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APPEAL PURSUANT TO S.106B TOWN AND COUNTRY PLANNING ACT 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

LAND AT CHILMINGTON GREEN, ASHFORD ROAD, GREAT CHART, ASHFORD, KENT

CLOSING SUBMISSIONS

On behalf of

ASHFORD BOROUGH COUNCIL

Introduction

1. These closing submissions should be read together with the Council's Opening Statement.[1] They are structured as follows:

   I. Introduction

   II. The Relevant Legal Principles to be applied and the immateriality of viability

   III. The Appellant's approach

   IV. The Council's response to the discharges and modifications sought applying the correct legal principles

[1] CD 14/2

V. The effect on the development of Chilmington Green of the discharges and modifications proposed when taken as a package;

VI. The substantive Viability case and the absence of support for the Appellant's position.

VII. Other matters

VIII. Conclusion

2. Issue IV is addressed in the attached Schedule which includes the Council's closing submissions in relation to each of the maintained requested Discharges and Modifications of planning obligations for which the Council is primarily responsible under the Agreement. That schedule should be read with the Council's responses contained in Annex A to its Statement of Case[2] which together and with these closing submissions contain its final position in relation to the requests. It is not proposed to read out the Schedule attached to these closing submissions but its content forms part thereof. In respect of the remaining requests for discharges and modifications on which Kent County Council (KCC) is leading for the purpose of these Appeals, the Council supports its position, and where we use the term "the Councils" in these closing submissions, this means both the Council and KCC.

I. Introduction

3. As we said in opening, there can be few instances where the provision of appropriate and timely infrastructure is of greater importance than when

[2] CD3/3

developing a major urban extension based on Garden Suburb principles. By far the largest part of the new South of Ashford Garden Community is Chilmington Green. Whether Chilmington Green is both to embody successful placemaking and be a sustainable and thriving new community, as required by the terms of its governing section 106 Agreement, are ultimately the central questions in these appeals. Whilst the Appellant seeks to portray its appeals as seeking to defer compliance with existing obligations, rather than removing or avoiding them,[3] the extensive suite of well over 100 changes which it seeks includes more removals than deferrals and would if approved, as the Council's extensive evidence has shown, substantially undermine the purpose of those obligations to the very significant detriment of the public interest.

4. The Council's evidence has, in large measure, not been seriously challenged by the Appellant at the roundtable sessions, with the purpose and utility of the vast majority of the obligations not gainsayed. The frequently repeated position of the Appellant has been to rely on viability as the factor justifying the discharge/modification sought. Where challenges have been made to the substance of the Council's position, those typically have relied on misleading or anecdotal information, evidence not before the inquiry or recollections of past events which, on scrutiny, have been shown to be inaccurate. Where they have involved criticisms of the Councils, they have been partial and unfair.

5. The Appellant's attempt to divert your attention from the correct tests to be applied in the appeals and its focus on its asserted view of the planning merits

[3] See e.g. Collins proof para.1.2.11 p.10

coupled with the attempted attribution of blame on others for the slow progress of the development, should be disregarded. Not only is its portrayal of the facts not an accurate one, the issues raised have no bearing on the purpose and continuing utility of the disputed obligations. The reality is that a site such as this will inevitably have delivery challenges over the course of its development, but those are capable of being managed by a competent Master Developer in a way which will provide an objectively viable return on investment which such a Master Developer would rightly seek. Both Councils have shown appropriate flexibility to assist this to happen, it being in both their interests that the development (appropriately regulated by the planning obligations) proceeds. However, the scale of discharges and modifications sought is such that were the appeals to be allowed, the development would be very different to that contemplated when planning permission was granted.

II. The Relevant Legal Principles to be Applied

6. Subsection 106A(6) TCPA 1990 provides that in respect of an application made under this section, the decision maker needs to determine:

   a. Whether 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. In determining an application, the four essential questions are:

(1) What is the current obligation?

(2) What purpose does it fulfil?

(3) Is it a useful purpose? And if so,

(4) Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?[4]

8. These tests fall to be applied in respect of each individual request made. Whilst the Appellant asserts that it needs all of its proposed discharges and modifications for the Development to progress[5] and advances them as a package, each request must be considered separately, albeit having regard to how it relates to or is consequential on other discharges or modifications sought.

