to support the CG development if the Appellant fails to meet its obligations.

301. The Appellant is then required to pay all financial contributions payable, to the Council, in advance of their use by the Council, which the Council places into the Council Contributions Bank Account (CCBA). The Council withdraws monies from this account in accordance with the procedure in Schedule 29C. Schedule 29A sets triggers for payments ahead of the date by which contributions are to be made and Schedule 29B sets triggers for Indexation Payments into the CCBA, made when the obligation is due.

302. Requests 113 to 117 inclusive seek to **discharge** the requirement to set up the DCyBA and maintain a Council Minimum Balance; to **modify** the payment triggers to be made into the CCBA; to **modify** the restriction on withdrawals to include interest within the terms by which ABC can make and use withdrawals from the CCBA; and to **discharge** the requirement to set up the DCpBA.

303. The background to these requests needs to be understood. Mr Hodson produced a statement[40] which Mr Collins explicitly refers to in connection with the modifications sought to the Schedule 29 payments into and from the CBA. It made several points alleging that ABC and KCC have not engaged positively or proactively to find solutions given what are seen as heavy early financial obligations, infrastructure needs and planning restrictions in the s106 Agreement which negatively affect delivery of the CG Development, compounded by planning delays, Covid-19, increased build costs, sharp interest rate increases, inflation and other matters. Thus, it is said, the s106 Agreement is not aligned to realistic timings from land sales receipts or housing delivery and the level of peak funding required cannot be secured as it exceeds risk levels that a financial institution would accept given the ongoing costs against the overall value of the development.

304. The Development breached its peak funding position on a loan to value basis and the revolving facility to fund payments and infrastructure was "paused" by the Appellant's funder in December 2023, since when its own equity has funded the development. Further re-finance is said to be impossible unless all the s106 Agreement obligations requested to be modified or discharged are accepted, otherwise the development will "stall".

[40] Appendix I to Mr Collins' PoE.

305. I note that the CGAAP stated[41] that in assessments of viability it would be assumed that the consortium reached an "equalisation agreement" to spread delivery costs and not artificially skew the viability position in any one phase. However, the s106 Agreement was nonetheless completed and the Outline Permission issued. The agreement envisaged a consortium of developers but in 2016 they advised that they no longer wanted to proceed with the development due to its overall financial costs and obligations. Nevertheless, and despite knowing that the duties of a "master developer" would fall to the Appellant, in 2017 Hodson purchased the other landowners' interests and became responsible for paying the contributions and the delivery of the strategic infrastructure required.

306. Mr Hodson complains that no renegotiation or re-basing of the s106 Agreement occurred despite the change in circumstances. His statement does not refer to the bank accounts save in connection with the Settlement Agreement[42] under which overdue instalments were withdrawn, eg instalments with respect to the Early Community Development Contribution on 6 March 2023. Clearly therefore, the bank accounts provide certainty that funds can be accessed in a timely manner, as outlined in the relevant topic paper[43]. They continue to serve a useful purpose.

307. It would be somewhat misleading to assert without qualification, that sums that ABC withdrew from the account, related to items that the Appellant is seeking to amend under these appeals. As far back as January 2022 Hodson received a letter before claim from ABC to pay £912,000 of its s106 obligations. The Settlement Agreement was not completed until February 2023 but it does evidence in my view, ABC's willingness to be flexible. Now, the Appellant says that the payments agreed to be made under the Settlement Agreement should not have been paid. The Appellant considers that it was unlawful for ABC to seek to enforce against obligations that were validly part of the applications that form the basis of this appeal. The applications were made by the Appellant to ABC and KCC on 20 October 2022. However, the demand for payment was made before the expiry of the five-year period when application could be made to vary the obligations.

308. The impression I have from the documentation and the oral evidence is that the parties' perspectives differed in this respect: the Appellant saw the process of re-negotiating the obligations on a continuum, whereas for the Councils there clearly came a point at which it considered that in the interests of protecting the public purse from incurring costs that properly fell due to the developer, action had to be taken. In any case the proceedings are peripheral to these appeals, and the lawfulness of the cause(s) of action is clearly not a matter I can consider.

