

Land at Chilmington Green, Ashford Road, Great Chart, Ashford, Kent (“the Site”)

Appeals under s.106B of the Town and Country Planning Act 1990 (“TCPA 1990”) by: Hodson Developments (Ashford) Limited; Chilmington Green Developments Limited; Hodson Developments (CG ONE) Limited; Hodson Developments (CG TWO) Limited; and Hodson Developments (CG THREE) Limited (“the Appellants”)

Against the failure to determine applications to modify or discharge obligations contained in the S.106 agreement dated 27 February 2017 attached to planning permission ref: 12/00400/AS (as amended by a Supplement Agreement dated 29 March 2019 and a deed of variation dated 13 July 2022).

Appeal References: APP/W2275/Q/23/3333923 & APP/E2225/Q/23/3334094

KENT COUNTY COUNCIL’S STATEMENT OF CASE

A: Introduction

1. This statement of case (“**SoC**”) sets out the position of Kent County Council (“**KCC**”) in relation to appeal APP/W2275/Q/23/3333923. A separate SoC has been filed by Ashford Borough Council (“**ABC**”) in the linked appeal APP/E2205/Q/23/3334094. The two appeals arise from an application (“**Application 2**”) which was submitted by the Appellants to both KCC and ABC under cover of a letter dated 20 October 2022.
2. The SoC responds to the case presented by the Appellants so far as it relates to the planning obligations which are enforceable by KCC (either solely or jointly with ABC). The Appellants’ case is understood to be comprised in:
 - (1) The Appellants’ revised SoC, which is dated October 2023 but updated and served by Fladgate on 25 October 2024.
3. An updated schedule of proposed changes (“**the Schedule of Changes**”) and tracked change version of the s.106 as proposed (also served on 25 October 2024).
 - (1) The updated Explanatory Statement prepared by Quod. This is dated October 2022, but was served in revised form on 1 November 2024.

4. KCC will be proceeding on the basis that that material sets out the full extent of the changes sought and the basis on which it is contended that the obligation no longer serves a useful purpose (discharge) or would serve that purpose equally well with modifications (modification).
5. Thus if it is said that the obligation should be discharged for viability reasons and no other reason then KCC will approach it on that basis and prepare evidence on that basis only. If this approach is wrong, KCC must be informed forthwith because it will be the basis on which the evidence is prepared.
6. Where the Appellants proposes to discharge an obligation entirely, KCC has responded only to that proposal to discharge and has not commented on any alternative. If viability is the only justification put forward for a modification sought, then KCC has assessed the application on that basis.
7. Further the Inspector required the Appellants to define whether they were seeking to discharge or modify each particular obligation. It could not present them as alternatives. Where the Schedule of Changes proposes discharge, KCC will address it on that basis only (and will not address any possible modification) and vice versa. Again, if this approach is wrong, KCC must be informed forthwith because it will be the basis on which the evidence is prepared.
8. The attached schedule (Annex A) summarises KCC's understanding of the changes sought in respect of obligations relevant to it. The schedule uses the following key to categorise each request: D is discharge; M is modification; O is other change¹ and V is a D or M based only on viability – so DV means Discharge because of viability only.
9. KCC has approached each modification by asking the four essential questions which are applicable to an application pursuant to s. 106A(3) TCPA 1990 (refer to Section C below). KCC has only responded in the Schedule to the modifications that involve obligations to KCC. Obligations to ABC are dealt with separately in their Statement of Case. Where an obligation applies to both ABC and KCC jointly, the Schedule indicates which council has responded on behalf of both councils.

¹ Some of the changes do not appear to be M or D but new obligations.

10. Where there is a disconnect between the change sought in the schedule and either the SoC and Explanatory Statement in respect of it, KCC will address the matter on the basis of the Schedule of Changes. Thus in respect of the A28, the schedule refers to viability and seeks discharge. It also cross-refers to the reasoning in the Explanatory Statement memorandum. That reasoning proposes lesser works to address the issue but that is inconsistent with discharge and is promoting modifications. KCC will thus not be addressing those aspects. If that is wrong, then KCC must be informed forthwith because it will be the basis on which the evidence is prepared.

B: Factual background

11. The factual background to these appeals will be addressed, so far as relevant, in evidence. That background includes the following.
12. In July 2013 ABC adopted the Chilmington Green Area Action Plan (“**the AAP**”). The AAP established a policy and delivery framework for ABC’s ambition for a new community at Chilmington Green, a large scale urban extension to Ashford.
13. The AAP forms part of the context in which the appeal has been considered by ABC and KCC. The AAP must be read as a whole, but the following parts of the AAP are particularly material.
14. As explained at [1.8] of the AAP, the AAP and Chilmington Green Masterplan set out the aspiration for the whole development to its ‘end state’. This reflects the requirement of Policy CS5 of ABC’s then Core Strategy that the area should be planned ‘in a comprehensive way that is linked to the delivery of key infrastructure’, and developed ‘at a rate which is supported by the delivery of infrastructure and the elements required for a balanced, mixed community’ as a core aim. This is repeated in Chapter 2 of the AAP and at [11.30] which provides that properly planned infrastructure delivery is required alongside the development of new housing such that any significant gaps or shortfalls in provisions are avoided.
- (1) ABC’s vision for Chilmington Green is summarised at [3.1] of the AAP as ‘a truly sustainable new community, one which delivers a healthy balance of homes, jobs and local services, supports a viable, high frequency public transport service’. This is also reflected in the development principles within Policy CGI of the AAP: see, in particular, principle (b) which requires that ‘[e]ach main phase of the

development will be sustainable in its own right, through the provision of the required social and physical infrastructure, both on-site and off-site’.