9. The "useful purpose" need not be a planning purpose or the same as the original purpose for entering into the obligation.[6] Although for the avoidance of doubt, it

[4] *R. (Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin); [2004] 1 P. & C. R. 39 (per Richards J (as he then was) at [28]).
[5] Although Mr Collins in his planning evidence suggested that there was some flexibility – XX ABC
[6] *Garden and Leisure* at [46].

is the Council's case that in respect of all of the obligations relevant to this appeal, the useful purpose served relates to the development of Chilmington Green and in all instances is the original purpose (see the Appendix to these closing submissions).

10. Further, a change in planning policy or circumstances such that the original obligation would not now be sought in a new agreement does not mean there is no useful continuing purpose.[7]

11. Further, the application of s.106A does not require consideration of whether a given obligation would meet the tests under regulation 122(2) of the Community Infrastructure Regulations 2010.[8] Nor is consideration of s.38(6) of the Planning and Compulsory Purchase Act 2004 part of the exercise.

12. The planning merits of the development are not in consideration; the s.106A application is not a new application for planning permission on different terms, nor is it an opportunity to change the essential basis on which the planning permission was granted or to undermine the planning balance on which it *was* granted.[9] Even where the decision-maker concludes that one or more of the Regulation 122 tests would not have been met when the obligation was entered into and/or might now not be met, the obligation can still serve a useful purpose[10].

[7] *R. (Renaissance Habitat Ltd.) v West Berkshire Council* [2011] J.P.L. 1209 (per Ouseley J. at [41]).
[8] *Renaissance Habitat* at [34]; and *R. (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 540 (at [40] and [48] per Fordham J).
[9] *R. (Millgate Developments Limited) v Wokingham Borough Council* [2011] EWCA Civ 1062 (at [29] per Pill L.J.).
[10] *Mansfield* at [40]

13. It is also important to note that the power to seek and sanction discharges or modifications applies only in relation to "obligations". There is no power to apply to modify or discharge boiler plate provisions, such as release from liability provisions. Section 106 draws a clear distinction between "obligations" and such other provisions (see in particular section 106(1) and (4)).

14. Further, there is no power to modify an obligation to provide for repayment of contributions already paid to the local planning authority whether expended or not. If the obligation to pay is discharged, whether any sums already paid should be repaid is a legally separate one which outside the scope of s.106A and would, if pursued by the Appellant, raise other legal issues such as the effect of the boilerplate clauses in the Agreement and whether the Councils have expended all or any of the sums paid to them.[11]

Viability

15. ABC maintains its position that viability cannot be relevant under s.106A (3) and (6) or in a s.106B appeal. If a development cannot be viably delivered that does not mean that its governing obligations do not serve any useful purpose. The purpose of the obligations is to regulate the development if it proceeds. The useful purpose of obligations is not contingent on their having no adverse effect on the viability (and thus potentially on the delivery of the regulated

[11] It is, however, accepted that a successful section 106B appeal is capable of affecting accrued liability – see *The City of York v Trinity One (Leeds) Limited* [2018] EWCA Civ 1883 Sir Earnest Ryder [58]

development). Securing viable delivery is not a “purpose” of any of the obligations.

16. This position emerges clearly from the statutory scheme itself. The proper forum for consideration of viability issues is through planning applications, which engage the s.38(6) duty, or through the operation of any bespoke provisions within the relevant agreement which allow for review of viability at stages in the development.

17. Section106A(6) is concerned with whether a given obligation serves a useful purpose, whereas viability considerations relate fundamentally to whether the development should be permitted to proceed in the absence of the obligation and regardless of its utility.

18. The test under s.106A is a bespoke and narrow one for each obligation in question, expressly not involving taking into account the broad range of considerations which would be material to the determination of a planning application.[12]

19. Even if all this were wrong, viability can have no relevance to the discharge of negative obligations, which are for the very purpose of acting as a bar to further development delivery unless and until the obligation is met. The fact that the obligation may not be capable of being met without causing overall scheme unviability in no way affects its essential purpose which is to prevent development

[12] *Garden Leisure* [49] *Millgate Developments* [29]

progressing until it is. It follows that, where the obligation serves a useful purpose, it continues to do so even where it might render the development unviable.