309. Then counsel for the Appellant submits that the CCBA could only have been intended for a delivery vehicle where several developers/ landowners were delivering the development such that if one or more defaulted ABC had a "single point of recourse". In my view this is nothing to the point. ABC continues to have a single point of recourse. If the arrangements for "equalisation", whatever they might have been, were to have produced an enforceable outcome they would presumably have been formally integrated into the s106 Agreement itself. As it is, the upshot is that the Appellant, principally Hodson, made a deliberate decision to take on the role of a master developer and provide ABC with a single point of recourse.

[41] Paragraph 1.19 -1.24.
[42] CD1/17.
[43] Delivery, Monitoring & Council's Costs Reimbursement Topic Paper, CD3/8 para.6.10.

310. The principles enshrined in the s106 Agreement work, and fulfil a useful purpose, for a single master developer as much as for a consortium of developers. The difference, which however lies outside the purview of the obligations themselves, may well be that in practice a consortium would have made arrangements among themselves to defray the ongoing liabilities under the multifarious obligations it jointly would have undertaken when the Outline Permission was granted. Nonetheless, if the source of funding available to the Appellant is restricted in the way described, that may of course affect the progress of the development. However, provided that the obligations continue to fulfil a useful purpose in, chiefly, - as this is the main point here – preventing further development in order to make the development acceptable in planning terms, they are not susceptible to discharge or modification.

311. Developer cash flow is nearly always critical to delivery of a large-scale development, but it is because it is particularly acute for the Appellant that it is said on its behalf that the CCBA mechanism unnecessarily ties up considerable capital. One may have considerable sympathy for the Appellant's position, however, that is not a matter that goes to the usefulness of the purpose which has been demonstrated by withdrawals made following failure to pay instalments.

312. The s106 Agreement records that the security provisions were there due to ABC and KCC agreeing that landowners other than the Paying Owners (all of whom are part of the Appellant) are not bound by obligations to pay money, but only by negative obligations preventing occupations. Only the Paying Owners have positive obligations to pay the contributions.

313. Enforcement of payment obligations is time consuming and costly, delaying delivery of necessary infrastructure when needed, and avoids legal costs of formal action falling on the public purse. The sums in Schedule 29A are required to mitigate the impact of the CG Development by delivering necessary infrastructure.

314. Thus, Request 113, to **discharge** the obligation to maintain the Council Minimum Balance in the DCyBA, is not accepted as it continues to fulfil the useful purpose of giving ABC security of funding to provide for the timely delivery of infrastructure to support the development if the Appellant fails to meet their obligations.

315. For Request 114, to **modify** the payment schedules, the account serves a useful purpose being a mechanism whereby ABC can be satisfied the funds to deliver required infrastructure are in place when the appropriate trigger is met.

316. Requests 115 and 119 pertain to interest, it being argued that ABC should not withdraw interest from the CCBA but the obligations in Schedules 29 and 30 continue to serve a useful purpose in clarifying when interest accrued can be withdrawn, which would not be served equally well by the **modifications** sought as it would be unclear when it could be withdrawn, resulting in interest being held permanently with no alternative proposal as to what happens if the words "*other than interest*" are removed.

317. Request 116, to **discharge** the obligation related to and remove all reference to the DCpBA can therefore be seen to continue to serve a useful purpose in giving ABC security of funding to provide for the timely delivery of infrastructure to support the development.

318. Request 117, to **discharge** the obligation related to and remove all reference to the DCyBA would also remove a continuing useful purpose in that, whilst the s106 Agreement has some occupation limits, it is not sufficient security for KCC given application has also been made to discharge the requirement to provide Bonds within Schedules 15 and 18. The loss of security which would ensue would eradicate an obligation that continues to fulfil this useful purpose.

319. Request 118 seeks to **modify** payment triggers and withdrawal triggers to remove the "*otiose provision for payments to be made earlier than is otherwise necessary*". The request includes that the Schedule 30B payment schedule (indexation) should align with Schedule 30C but this already appears to be the case. Otherwise, Schedule 30C sets out limits on occupations, before withdrawals may be made which are in line with the occupation triggers in the corresponding subject schedules. To align schedule 30A payments, as requested, to those set out in Schedule 30C would mean payments would be made into the account at the same time as they are due to be paid to KCC. The useful purpose of providing financial security would not be equally well met if subject to the modification as it would result in payments to the CCBA at the same time as they are due to be paid to KCC and detrimental to the establishment of financial security.