- (2) Linked to this, at [4.27] the AAP explains that ‘[t]o make sure that each main development phase is as sustainable as possible, the delivery/funding of infrastructure will be based on a series of ‘triggers’, typically threshold numbers of homes completed. These triggers will help to guarantee that at all stages of the development, sufficient infrastructure will be in place to adequately serve the resident populations’.
 - (3) At [9.43] the AAP explains that there is a need to provide public transport in advance of the time at which such services might be commercially viable so as ‘to provide the service at a point before travel patterns and behaviour become too established by residents’ and thus the services will need to be supported by developer subsidy.
15. It is clear from these parts of the AAP (and the AAP as a whole) that the timely delivery of infrastructure as the development of Chilmington Green progresses is a key objective of the AAP so that a truly sustainable development is achieved.
16. Prior to the adoption of the AAP, a consortium of developers, including Hodson, made an application for planning permission pursuant to ref: 12/00400/AS (“**the Application**”) in respect of the Site for a comprehensive mixed use development (“**the Development**”). The Site is almost the entirety of the area covered by the AAP.
17. The Application was considered by ABC’s planning committee on 15 October 2014. The planning committee received a written report on the Application from ABC’s officers (“**the OR**”). In respect of the phasing and delivery of the Development, the OR stated at [380] – [383]:

‘380. Clearly with such a large development as is proposed, there is a need to establish how it will be delivered in terms of phase, implementation, and construction and in particular, having regard to the vision for Chilmington Green how quality control is achieved over the entire build period.

381. In order for the development to be delivered in a sustainable way over a long period of time, the AAP sets out the way in which the phasing should be approached. It is informed by the availability of existing infrastructure, and the ability to deliver new infrastructure in a cost-effective and viable manner whilst ensuring that the development remains sustainable in its own right at all stages,

which is a key principle of the AAP. As a result the AAP sets out the development into four broad phases (the four Main AAP Phases).

382. [...] The four Main AAP Phases are Phase 1 – The District Centre Phase (including the hamlet and the Brisley Farm edge); Phase 2 – The Central Phase; Phase 3 – The Southern Phase and Phase 4 – the South-Eastern Phase. In order to ensure that each Phase is sustainable in its own right, in line with Policy CGI(b), the AAP also includes a phased infrastructure Delivery Plan which sets out when key infrastructure will need to be delivered and how it is anticipated this will occur.

383. The documents submitted with the application follow the approach to the four Main Phases advocated in the AAP and I consider them to be compliant with it [...]

18. In respect of the viability of the Development, the OR stated at [404] – [411]:

“404. Policy CG0 of the AAP sets out the need to approve sustainable development proposals at Chilmington Green which are in line with the AAP without delay, and policy CGI sets out the key development principles that will deliver a sustainable place, including many of the matters outlined above, and specifically social and physical infrastructure to support the day-to-day needs of residents. Phasing of that social and physical infrastructure is set out in Chapters 11 and 12 of the plan and its appendix 3 – the Infrastructure Delivery Plan. As usual, it is necessary and appropriate that these matters (along with others) are delivered within the context of a s106 Agreement with the Council [...]

405. From the start of negotiations on this scheme, the Applicant identified that the development would not be able to bear the full costs of developer contributions sought by this Council through the AAP at this point in time. More recently the up-turn in the housing market has lessened those viability issues, but some still remain. Officers have therefore required that independent viability consultants were involved from the outset. A full cost plan has been produced and assessed – this shows the costs of community infrastructure as required and produced by service providers, and other infrastructure needed to facilitate the development (i.e. roads, sewers etc). All costs have been the subject of scrutiny between the Council’s providers and consultants and the developers [sic.] cost consultants.

406. The remaining, more theoretical costs (i.e. building costs, developers return, financing, land value etc.) have been agreed using industry best practice, and various scenarios have been tested to achieve the best outcome, and provide a basis for financial re-appraisal of the scheme in the future (see below) [...]

408. Chapter 1 of the AAP deals with scheme viability. Para. 1.19 identifies that major housing developments tend to have heavily front loaded costs especially the main elements of new infrastructure (roads, utilities, off-site highway improvements etc.), but become relatively more profitable in their later stages. The viability appraisal carried out by the applicants demonstrates this is currently the case here [...] On current modelling, the whole scheme can just support a total of 10% affordable housing (if all other infrastructure needs are met) as required by the AAP, and the developers are looking to fix this for the first phase (in viability terms) of 1,000 dwellings; to put this into perspective the costs of a 5% additional tranche

of [affordable housing] would be approximately £2m for that phase (an additional 50 dwellings). However, on present costs/returns the later phases of the development are viable [...]

409. Returning to Chapter 1 of the AAP, para. 1.21 sets out the Council's flexible approach to dealing with uncertain and unviable development projects [...]

411. Officers, on the advice of their consultants, have therefore concluded that a slightly different approach must be found [...] The proposal is that there are a greater number of phases for assessing viability than those set out in the AAP. Thus instead of scheme viability being re-assessed in advance of each of the four phases of the development as suggested by AAP para. 1.23 (from here on referred to as main phase) it would be re-assessed for viability purposes as follows:-

Phase 1 = 1000 dwellings

Phases 2 – 8 = 600 dwellings each

Phase 9 = 550 dwellings ...”