20. However, even if *that* were wrong, the existence of a claimed viability barrier to delivery does not by implication negate *any* useful purpose that a particular obligation might have. The purpose of the obligations 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. Viability is not the purpose of any of these and, even if it were *a* purpose, it could not be said to be its *only* purpose. It follows that even if viability is taken to be potentially relevant (which the Councils do not accept), a further analysis would always still be required in order to comply with the statute, as to whether the obligations also serves *any other* useful purpose.

21. In specific answer to the issues raised in your letter of 17 February 2025, the general concept of viability has nothing to do with the useful purpose of particular obligations. It may be relevant to viability review mechanisms within a s.106 agreement, but it has no applicability to obligations for which it is not the purpose. If the scheme would not have been permitted without the particular obligation, then viability can have no bearing on its useful purpose.

22. Further, a decision maker is entitled to conclude that an obligation is not in or of itself so important for the scheme that permission might have been granted without requiring the obligation in order to make the development acceptable in

planning terms and still conclude that the obligation still serves a "useful purpose". This is confirmed by *Renaissance Habitat* at [34] and *Mansfield* at [40] and [48]. Regulation 122 of the Community Infrastructure Levy Regulations 2010 is simply *not* relevant to the exercise under s.106A.

23. It also follows, logically, that where the decision maker concludes that such an obligation is not in or of itself so important for the scheme that permission might have been granted without it, it *must* reach the conclusion that it still serves a useful purpose even where it might render the scheme unviable.[13]

III. The Appellant's Approach

24. The Appellant' approach invites you to supplement the four tests laid down by case law with a fifth test namely:

"*Whether the obligation contributes to the scheme being unviable*"[14]

No authority is cited in support of the addition of this fifth test which is amplified by the following:

"*If an obligation (on its own or in combination with other obligations) renders a development incapable of being carried out or completed because it makes the scheme unviable or unfundable then the decision maker may conclude that it does not serve a useful purpose"*[15]

[13] See Response to the questions at the Annex to CD14/2
[14] CD14/1 Appellant's Opening Statement para.13(ii) and CD 2/16 Appellant's Submissions on whether viability can be relevant to the determination of section 106A applications and section 106B appeals
[15] Ibid para.14

25. There are serial problems with this claimed additional fifth test. Firstly, it confuses the logically discrete issues of whether an obligation serves a useful purpose with its potential effects on deliverability (see above). Secondly, it allows a non-purpose (viability of the development) to "trump" the useful purpose served by an obligation; thus the answer to the third question is dictated by scheme viability, rather than the merits of maintaining the obligation. Thirdly, the Appellant advances the fifth test on the basis that it is a discretionary one; "the decision maker may conclude…."[16]

26. No guidance is given in the Appellant's Opening as to the circumstances in which it might be appropriate for the decision maker to disregard the useful purpose of an obligation in favour of scheme viability, but it was apparent from its Submission on whether viability can be relevant[17] and Mr Collins' evidence that you are being invited to trespass into matters of (i) whether the obligation would comply with regulation 122 if imposed today, (ii) the relative importance of the obligation and (iii) a section 38(6) style planning balance. Those, as is clear from the case law, are all matters which are irrelevant to the determination of a section 106A(3) application.

27. In substance, the Appellant's fifth test simply invites you to conclude that where a scheme is unviable, the Regulation 122 tests may be introduced into the determination. For the reasons already set out, that is misconceived. Those tests have nothing to do with a section 106A application. Regulation 122

[16] See also CD 2/16 paras.4 & 5
[17] Ibid

expressly states that "*This regulation applies where a relevant determination is made which results in planning permission being granted for development….a planning obligation may only constitute a reason for granting planning permission for the development if…"* A section 106B appeal does not result in a grant of planning permission.

28. There are particular difficulties for the Appellant in the application of its new fifth test on the facts here. Just by way of example, it accepts that the negative obligations contained in Schedule 18 (the A28 Bond) and Schedule 22 (RIF Contribution) serve a useful purpose and would meet the Regulation 122 tests were planning permission to be granted today,[18] yet it seeks discharge of both obligations. It therefore appears in practice that the discretion now being argued for entitles the decision maker on a section 106A(3) application to decide that viability trumps even necessary obligations without which planning permission would not have been granted. That is not consistent with how Mr Collins explained his test in his proof of evidence which asserted that where a particular obligation is not necessary and impacts on viability, to the extent that it would hold back development, the obligation serves no useful purpose.[19]

29. What principles should be applied in reaching such an extreme decision on a section 106A(3) application have not been clearly articulated. Mr Collins invited you to enter into a planning merits judgement applying section 38(6), but that is beyond the scope of your powers, as the High Court has held. Further, if the

[18] A28 Bond - Dix XX KCC and RIF RT & Collins XX ABC
[19] CD2/25 para.4.1.5p.50

Appellant wanted to invite you to engage with that exercise, it needed to equip you with the evidence to undertake the comprehensive balance which would be necessary. As you pointed out to Mr Collins, the planning balance argument was clearly an important part of his case, but nowhere in his evidence had he undertaken that balance, let alone on any principled basis.