Requests 67, 68, 69, 70, 71, 72, 73, 74, Education

320. The s106 Agreement envisages provision of a secondary school of up to 8 ha and up to four primary schools (PS) of up to 2.1 ha each. These requests seek to:

67: discharge the requirement for a bond to the value of PS1 Contributions 2, 3 and 4;
68: discharge the obligation to pay PS1 Contributions 1 to 4;
69: modify the obligation to pay PS2 Contributions 1 to 4;
70: discharge the obligation to provide a bond to the value of PS2 Contributions 2, 3 and 4;
71: modify the obligation to pay PS3 Contributions 1 to 4;
72: discharge the obligation to provide a bond to the value of PS3 Contributions 2, 3 and 4;
73: discharge the obligation to pay PS4 Contributions 1 to 4; and
74: discharge the obligation to provide bonds to the value of PS4 Contributions 2, 3 and 4.

321. Mr Hunter who gave evidence for the Appellant said that the requirement for bonds does not serve a useful purpose and was outside the realms of usual practice whereby payments were made at appropriate trigger points. Again, my experience in dealing with provision of education infrastructure is that bonds are a common method of providing the necessary surety. If it serves a useful purpose, then whether it jeopardises viability in the Appellant' circumstances, as is submitted, is not a matter relevant to usefulness of that purpose, provided that a useful purpose continues to obtain in respect of the obligations.

322. Reference to the 2023 DfE developer contributions guide is made. For direct delivery of new schools by housing developers, it states "*where a risk of non-delivery is identified, we recommend that specific planning obligations are secured to mitigate that risk (for example through performance bonds*".[44] However, it also

[44] CD9/6, paragraph 4.

points out the great value in detailed local methodologies and guidance related to developer contributions for education in that area, which is not intended to be displaced by the DfE guidance, including the approach to seeking contributions for education, and standard planning obligation clauses. The planning policy and methodology used is well rehearsed in the submitted documentation.[45]

323. It is understood that the development would generate sufficient numbers of pupils for PS1. The PS1 bond had to be called in which highlights the financial risks and costs that KCC would have to incur on behalf of the public in pursuing debt action for unpaid contributions if less effective means of recovery are permitted. The obligations serve the useful purpose of reimbursing KCC for its expenditure and delaying or discharging the obligations does not serve that purpose equally well as it would leave KCC out of pocket for longer. As to the requested removal of bonds for PS2 — PS4, it seems to me that they are an equally essential security for the forward funding arrangements agreed to by KCC, the need for which is shown by the fact that the bond provided to date has had to be called on. The non-occupation clauses, bonds and DCyBA together form the necessary and sufficient mechanism to ensure infrastructure and house building progress in tandem as well as to guarantee the forward finding of the infrastructure.

324. Reference is also made to the dispute as to what the costs of the PS1 school were, alleging that and KCC refused to itemize the expenditure two years after the school had opened. Again (see above) that is not a matter for me to adjudicate upon. Other mechanisms are available to the Appellant to dispute the quantum of monies already spent.

325. As to the request to remove entirely the need to pay for PS4, the requirement is said to be based on the original proposal to develop 7,000 dwellings. This has been shown by the documents[46], and by the cross examination of Mr Hodson to be not at all correct. The Core Strategy may have originally proposed up to 7,000 dwellings but the CGAAP reduced this to up to 5,750 dwellings.

326. The Education SoCG[47] identified two disputed issues, the first being the housing mix that should be applied to the education assessment. KCC says this should be based on the “Melton Mix” ie 92.17 houses, 6.96% applicable flats, as reflected in the Outline Permission which allows no more than 92.7% of the dwellings to be houses and no less than 5.9% to be applicable flats. The Appellant says that to achieve the densities required the mix is likely to be nearer 74% houses and 26% flats, reflecting Condition 100. The second disputed issue is whether KCC is correct having regard to the education assessments, that one can assume forecast roll numbers in will stay the same beyond 2033/34 up to 2048/49, or rather that would be a fundamental change in the trend forecast over the previous ten-year period.