19. The OR recommended that outline planning permission be granted for the Development. The planning committee agreed with this recommendation and resolved to grant outline planning permission on 15 October 2014.
20. ABC and the consortium of developers negotiated the Agreement to secure the necessary mitigation and infrastructure required for the Development. Those negotiations included extensive discussion of the issue of viability, as described in the OR, including the production of viability appraisals for the Development. The approach adopted following those viability appraisals was that the Development would not be viable in the first phase, but the viability would improve over time with each subsequent phase (as reflected in the OR – see above).
21. Following these negotiations, ABC issued the outline planning permission for the Development by a decision notice dated 6 January 2017 (“**the Permission**”). The Agreement was made on 27 February 2017. The Permission has since been amended by non-material amendments 12/00400/AMND/AS: 12/00400/AM01/AS & 12/00400/AM10/AS and proposes the comprehensive mixed-use development on the Site comprising:
 - up to 5,750 residential units, in a mix of sizes, types and tenures;
 - up to 10,000 m² (gross external floor space) of Class B1 use; up to 9,000 m² (gross external floorspace) of Class A1 to A5 uses;

- Education (including a secondary school of up to 8 ha and up to four primary schools of up to 2.1 ha each);
- Community Uses (class D1) up to 7,000 m² (gross external floorspace);
- Leisure Uses (class D2) up to 6,000 m² (gross external floorspace);
- Provision of local recycling facilities;
- Provision of areas of formal and informal open space;
- Installation of appropriate utilities infrastructure as required to serve the development, including flood attenuation works, SUDS, water supply and wastewater infrastructure, gas supply, electricity supply (including substations), telecommunications infrastructure and renewable energy infrastructure (including CHP in the District Centre);
- Transport infrastructure, including provision of three accesses on to the A28, an access on to Coulter Road / Cuckoo Lane, other connections on to the local road network, and a network of internal roads, footpaths and cycle routes;
- New planting and landscaping, both within the Proposed Development and on its boundaries, and ecological enhancement works; 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 onto the A28 and the access onto Coulter Road/Cuckoo Lane.

22. The Permission was subject to a number of conditions. Conditions 2 – 9 of the Permission set out the time periods for each phase, in particular conditions 2 and 3 concern the first phase of the Development (referred to as “**Main AAP Phase I**”):

“2. The development within each Reserved Matters Site within Main AAP Phase I (except for any Detailed Development within that Main AAP Phase) must be begun by no later than the expiration of 2 years from the date on which approval of the last Reserved Matter approved for that Reserved Matters Site within Main AAP Phase I is approved ...

3. All submissions for the approval of Reserved Matters for Reserved Matters Sites within Main AAP Phase I must be made by no later than the expiration of 6 years from the date of this permission ...”

23. The Development has been commenced pursuant to the Permission. The Development remains within both Main AAP Phase I and the first phase for the purposes of viability (see the OR at [41 I]). The Appellants do not expect it to complete until 2031².
24. By a document dated 20 August 2020, Hodson requested the modification or discharge of 55 provisions within the Agreement. Hodson could not apply to modify or discharge those provisions pursuant to s. 106A(3) TCPA 1990 at that time, therefore ABC and KCC considered those requests pursuant to s. 106A(1)(a) TCPA 1990.
25. By a letter dated 16 October 2020 (“**the First Decision Letter**”), ABC and where relevant, KCC, refused all of the requests made on 20 August 2020 except in respect of eight provisions (where the request was not determined and was retained for further consideration). The Appellants brought a claim for judicial review of that decision by ABC and KCC. The parties settled that claim by a consent order sealed on 23 April 2021 (“**the Consent Order**”).
26. A further determination by letter was given on 17 November 2021 (“**the Second Decision Letter**”), rejecting some of the Appellants’ requests and making counter proposals in relation to others. The Appellants brought another claim for judicial review which was refused permission by the court, first on paper and then at an oral renewal hearing. The grounds raised the question of whether viability was a mandatory material consideration on the application. This was not determined by Lieven J at the oral renewal hearing but left to another day: **R(Hodson) v Ashford** [2022] EWHC 3466 (Admin) at [7].

C: Legal approach to s.106A

27. Section 106A(1) of the TCPA 1990 provides that a planning obligation may not be modified except:
 - (1) By agreement between the authorities by whom it is enforceable and the person or persons against whom it is enforceable (s.106A(1)(a);
 - (2) In accordance with s.106A and s.106B (s.106A(1)(b)(i)); or
 - (3) In accordance with s.106BA and s.106BC (s.106A(1)(b)(ii).

² Appellants SoC at §5.

28. Subsections (3)-(9) provide, so far as material:

“(3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the appropriate authority for the obligation—

- (a) to have effect subject to such modifications as may be specified in the application; or
- (b) to be discharged.

(4) In subsection (3) “the relevant period” means —

- (a) such period as may be prescribed; or
- (b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.

(5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.

(6) Where an application is made to an authority under subsection (3), the authority 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.

...

(7) The authority shall give notice of their determination to the applicant within such period as may be prescribed.

(8) Where an authority determine under this section that a planning obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.

(9) Regulations may make provision with respect to—

- (a) the form and content of applications under subsection (3);
- (b) the publication of notices of such applications;
- (c) the procedures for considering any representations made with respect to such applications; and
- (d) the notices to be given to applicants of determinations under subsection (6).