30. Indeed, the scope of the Appellant's evidence is so limited that it is simply not possible to undertake any such planning balance. For example, Mr Dix expressly declined to engage in his evidence with the issues of the need for and timing of the A28 improvements. A critical input to any such balance; the highway consequences[20] of allowing Chilmington Green to progress without the A28 improvements (the consequence of the discharge of the obligations in Schedule 18 of the Agreement) has been left entirely unassessed by the Appellant, but it accepts that the impact would be severe.[21]

31. In relation to the RIF funding, the Appellant accepted that the Council has demonstrated that the contribution from the Chilmington Green development served a useful purpose and advanced viability as being the only basis upon which discharge was sought. Mr Collins sought to justify this on the basis that the improvements were already in place and that the contribution was not "really necessary"[22] and any deficit could be addressed by other developments.

32. Not only does that approach directly conflict with the reasoning of the High Court in the Lichfield case (see above), the implications of requiring other unspecified

[20] CD 2/26 para.2.2 p.5
[21] Highways SOCG para.1.4 p.2
[22] XX ABC

developments to bear the costs of the £5.6M foregone[23] are entirely unassessed in the Appellant's evidence. On Mr Collins evidence, the balance is all about Hodson. Indeed, the Appellant's evidence focuses predominantly on the viability benefits to it of the discharges and modifications it seeks, with scant consideration of the adverse consequences either for the existing and future residents of Chilmington Green or for the wider Borough.

33. There is the further problem that the Appellant's viability appraisal is undertaken on an "all or nothing basis". That leaves you unable to weigh the claimed viability benefits of each modification individually against its disbenefits. If viability were a material consideration, you would be required to undertake that balance for each individual modification if the Appellant's approach were correct.

34. You are, therefore, simply not in a position to engage with the planning balance urged upon you, even were that a course legally open to you.

35. There is one final difficulty arising on the Appellant's viability evidence. Whilst Mr Hodson asserted that the Appellant wants and intends to progress the development and can do so only with *all* of the discharges and modifications sought,[24] even were you to accept them all, Mr Wheaton's evidence is that the scheme would remain unviable. Whilst the threshold of viability he was advocating, remained opaque, his principal position was that that the Benchmark Land Value should be achieved. On none of his appraisals would viability be

[23] See S106 Schedule 22 para.2
[24] XX ABC

attained on that basis, including his most optimistic 2% per annum place making premium appraisal which shows a deficit of £19M.[25]

36. What weight you should give to discharges and modifications which would, on the Appellant's most optimistic case, still leave the scheme unviable, has been left entirely unstated.

37. Ultimately, if the Appellant were right, the statutory scheme would be undermined by entirely displacing the test of whether individual obligations serve a useful purpose, in favour of a different question i.e. whether purely scheme-wide financial considerations justify the discharge or modification of an individual obligation. That cannot be the way the regime was intended to operate. It would require reading down the express statutory wording and rendering it meaningless.

IV. The Council's Response to the Discharges and Modifications Sought

38. The attached Schedule sets out the Council's final response to the Discharges and Modifications sought with which it, rather than KCC is dealing, with references to the evidence as appropriate.

V. The Effect of the Modifications Sought

[25] Viability SOCG Appx F Part 3

39. Within this section and for the purposes of illustration, we touch on some of the key adverse placemaking and other consequences of the requests made by the Appellant.

40. The premise for the applications, beyond viability, is that obligations either serve no useful purpose or else deferral of the trigger will serve the purpose equally well. In relation to the purpose served, ABC's evidence has demonstrated beyond doubt that this premise is wrong. If the changes are accepted, the development will end up with significant issues arising from harmfully delayed and inadequate provision of infrastructure, under-sized services and facilities with uncertain/inchoate maintenance provision; all to the detriment of the placemaking which is necessary to deliver both a quality and a viable development. The changes would therefore be self-defeating, and in no sense can it be contended that the statutory requirement of equivalence would be met.