327. Mr Hunter says that if pupil numbers continue to fall in the Ashford South Planning Area at the same rate as forecast between 2024/25 and 2033/34, then by 2049 there will only be 1,183 pupils in the planning area which would remove the need for PS4 and leave surplus capacity in the system after PS3 is delivered. Therefore, it is said, PS4 could only be justified on KCC’s assumptions regarding school

[45] See Topic Paper, CD3/27 and generally, CD9.
[46] CGAAP Policy CG15 which requires 4PS for 5740 dwellings; examination of Mr Adams; the s106 Agreement itself and the committee report 15 October 2014.
[47] CD14/25, completed 22 April 2025.

projections fundamentally altering, in that the significant fall in pupil numbers forecast will end and level out.

328. The point about the Melton Mix is that the more family size dwellings there will be overall, the more pupil places need to be planned for. Whilst I do not necessarily agree that the current delivery rate equates to the overall outturn, a 74/26 houses to flats ratio, if used now in assessing the need for PS4, would significantly alter the expected child yield of the development. The trend dispute naturally has led, despite the quantitative methods used, to different conclusions legitimately being drawn from the same data such that different patterns can be discerned (to use a neutral term) over time.

329. I am conscious of the fact that since the inquiry closed the Office for National Statistics (ONS) released its 2022-based subnational population projections in June 2025, used by DfE for its national pupil projections. However, it is unnecessary to take account of these because ultimately, they are not necessary to my decision. I find the arguments advanced by Mr Hunter somewhat persuasive, but it seems to me that I should also consider the levels of confidence a local education authority reasonably is entitled to have, that a posited 4th PS is so unlikely to be necessary as to require it to dispensed with all together.

330. KCC is open to a monitor and manage mechanism such that the occupation triggers would be pushed back as appropriate, as clearly school places should be delivered in line with demand, but there remains the need for formal triggers and obligations to provide certainty. KCC undertook to engage with the Appellants to seek to agree an alternative mechanism without prejudice to its case that no modification or discharge is justified under s.106B(6).

331. I agree with KCC's submissions, based on its counter arguments which have force, that there can be no confidence that fertility will drop to the point where provision beyond PS3 is unnecessary, or that Mr Adam's projections on behalf of the LEA, are other than conservative. That leads me to consider that some sort of wait and see approach might be taken. However, all references to PS4 have been excised from the proposed modified agreement which makes it difficult for me to agree that the request should be acceded to, as clearly provision for a 4th PS has at least some useful purpose if it proves to be necessary in the future.

Requests 75, 76, 77 secondary school site transfer and contributions.

332. These requests have been withdrawn.

Request 78, Account of education expenditure and repayment

333. The request seeks firstly to **modify** Part 7, Schedule 15 so that the person from whom any contribution was received may apply to KCC one year after practical completion of a school for an account of the expenditure of the money, such account to be provided within a reasonable time of the request, and to reimburse any surplus. However, it also seeks to delete the part of the obligation by which KCC may hold monies for ten years from receipt of the final instalment in respect of a school before returning any surplus.

334. Schools are not built in one phase and KCC may choose to build hybrid schools, for example a 1FE primary school with core facilities for 2FE, adding classrooms to enlarge it to 2FE, depending on budgetary pressures where full development

contributions are outstanding or to ensure that school provision matches demand. The cost to KCC of providing PS1 is more than the s106 Agreement exacts by way of contributions. For these reasons the request is not approved.

Requests 79, 80, 81, 82, 83, 84, Transfer of site to KCC

335. Request 79 seeks to **modify** the obligation contained in Schedule 15A, related to KCC's site transfer requirements, which states "*The site is to be provided to the County Council's level*." The financial contributions agreed are predicated on the site provided being to a level required by the County Council, but the wording here is ambiguous. The amended wording would require the site to be provided to the County Council in a reasonably level condition. The rest of the clause would remain as existing which states "*if works are required to do this, then they shall be undertaken by the Owner at the Owner's cost to an agreed specification and form of works*." In light of this caveat the modified obligation would serve the useful purpose of ensuring that an appropriate site is provided just as well, without incurring abnormal costs for KCC.