...”

29. The appropriate authority to whom an application may be made is the authority by whom the obligation is enforceable: s.106A(3) and (10).
30. It is a requirement under s.106A(3) that the application must either seek discharge of the relevant obligation or modification and, if modification is sought, must specify the modification.
31. Under subsection (6), the test to be applied by the appropriate authority (and by an inspector on any appeal under s.106) is:
 - (1) In relation to an application to discharge, whether it “*no longer serves a useful purpose*”.
 - (2) In relation to an application to modify, whether it “*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*”
32. The correct approach to considering an application under s.106A TCPA 1990 was formulated and recorded in **R (Garden and Leisure Group Ltd) v North Somerset Council** [2004] 1 P&CR 39 at [28] as involving four “essential questions”, namely:
 - (1) What is the purpose of the current obligation?
 - (2) What purpose does it fulfill?
 - (3) Is it a useful purpose?
 - (4) If so, would the obligation serve that purpose equally well if it had effect subject to the proposed modification?
33. The following further principles emerge from the relevant authority:
 - (1) The “*useful purpose*” in s. 106A(6)(b) and (c) may, but need not be, the same as the original purpose for entering into the planning obligation: *ibid* at [46]. See also **R. (Renaissance Habitat Ltd.) v West Berkshire Council** [2011] J.P.L. 1209 per Ouseley J at [33].

- (2) There is no requirement that the “*useful purpose*” needs to “*relate to the impact of the development at all or to the same impact for which it was originally sought*”: ***Renaissance Habitat*** at [34].
 - (3) “A change in [planning policy] or circumstances such that the original charge would not now be sought in a new agreement does not mean that there is no useful planning purpose to be served by enforcing the agreement or anything unlawful in doing so”: ***Renaissance Habitat*** at [41].
 - (4) The application of s.106A does not require consideration of whether the obligation(s) in question would, if considered in the context of an application for planning permission, meet the tests under reg. 122(2) of the Community Infrastructure Regulations 2010 for a planning obligation to be a reason for granting permission. The obligation therefore does not need to be “*necessary to make the development acceptable*” or required by planning policy. See ***R. (Millgate Developments Ltd.) v Wokingham BC*** [2012] J.P.L. 258 (CA).
34. A determination pursuant to s.106A(1)(a) is not a determination to which s.38(6) of the Planning and Compulsory Purchase Act 2004 applies: see ***Millgate*** at [29]. It does not bring in the full range of planning considerations involved in an ordinary decision on the grant or refusal of planning permission: ***R. (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government*** [2018] EHC 1794 (Admin) at [30];
- (1) The question of whether the obligation serves a useful purpose is not confined to consideration of whether the obligation serves a useful planning purpose because the restrictive word “planning” should not be implied: ***Mansfield*** at [38].
35. The outcome of this is that the statutory language creates a low hurdle for retention of planning obligations. An obligation which still serves a useful purpose, even if not related to the original development or its impacts, should not be discharged and should only be modified if the modified obligation serves the purpose equally as well.
36. As the editors of the Planning Encyclopedia note at P106A.06, the facts of ***Mansfield*** provide a good illustration of the relevant principles. A planning obligation had been entered into in an agreement under section 106 to pay a sum of money towards the provision of a highway in connection with a planning permission for 215 dwellings on

land. Permission was granted on appeal but it was considered at that time the contribution was not necessary because the road had been provided. The land was not developed. The claimant sought to discharge the obligation requiring him to pay the balance of the sums due. On appeal the Inspector discharged the obligation essentially because it had been found unnecessary to allow the development to be acceptable, the road having been in place for a number of years. She therefore concluded the obligation no longer served a useful purpose. The Court noted that it was right to say that the payment of the money would not now be directly related to the present development of the land because the road was already present. However, the task for the Inspector was to identify the purpose of the obligation and consider whether that purpose remained useful. There was in fact an obvious purpose in enforcing the obligation, namely to recover the expenses incurred by the council in building the road. That was a useful purpose because public money expended to facilitate the development should be recovered where possible.

D: KCC's case on viability/deliverability

37. The Appellants' SoC advances the case that it is essential to make changes to the s.106 agreement for six principal reasons:
- (1) Delay in issuing Outline Permission;
 - (2) Delivery Rate;
 - (3) Developer reconstitution and access to finance;
 - (4) Viability and affordable housing delivery;
 - (5) Early/over provision of infrastructure;
 - (6) Deliverability.
38. While presented as separate reasons, each of these points goes to the central case made by the Appellants – that without the changes sought, the combined practical effect of the obligations is to stall, delay or prevent the Development and thus that the proposed changes are necessary to enable continued delivery of the Scheme (see Appellants' SoC at §104-106).
39. KCC's case in response is multi-layered. KCC will show:

- (1) in submissions and evidence that the impact of the obligations at issue on the viability of the Chilmington Green development is not material at all in determining whether those obligations continue to serve a useful purpose under s.106A(6) or s.106B;
- (2) that, in general and specifically here (given the detailed consideration of the matter by ABC), the correct forum for consideration of viability issues is through planning applications and not via s.106A. Viability arguments (i.e. the level of contributions which a development scheme can afford to support and the implications of that for its potential impacts) go to the balance of rights, benefits and burdens conferred by a grant of planning permission and, if a development cannot be viably delivered, that may impact whether permission should be granted at all or in a modified form;
- (3) alternatively, and in any event, that viability considerations cannot result in the negative obligations being found to no longer serve a useful purpose. Such obligations are imposed to prevent X until Y is provided so as to avoid the unacceptable consequences of X if Y is not provided for whatever reason. If Y cannot be provided for viability reasons, that proves rather than undermines the case for the negative obligation;
- (4) in any event, the viability case is not proven (see further below).