Bus Services

41. The delay in the commencement of the service would mean up to 500 households having to rely on private cars to meet day-to-day transport needs. The delayed and modified service, with no specified level of minimum service, combined with deletion of the bus voucher scheme and the postponement of necessary on-site bus related infrastructure would undermine the objective for Chilmington Green of achieving the required public transport mode share for trips to and from the site.[26] Whilst the Appellant seeks to rely on the existing bus

[26] 14% in Phase I and 17% by the end of the development period

services using the A28 corridor in defence of its proposed modifications, there are no bus stops on the A28 serving the Chilmington Green development.[27]

42. It is therefore illogical for the Appellant to accept a 100 dwelling occupancy restriction before a bus service is provided at Possingham Farm (a development of just 655 dwellings) whilst advocating a 500 dwelling occupancy trigger in relation to Chilmington Green. It is essential in order to achieve the mode share in bus travel that the bus service is in place before travel patterns and behaviour have become established.[28]

43. It is also important that the bus related infrastructure increases in line with the number of dwelling occupations. Delay of the Phase 1 initial bus infrastructure to 1222 dwelling occupations would result in 1222 households having access only to a single temporary bus stop (a sign and no shelter) at the northern end of the site adjacent to Access A off the A28. It would not be within the recommended 400m walking distance from all 1222 households it would serve. On no conceivable basis could it be contended that the useful purpose of the Bus Service obligations (which is to put in place sufficient incentives to achieve the ambitious Bus mode share target) is served equally well by the proposed modifications.

The A28

[27] Tomlinson Round Table evidence
[28] Bus Service Topic Paper para.6.4 p.11

44. The A28 dualling scheme, essential according to the Appellant's own evidence to the very recent Possingham Inquiry[29], would not go ahead with the proposed discharge of the obligations contained in Schedule 18. The result, as KCC has demonstrated, would be severe congestion on the local highway network.[30] Mr Dix accepted that the Schedule 18 obligations serve a useful purpose[31] and, whilst Mr Collins sought to flirt with a contention that the need or timing were not as critical as KCC's evidence shows that they are, that was directly contrary to the stated position of the Appellant's own highways' expert that such matters were not considered by him.[32] In any event, the critical flaw in Mr Collins flirtation is that the Appellant has sought to discharge and not modify, the obligation.

45. The A28 improvements were recognised as being essential to the development of Chilmington Green at the permission stage[33] and all of the available evidence supports KCC's position that they remain essential if a severe impact on the A28 is to be avoided. There has been no challenge to that evidence.

Playspace, CMO Premises and Community Hub

46. With the Appellant's proposed modifications up to 2201 households[34] (circa 5283 residents) would have access to only one undersized playspace, with that site

[29] CD 10/5; 10/22, CD 7/1 para.28
[30] Agreed within the Transport SOCG para.1.4 p.2
[31] XX KCC
[32] CD2/26 para.2.2 p5
[33] CD6/1
[34] There are 1501 dwellings in Phase 1 and 1124 in Phase 2. Moving the trigger for PS2 to not more than 700 occupations in Phase 2 means that 1501+700 households would have access only to PS1 which is currently partially occupied by the CMO first temporary premises. Discharge of the obligation to provide the second CMO premises as requested would mean that the temporary building on PS1 would need to remain until the Community Hub building is provided which the Appellant proposes would be no later than 3250 dwellings.

being shared with the CMO First Premises. Up to 3250 households (circa 7800 residents) would have access only to a single small temporary building for community use (CMO First Premises) and time restricted access to facilities at the secondary school. If and when the facilities in the community hub coming forward, there would be a significant risk that, with the Appellant's cost cap of £2,000,000, it would not have the necessary facilities to meet the needs of the Chilmington Green development.[35] The Appellant's request that it should be allowed to "scope" the provision to this total sum, provides no confidence that it will be adequate to deliver what is required.[36]

47. There is the further significant problem that, the Appellant's proposed modifications could result in the Community Hub not being delivered at all as, in the event that any one of the offers of a ill-defined public service lease is not taken up by various bodies, the obligation to construct and provide the Community Hub ceases to apply and the Appellant would be released from any occupancy restriction.