336. Request 80 seeks to **modify** the obligation to have pegged out and fenced the site prior to completion of the transfer by deleting the fencing requirement, on the basis that until the design and construction method is known fencing is potentially abortive work whereas the developer would progress this as part of their agreed construction method statement in line with other land sales at CG. However, neither the fencing costs nor a method statement is built into the s106 Agreement. Unlike the pegging out which has to be to KCC's satisfaction, such a requirement would not appear to apply to fencing. KCC's argument that it is needed for the safety of pupils appears misplaced, as it will wish to discharge its duties in due course as education authority by ensuring appropriate physical boundaries are in place at the right time. In the meantime, a general fencing requirement prior to transfer would fulfil the useful purpose of identifying and protecting possession and control of the land, therefore the modification would not serve that purpose equally well.

337. Request 81 seeks in part to **modify** the obligation to construct haul roads by inserting the words "to the site boundary'. KCC has no objection, and for the avoidance of doubt the additional wording would continue to serve the useful purpose of providing an appropriate access equally well.

338. Request 81 also seeks to **modify** the obligation to construct the haul roads by requiring them to be constructed prior to site transfer. KCC pushes back against this proposal as it could result in additional maintenance costs where the road(s) degrade during school construction of which KCC has prior experience. However, the proposed wording is to construct and maintain "*to a standard capable of accommodating heavy goods vehicles and other construction traffic*." I agree that with this safeguard the proposed modification serves its intended purpose of ensuring a haul road suitable for construction traffic is provided to the transferred site equally as well.

Request 82, Provision of services and utilities

339. This request is to **modify** the obligation to provide adopted services and utilities to the site boundary prior to the site transfer, by adding "*if not reasonably practicable, within a reasonable time thereof*", and secondly to change the requirement that statutory undertakers' plant is located outside the site boundary to a discretion whether to do so or not. In the context of the useful purpose that the obligation

serves in ensuring certainty that the services are provided to enable delivery and eventual opening of the schools, the unqualified proposal would create uncertainty in the timing of delivery of infrastructure to the secondary school site and therefore would not serve the stated purpose equally well.

340. The second part of the proposal would not allow for the "practicalities of provision" as suggested; it would be a fundamental change to the agreed arrangements that serve the useful purpose of ensuring the site when transferred will not contain plant of this nature the size and location of which would be unresolved and liable to hinder the school infrastructure delivery unless agreed in advance. In any case the plant would seem to serve development other than just the school providing a rational reason for it staying in land controlled by the Appellant. Therefore, the modification would not serve these purposes equally well.

Request 83, temporary electricity and water supplies

341. This request seeks to **discharge** the obligation to provide temporary electricity and water supplies to the site from the start of construction, it being argued that this can only be arranged by the school contractor occupying the site, although this is not fully explained. KCC has provided some evidence of the Appellants having failed to provide temporary services at PS1 which led to costs and delays to the school opening. It is unclear why the Appellant could not provide such services to the site boundary by, in line with practice elsewhere, water bowsers, generators, temporary supply from the nearest sub-station and so forth. I find that the obligation continues to serve the useful purpose of facilitating construction of the school to provide additional education places to meet the needs of the Development.

Request 84, KCC legal costs

342. The request is to **discharge** the obligation to pay KCC's legal costs and costs of any project management agreements. KCC states that this is a standard obligation imposed on other developers of similar schemes. The Appellant states that they would be very substantial and affect viability, but no quantification of the costs is provided. The obligation continues to serve the useful purpose of minimising the burden of associated costs on the public purse which are normally met by the development in question.

Requests 120, 121

343. These requests have been withdrawn from the appeals.

Request 122, Viability review templates

344. This request is a generalised request to discharge or modify the viability review templates in Schedule 49. However, no details are provided. Therefore the request is not approved.

Conclusion

345. For the reasons given above the appeals should be allowed in part only.

Grahame J Kean

INSPECTOR

APPEARANCES

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Interested Persons

David Ledger Vice Chairman of Shadoxhurst Parish Council
Councillor Jessamy Blanford, Ashford Borough Council member
David Robey Deputy Cabinet Member for Highways & Transportation KCC
Paul Bartlett Kent County Council member.