Role of viability in determinations under s.106A(6)

40. KCC's position is that impact of an obligation on the viability of a development is not material in determining whether those obligations continue to serve a useful purpose under s.106A(6) or s.106B at all. This can be contrasted with:
 - (1) the position on an application for a new planning permission under s.70 TCPA 1990 or a permission subject to new/varied conditions under s.73 where matters of viability are clearly material; or
 - (2) historically, the position on an application under s.106BA (no longer in force since April 2016) where the viability of affordable housing contributions was the direct subject matter which the authority was required to consider.
41. KCC will expand on this position in submissions and evidence but, without prejudice to such further arguments as it will make, the following points are relied upon.

42. First, as set out above, the legal authorities establish that the question of whether an obligation serves a useful purpose is to be judged by identifying the purpose which the obligation serves, and whether it remains a useful purpose. KCC will say that, given the purpose need not be connected with the original development at all (see **Renaissance Habitat**), it is not obvious why this would entail consideration of either the objective viability of a scheme or any additional effect which an obligation might have on its practical deliverability of a development scheme.
43. Thus, for a positive obligation to pay monies, as illustrated in **Mansfield**, the purpose is likely to be the securing of contributions towards provision of needed infrastructure or services. If that infrastructure or services are needed, they are likely to be inherently useful and that usefulness will be unaffected by whether the payment of those contributions results in other impacts.
44. Second, KCC will say that this is even clearer in respect of a negative obligation.
45. The purpose of a negative obligation (as opposed to the reason for which they were originally imposed – which would be because they are necessary to make the development acceptable) is to prevent X occurring until that which is necessary to make acceptable (Y) is in place – such as not to occupy more than 500 houses until the bus service is operational – it having been judged through the planning process that the development needs a bus service at 500 houses and beyond that number of units the development is unacceptable without the bus service.
46. The negative obligations thus act as bar to further development if Y cannot be provided for whatever reason including viability. That is the purpose of them.
47. In a situation where Y cannot be provided it necessarily follows that the purpose of the negative obligation is triggered – to prevent X without Y first being provided.
48. The fact that Y is not viable simply proves the need for the negative obligation and thus prevents further development.
49. Third, whilst this might seem in one sense to entail a narrow approach, it must be remembered that there remains another (correct) route by which all of the issues in relation to which the balance of rights, benefits and burdens conferred by a grant of planning permission may be considered: a new planning application. That step would

allow for consideration of the acceptability of the development including X but without Y as against s.38(6) and the planning balance. It may be that on that planning balance the development including X is acceptable without Y (i.e. if the necessity for Y before X no longer applies) or that the development is not so acceptable so that permission would be refused. However, there is no scope for that planning balance to be struck under s.106A(6) and an attempt to do so in part risks the wider balance not being properly struck in the public interest.

50. Fourth, the correctness of the narrow approach deriving from the legal authorities can be confirmed by Parliament's recognition in enacting s.106BA TCPA 1990 – inserted by the Growth and Infrastructure Act 2013 to provide a temporary power to review affordable housing requirements on viability grounds. If s.106A had been suitable for addressing viability considerations, the amended provision would not have been necessary. Its enactment (and the limitations in it) show that the viability is not a matter which can be addressed under s.106A and that in any event any amendment has to be closely tied to the viability output.
51. The result is that viability is not relevant at all under s.106B – a modification or discharge cannot be justified on the basis that it is not viable. If it cannot be viably delivered that does not mean that it does not serve a useful purpose. It means that the useful purpose it serves will not be met. That is a fundamentally different question and is not within s.106A(6)/106B(4).

Viability Evidence

52. Even if all that is wrong, the viability case is not proven.
53. In this regard, KCC has been significantly prejudiced in its preparations by the failure of the Appellants to provide a full Financial Viability Appraisal (“**FVA**”) accompanied by the necessary supporting material. While it is for the Appellants to decide how to prove their case, the fact that they have indicated an intention to provide an updated Viability Assessment, as well as updated Transport Impacts Assessment (TIA) and Education Needs Assessments but:
 - (1) Have not yet done so; and
 - (2) It is not currently understood when they will be provided, with them potentially being held back to the exchange of proofs;

This puts KCC in the situation where it is unlikely to be able to fairly deal with the material in the time available and at the inquiry. KCC consider that this conduct is unreasonable and, if it leads to additional expense, KCC reserves the right to claim costs.