48. The purpose of the obligations is to ensure that, in accordance with the AAP, properly planned infrastructure delivery is achieved alongside development of the new housing so that any significant gaps or shortfalls in provision are avoided. The discharges and modifications sought would defeat that useful purpose.

[35] See CD14/27 Appx D - Viability SOCG BPC have costed the provision of the Community Hub using BCIS data at £7,311,420.72

[36] BPC's BCIS comparison indicates that it would not be – see CD14/27 Viability SoCG Appx D

Sports and Recreation Facilities

49. With the Appellant's proposed modifications up to 3500 households (circa 8400 residents) would only have limited access to sports and recreation facilities – having to rely on the facilities at the secondary school. Some 56% of the development would be occupied before any fully accessible sports facilities were provided given the Appellant's proposed triggers for the delivery of the Community Hub, Chilmington Hamlet and Discovery Park facilities, which the secondary school facilities would not have the capacity to substitute for. Again, the essential useful purpose of the obligations; to ensure that at all stages of the development the services and facilities required adequately to serve the resident population should be in place, would be defeated.

The District Centre

50. The Appellant's proposed modifications effectively remove the obligation to construct and provide any District Centre facilities. The obligation to construct and provide Small Retail Units to serve the development is effectively removed, unless they form part of either a reserved matters application or a fresh "drop in" permission for the District Centre. From Mr Hodson's evidence,[37] it is clear that the Appellant has no intention of delivering small retail units unless it has to and, therefore, the District Centre might comprise of nothing save serviced sites for District Centre Facilities. That would defeat the useful purpose of the obligations.

[37] CD2/25 Appx I Hodson Developments Statement of "Facts" paras.75-78. The BNP Paribas letter relied upon here says nothing at all about the market for retail development on the site (See Collins Appx.IV).

The CMO

51. The Appellant's proposals would result in a funding gap for the CMO that would render it unable to function, leading to an inability to manage and maintain the community facilities and amenities (including large areas of public realm), with no certainty that these facilities and amenities would be managed and maintained in perpetuity and to the high standard envisaged. This would result from the many modifications and discharges which are directed at seeking to emasculate the role of the CMO in the Chilmington Green development.

52. That appears to be part of a desire on the part of the Appellant to pursue an alternative "Estate Management Company" model for the development.[38] However, that model is not provided for in any of the modifications proposed and were the Appellant's proposals to be accepted, they would result in a complete muddle and serious gaps in relation to the maintenance and management of the Chilmington Green development.

53. Residents would continue to be required to pay the rentcharges to the CMO for, inter alia, maintenance and management of communal facilities and spaces, yet some facilities and spaces would no longer be transferred to the CMO (or apparently anyone), some would only be leased or just licensed[39] to the CMO for a limited period after which the management and replacement responsibility is

[38] See e.g. CD 2/25. Collins proof para.3.1.80 p.46
[39] The Appellant's proposal in respect of the Allotments

not provided for and some would be subject to long leases, but with no length of terms or other provisions specified in terms of repair or replacement or other obligations. It is not proposed that Hodson would assume any liability under the modifications for the long term management or maintenance of assets or areas which are not transferred. Nor is any obligation put forward which would actually require the owners of these assets and facilities to continue to make them available free of charge to the public for their intended purposes.

54. The CMO would also be deprived of its income generating Commercial Estate assets/alternative endowment payments and the Deficit Grant Contributions.

55. The net result would be dysfunctional management and maintenance arrangements with no liability on anyone to maintain and keep open some areas, despite residents paying for this through their rentcharges to the CMO.

56. In an attempt to justify this incoherent set of modifications, the Appellant through Mr Hodson sought to portray the CMO as inefficient, ineffective and out of its depth. However, Mr Shorter's evidence will have shown you that Mr Hodson's assertions were both unfair and misleading. They betrayed an individual who, for his own personal reasons, appears to have decided not to involve himself in the operation of the CMO (nothwithstanding that he is one of its Directors and Charity Trustees) and, as a result, is entirely out of touch with the reality of its operations. That is not the stance one would expect a competent Master Developer to adopt given the importance of the CMO to the development, and

the objectives building community, generating a sense of place and potentially increasing value.

57. Mr Shorter's evidence demonstrated that the CMO operates efficiently in terms of administration and the use of its resources, having regard to the slow rate of the development to date, uses reputable contractors with high standards in order to discharge its maintenance obligations and is both financially prudent and sound.