Schedule of Requests to discharge/modify obligations and outcome

No	*Subject*	*Decision*
1	Definitions	Allowed
2	Definition of CMO	Withdrawn
3	Definition of Paying Owners	Allowed
4	Release from liability	Dismissed
5	Index linking (format)	Dismissed
6	Base date for indexation	Dismissed
7	Affordable housing	Dismissed
8	do	Dismissed
9	do	Dismissed
10	do	Dismissed
11	Carbon off-setting and CHP	Allowed
12	do	Allowed
13	Provision of welcome pack	Allowed
14	Completion of CMO First Operating Premises	Withdrawn
15	Maintenance of CMO First Operating Premises	Dismissed
16	CMO Second Operating Premises	Dismissed
17	Deficit Grant Contribution	Dismissed
18	Rent charge deeds	Withdrawn
19	Commercial estate basic provision	Dismissed
20	do - second tranche	Dismissed
21	do - third tranche	Dismissed
22	Commercial estate - cash endowment	Dismissed
23	CMO start up contribution	Dismissed
24	Early Community Development (ECD)	Dismissed
25	Natural greenspace	Dismissed
26	do	Dismissed

27	do	Dismissed
28	Do (ABC's costs)	Dismissed
29	Chilmington Hamlet Facilities	Dismissed
30	do	Dismissed
31	do	Dismissed
32	do	Dismissed
33	do	Dismissed
34	Children and young people's playspaces	Dismissed
35	do	Dismissed
36	do	Dismissed
37	do	Dismissed
38	do	Dismissed
39	do	Dismissed
40	Allotments	Dismissed
41	do	Dismissed
42	do	Dismissed
43	do	Dismissed
44	do	Dismissed
45	do	Dismissed
46	do	Dismissed
47	Discovery Park	Dismissed
48	do	Dismissed
49	do	Dismissed
50	do	Dismissed
51	do	Dismissed
52	do	Dismissed
53	do	Dismissed
54	do	Dismissed
55	do	Dismissed
56	do	Dismissed

57	Cemeteries	Dismissed
58	Community Hub	Dismissed
59	do	Dismissed
60	do	Dismissed
61	do	Dismissed
62	do	Dismissed
63	do	Dismissed
64	Orchard Village and Chilmington Brook Facilities	Dismissed
65	District centre	Dismissed
66	design brief	Withdrawn
67	Education	Dismissed
68	do	Dismissed
69	do	Dismissed
70	do	Dismissed
71	do	Dismissed
72	do	Dismissed
73	do	Dismissed
74	do	Dismissed
75	secondary school site transfer and contributions	Withdrawn
76	do	Withdrawn
77	do	Withdrawn
78	account of education expenditure and repayment	Dismissed
79	Transfer of site to KCC	Dismissed
80	do	Dismissed
81	do	Dismissed
82	(provision of services and utilities)	Dismissed
83	(temporary electricity and water supplies)	Dismissed
84	KCC legal costs	Dismissed

85	Other KCC services	Dismissed
86	do	Dismissed
87	do	Dismissed
88	do	Dismissed
89	Repayment of surplus	Withdrawn
90	Ecology	Dismissed
91	Provision of bond (Schedule 18)	Dismissed
92	Obligation to let contract	Withdrawn
93	Payment Covenants and Post-Contract 278 Contributions	Dismissed
94	Off-site pedestrian and cycle links	Dismissed
95	Provision of bus services	Dismissed
96	Bus vouchers	Dismissed
97	Traffic monitoring	Dismissed
98	Traffic calming payments	Dismissed
99	Regional Infrastructure Fund	Dismissed
100	Viability reviews	Dismissed
101	do	Dismissed
102	do	Dismissed
103	do	Dismissed
104	do	Dismissed
105	Public Art	Dismissed
106	do	Dismissed
107	do	Dismissed
108	do	Dismissed
109	Archaeological and heritage contributions	Dismissed
110	do	Dismissed
111	Quality monitoring	Dismissed
112	Monitoring fees	Dismissed
113	Bank accounts	Dismissed

114	do	Dismissed
115	do	Dismissed
116	do	Dismissed
117	do	Dismissed
118	do	Dismissed
119	do	Dismissed
120	Heads of Terms for CMO First Operating Premises lease	Withdrawn
121	Articles of Association of CMO and CMO Business Plan	Withdrawn
122	Viability Review Templates	Dismissed