54. KCC makes submissions about the relevance and consequence of the proposals to provide an updated TIA and Education Needs Assessment at E1 and E2 below.
55. In relation to viability, KCC's advisers, Bespoke Property Consultants ("**BPC**") have provided advice to ABC and KCC (by letter dated 23 September 2024) which sets out deficiencies in the viability evidence so far provided and sets out the necessary matters which an updated FVA will need to address. This was sent to the Inspector and Appellants on 26 September 2024 and forms the most recent step in the detailed engagement by KCC with the Appellants' case: see Annex B. To progress matters on viability in a timely manner the councils' viability consultant has sought to engage with the Appellants' consultant and discussions have taken place.
56. KCC relies upon this letter. At the present time, in the absence of the information specified, the Appellants' viability case is entirely unproven.
57. KCC reserves its position in relation to the substance of the Appellant's viability case until it has seen the promised Full Viability Appraisal.
58. If adequate information is provided, the Inspector will need to consider the viability implications of the suite of modifications/discharges he is considering. KCC will endeavour to assess the value significance (in broad terms) of each modification/discharge or group of modifications/discharge to allow the broad scale of their impact on viability to be established. However, if viability is the basis for removing certain obligations a process will be required to ensure that the totality of the changes accepted by KCC/ABC or accepted by the Inspector is the minimum necessary to secure viability.
59. Further, KCC will explain that if viability is relevant, and if modifications are permitted based just on viability, then the modifications will need to include review mechanisms to allow for uplifts if the viability situation changes (as would have been the case on any application for permission).

E: KCC's case on Most Significant Specific Changes Sought

60. As set out in Section A above, KCC has set out its detailed response to each proposed discharge or modification in the Schedule attached as Annex A. Notwithstanding that detailed position, it is appropriate to elaborate on the two most significant changes sought and KCC's position on them. This in no way detracts from KCC's detailed position as set out in the Schedule.

E1: A28 DS Discharge

61. The Appellants seek a discharge of the obligation to provide the bond for the A28 dualling scheme ("**A28 DS**") before occupation of more than 400 units. There is no other mechanism in the permission or the s.106 to secure the funding for the A28DS.
62. KCC will demonstrate that there is no prospect of it funding the A28 DS and it will demonstrate on a correct understanding of the history that it has never indicated to the contrary.
63. There is no claim by the Appellants that the A28 DS can be provided through any other route or any other funding stream.
64. The result is if the discharge is accepted there will be no A28 DS even with the full development impact here.
65. Nor is there any modification proposed to secure the lesser works referred to in the 2013 material referred to and apparently relied on in the explanatory memorandum.
66. The Appellants have never presented any modelling to show that this development as a whole is acceptable without the A28 DS.
67. KCC will rely on the Appellants' Explanatory Statement Table 10.3 – 10.4, and the Appellants' evidence to the Possingham inquiry³ to show that even on its case the development without the A28 DS is unacceptable because of the severity of the highway impacts.
68. The Appellants cannot now consistent with their submitted material produce a fresh TIA claiming that the A28 DS is not required. It has relied on viability and has claimed, instead, that KCC is committed to funding it. It has claimed that the money can be

³ Appeal reference APP/E2205/W/24/3345454

obtained from elsewhere. That is the case KCC will meet. If this is wrong, KCC needs to be informed immediately.

69. The short case for KCC will be that Sch 18 para 1 serves a useful purpose because it is the means to ensure either that the development provides as much of the funding needed to bring forward the A28 DS or prevents further development at CG which would have unacceptable highway impacts. Viability issues do not remove or undermine that purpose but confirm the need for the negative obligation. This is not a modification application and there is no proposal to somehow substitute lesser works for the A28DS into the overall package. The Appellants' case is thus simply that the whole development can proceed without the A28 DS. That is simply wrong on its own evidence.
70. It is not currently understood what the role of highway experts and highway modelling will be in the Appellants' case for discharge. KCC has asked whether a TIA is being prepared and sought to engage with the Appellants' transport consultant to agree parameters but no substantive information has been forthcoming in order to do so.

E2: Education

71. The Appellants' proposed modifications relating to education contributions have been carefully considered.
72. However, at the time of writing, the information provided to make any reassessment is scant and the evidence to support the Appellants' assertions ranges from illusive to non-existent.
73. The Appellants have sought to:
 - (1) Discharge the provision of Bonds on the basis that these impact the Development's viability, do not serve a useful purpose and that the Appellant is unable to obtain them.
 - (2) Discharge Primary School 1 Payment 4, plus indexation on Payments 1-4 on the basis that they impact the Development's viability and that the school provision is meeting in part the need of the wider Ashford area.
 - (3) Implement a monitor and manage system for the delivery of Primary Schools 2 and 3. PS2 modifications to defer triggers are sought on viability grounds and to

prevent premature delivery. PS3 modifications are sought to prevent premature delivery.

- (4) Discharge the requirement for Primary School 4 – this is sought on the basis viability and that it no longer serves a useful purpose due to being surplus to requirement.
 - (5) Defer the Secondary School Stage One Payments – sought due to premature delivery and viability.
 - (6) Modify the General Site Transfer Terms – due to ambiguity, duplication, drafting amendments etc.
74. The Appellants have provided their rationale for the modifications via Annex A to the Quod Chilmington Green Application 2 Explanatory Statement and the Quod Viability Report.
75. The Explanatory Statement (18 October 2022) sets out in Table 10.2 ‘the Actual Chilmington Green (CG) Phasing as of 2022’.
76. The original four phases remain consistent in respect of the number of units in each, it is simply the timing of delivery of each which has changed. No new information has been provided on the housing mix.
77. Paragraph 11.15 of the Explanatory Statement is welcomed. It states that *“It is reasonable and expected that a development of this scale would seek to meet all, or the vast majority, of its school needs on site in the long term, and for that to be paid for by the developer, including the transfer of land at nil or nominal cost. Hodson Developments are not challenging that expectation”*.

Primary school provision

78. The s106 provides for a primary school within each phase of development. Based on 5750 units, the original assessed need was for up to 7 Forms of Entry (FE) of primary school need, to be delivered via 3No. 2FE schools (2.05Ha sites plus financial contributions), and a fourth primary school (2.05Ha site and 1FE of financial contributions).

79. During the drafting of the s106 and at the time of signing in 2017, Hodson Developments advised that the build rate for CG would be circa 275 units per year, meaning that a 2FE primary school would fill from the development approximately every five years. The s106 consequently, reflected this, with the transfer of the first primary school site being within 18 months of Commencement of Development. Transfer of the school site was set for this point, as it takes at least three years to undertake the statutory process to open a new school, design, obtain planning permission, build and occupy it.
80. The first primary school (PS1) opened off-site in September 2018, at KCC's expense. KCC will contest the assertion that this was in advance of need or was not in response to the needs of pupils generated by this development. The school moved to its permanent site (on Chilmington Green) in November 2021. This was not in advance of need as the Appellants have asserted. It was in response to the Developer's housing trajectory and the fact that neighbouring schools in the planning group were full. Additional primary school places were therefore, needed for the pupils generated by this Development. The suggestion that the school was brought forward early to meet basic need pressures is incorrect, as is the contention that it is meeting the needs of other developments.
81. The provision of a bond provided KCC with surety of funding to enable it to agree to forward fund the school build costs. It has proved necessary to call in the bond for PS1 Contribution 4 due to the Appellants' non-payment of this obligation. A letter before action has been issued to recover the outstanding sums owed to KCC in relation to PS1.
82. The proposal not to fully fund this infrastructure through the discharge of Payment 4 and repayment of the funds secured through the calling in of the bond both fail to meet the tests under s.106A(6). As in **Mansfield**, recovering the costs incurred by KCC in facilitating the development is a useful purpose.
83. In the Explanatory Statement, the Appellants emphasise the advantages of early delivery of education facilities, and at paragraph 11.22 it has suggested that "*bridging loans from KCC, the DfE, Homes England and other relevant parties should be facilitated*". KCC will explain why these comments reinforce the essential part played by bonds in helping secure the timely delivery of infrastructure. Third parties will not forward fund without surety. As will be explained, KCC has already assumed a level of forward funding to

support the delivery of education infrastructure at Chilmington Green. The Appellants' proposals will increase those burdens, burdens which KCC will explain that they are unable to shoulder. The obligations if modified will fail to serve their purpose equally well.

84. The triggers in the s106 agreement in respect of Primary Schools 2, 3 and 4 are occupations based, with long-stop dates to allow for changes in housing delivery. KCC will explain that these are relevant and continue to serve a useful function. Demand for school places is generally assessed against the number of dwellings and the average pupil yields generated by dwellings. Thus, occupation-based triggers are a consistent and commonly used approach.
85. KCC will explain why Primary School 4 continues to be required.
86. KCC is however, open to incorporation of a monitor and manage mechanism which would enable timings and triggers to be pushed back if and when appropriate. As the Statutory Education Authority, KCC wishes to see school places delivered in line with the demand for them. It does not have the resources to forward fund schools that are not required, nor does it wish to threaten the viability of other schools through the over provision of pupil places. There remains the need for formal triggers, long-stop dates and obligations to provide certainty for both parties from which they can plan. The mechanism as drafted by the Appellant is not satisfactory and KCC will 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).

Secondary school provision

87. KCC's position has been and remains that existing secondary schools do not have capacity to meet the needs of the Development from the outset. This will be explained in evidence. The Chilmington Green Area Action Plan (paragraph 10.4) states "*At present the secondary school is expected to be required within either phase 1 or 2 of the CG development (based on current modelling by the County Council)*". The s106 reflected the agreed need for early delivery, with the serviced secondary school site to be transferred to KCC by 1 September 2022.
88. KCC will explain that the site has been transferred to the County Council, but at the time of writing remains un-serviced (highways access/utilities). This is despite KCC and

Appellants entering a separate agreement in which the KCC agreed to loan the Appellant up to £3.1m to provide the services and road infrastructure necessary to enable the school to open. The Appellants have drawn down £2.6m of that funding, but abandoned the works, with contractors leaving site in October 2023. It is incorrect for it to be stated that the County Council has brought forward the delivery of this school.

89. The Appellants now seek to modify the payment schedule for Stage One Secondary School Contributions.
90. It should be noted that KCC has previously engaged proactively with the Appellants to seek to attract forward funding and to agree alternative payment schedules. As KCC will explain, the original s106 provided for Stage One (£13.55m) to be paid in four instalments over 39 months, commencing in 2020. KCC actively worked with the Appellants, the Department for Education (DfE) and school sponsors to promote the opportunity for Chilmington Green Secondary School (CG SS) to be included in the DfE's wave funding programme. The DfE guidance, Securing Developer Contributions for Education 2023 (para 11) clearly sets out that the Department expects the developer to make an appropriate contribution to the cost of a project and to provide the site on a peppercorn basis. KCC brokered discussion between the DfE and the Appellant, such that the Appellant wrote to the DfE proposing changes to the schedule of payments for Stage One Secondary School Payments. The DfE agreed, with the payment triggers amended to - six equal payments over six years, commencing in March 2026. The DfE also agreed that the requirement for a bond covering these payments could be removed. Accordingly these were captured in the Deed of Variation dated July 2022. It is therefore disappointing that three months later, in October 2022 the s106A application was received proposing further changes to the payment schedule.
91. The Stage One Payments are expected to fund the first 4FE of secondary school provision. At paragraph 11.11 of the Explanatory Statement it is suggested a 4FE provision would not be required until c2000 homes. According to the revised housing trajectory (Explanatory Statement paragraph 10.22) this will be in about 2030. Payment 5 is expected in 2030, payment 6 in 2031. The Appellant's own report demonstrates the current triggers are appropriate and continue to serve a useful purpose.
92. KCC will address the position in relation to Stage One Contributions 5 and 6. The Appellants' requested modification proposes pushing back the amended payment dates

for Stage One Contributions 1 to 4 meaning these remain payable. It is silent about Contributions 5 and 6.

93. There is an ongoing dispute between KCC and the Appellants in relation to the effect of the Deed of Variation on those Stage Two Secondary Contribution payments. KCC's position is that the contributions remain payable and they intend to bring proceedings for a declaration or, in the alternative, rectification of the Deed of Variation. The Schedule of Changes is silent on Stage Two Contributions but deletes the payments in the modified s106 and the Schedule of Changes at line 76 refers to the discharge of Stage One and Stage Two Bonds. KCC will resist both changes.
94. More generally, KCC will explain that the triggers for these contributions remain reasonable and appropriate and continue to serve a useful purpose.
95. The Appellants have proposed modifications to paragraph 48 and 49 of Schedule 15 to enable recovery of unspent funding more quickly. The requirements of paragraph 48 continue to serve a useful purpose. Paragraph 48 allows for any surplus of the contributions to be expended for Educational Purposes. Clause 26 at the front end of the s106 agreement similarly confirms that the contributions may be spent by KCC on whichever of the Education Purposes, as defined by the Deed, as KCC may find necessary acting reasonably. In this context, KCC will explain that the requested modifications insufficiently recognise the fact that a school may be delivered in phases, or further works may be required after practical completion. The obligations as modified will not serve their useful purpose equally well.
96. The modifications sought in respect of Schedule 15A (site transfer requirements), seek to water down the undertakings of the Appellants to provide sites suitable for their end use. The primary and secondary school contribution rates are predicated on sites being provided that accord with the site requirements. They include being fenced, reasonably level, free from contamination, with services provided to the boundary. If the sites are not delivered in accordance with these requirements then the costs of delivering the schools will rise accordingly. The suggestion that services should be provided at an unspecified date after transfer is unacceptable, as evidenced above. The requirements all continue to serve a useful purpose and the modifications would not serve the purpose equally well.

F: The legality of the approach to modifications

97. KCC reserves its position as to the legality of allowing the Appellants to further modify its proposed modifications during the inquiry process.
98. In any event, KCC will have to be given adequate time to consider any proposed further modifications, present evidence on them and test their impacts on viability and on other obligations.

G: Engagement

99. KCC will explain its efforts to engage. It has sought meetings on the A28, education and FVA to identify areas of agreement and disagreement, to seek to agree methodologies. KCC will continue to seek to engage with the Appellants in order to narrow areas of dispute. A copy of the Appellants' Statement of Common Ground has been received and KCC will work with the Appellant to agree a final draft.

H: Witnesses

100. KCC provisionally proposes to call evidence in relation to:
- (1) Viability;
 - (2) Transport impact;
 - (3) Educational need.
101. KCC envisage that any other issues can be addressed via written statements as necessary.

I: Documents

102. In addition to the documents already referred to, KCC will rely [MDH1][MDH2]on:
- National Planning Policy Framework (NPPF) 2023
 - National Planning Practice Guidance (NPPG)
 - Chilmington Green Area Action Plan (Adopted July 2013)
 - Ashford Local Plan 2030 (Adopted February 2019)
 - Kent County Council Developer Contributions Guide 2023

- Framing Kent's Future – Our Council Strategy 2022/2026
- Commissioning Plan for Education Provision in Kent 2025/2029
- Department for Education (DfE) - Estimating pupil yield from housing development August 2023
- DfE – Local Authority Pupil Planning Areas – guide for local authorities – September 2021
- DfE – School Capacity (SCAP) Survey 2024 – guide for local authorities – April 2024
- DfE – Securing developer contributions for education – August 2023
- MHCLG - National Planning Policy Framework – December 2023
- Department for Education 'Working Together to Safeguard Children'
- Kent County Council Making a difference every day – Our strategy for Adult Social Care 2022 to 2027
- Rights of Way Improvement Plan 2018 - 2028
- Rights of Way Circular (1/09) (version 2 October 2009)
- KCC Active Travel Strategy
- Local Transport Plan 4: Delivering Growth without Gridlock 2016-2031
- Inspector Young's decision to grant permission at Land north of Possingham Farmhouse, Ashford Road, Great Chart, TN26 3BQ (reference: APP/E2205/W/24/3345454).
- Kent County Council – Proof of Evidence - Land north of Possingham Farmhouse, Ashford Road, Great Chart, Kent (reference: APP/E2205/W/24/3345454)
- SLR – Proof of Evidence - Land at North of Possingham Farmhouse, Ashford, Great Chart, Kent (reference: APP/E2205/W/24/3345454)

103. KCC will engage with the other main parties to agree a core documents list. A list has already been received from the Appellants and is being reviewed.

Annexures:

- A Schedule of the County Council's responses to the proposed modifications.
- B KCC/ABC email to Inspectorate on 26 September 2024, enclosing BPC letter of 23 September 2024.