58. Mr Hodson then sought to use the CMO Board's recent 10 year Financial Plan, prepared principally for the setting of the rentcharges for 2025/2026, to support the assertion that the CMO needed no resources going forward, other than the rentcharge income, in order to discharge its obligations under the section 106 Agreement. However, his note[40] in support of that contention was deeply misleading and flawed. What he failed to point out was that the CMO's principal Business Plan is a twenty year business plan,[41]which deploys a complex model to model the income and expenditure of all the assets and spaces the CMO is charged with owning, maintaining and replacing over the life of the development.[42]

59. As with any such modelling the Business Plan assumes rates of delivery of dwellings and timings of the provision and transfer of assets and spaces over the course of the development in order to model cash flows and to ensure that the

[40] CD14/15
[41] CD13/17
[42] Ibid Appx K pdf 186

CMO, through rentcharge and other income and contributions to a sinking fund over time, will have the resources it needs ***in perpetuity*** to maintain and as necessary replace them. The Business Plan resulted from a number of sensitivity runs testing the risks to ensure that it would be capable of inter alia accommodating different occupation rates.[43]

60. As is clear from the Business Plan, it was always anticipated that the CMOt would have rolling medium-term plans to create annual resource budgets for its shorter term action plans.[44] The 2024 Financial Business Plan is the latest such plan. That Plan cannot be used to support the contentions advanced by Mr Hodson, because it does not look over the development period of the development, and it takes account only of a small fraction of the communal space and *none* of the major assets which the CMO will be required to maintain and replace over time. Without re-running the full Business Plan model over a 20 year period, it is simply not possible to assert that the CMO could survive on rentcharge income alone.

61. Furthermore, surprisingly for a Director of the CMO, Mr Hodson sought to amalgamate the funds in the CMO's Rentcharge Deed Account and its Charities Account to support his argument. The Rentcharge account is a restricted account. It cannot be used as a source of funds for the CMO's administration or activities. Whilst under the Rentcharge Deed, the Rentcharge Account can be used to pay managing agents' fees, that is the only contribution made from the Rentcharge Account to the CMO. When the need for the disaggregation of the

[43] Ibid section 11 pp.136 et se
[44] Ibid p.14

accounts is understood, what Mr Hodson's note in fact shows is that by 2027/2028, without the funding provided by the Deficit Grant Contribution,[45] the CMO would be insolvent. The negative placemaking implications of that are obvious. The obligations clearly serve a useful purpose and Appellant has failed to show that the tests for the discharges and modifications it seeks are satisfied.

Affordable Housing

62. Whilst the Appellant relies heavily in its appeals on the claimed housing delivery benefits of its proposed modifications and discharges, but makes no commitments in relation to delivery. Perhaps because of the obvious weakness of its viability case, it is less keen to highlight the negative affordable housing implications of its proposals. The exclusion of the Extra Care units from Viability Phase 1 will result in the affordable housing provision within that phase falling well below the minimum 10% provided for in the Agreement. The removal of viability review for Viability Review Phases 2-4 inclusive, would restrict the provision of affordable housing to the minimum 10%. Whilst any greater provision within those Viability Review Phases may be unlikely, it cannot at this point of time be ruled out.[46]

63. Further, the proposal to tie Viability Review to the mere submission of reserved matters applications (RMAs) as opposed to occupations, risks depriving the Council of any effective ability to review viability to secure the provision of

[45] And assuming repayment of the DGC paid to date which is sought in the amendments together also with the repayment of the CMO Start-Up Contributions
[46] Leahy XX by Appellant

additional affordable housing up to the 40% cap in the later phases of development. The Appellant, through the simple expedient of submission of a suite of RMAs at an early stage would be able to circumvent any meaningful review of actual values and costs relevant to the Viability Phase in question, since this might not be realised for many years after the RMAs have been considered and approved. The replacement definition of "Premature Viability Review Submission" which the Appellant seeks to introduce into the definition section of the Agreement, provides no meaningful safeguard against this risk.

64. The end result of these proposals (and the other changes, set out more fully in the appended Schedule) is a development that would fail across a wide range of areas to achieve the placemaking and sustainability aims that have been a golden thread running through the plans for this Garden Suburb and Garden Community. Save for a very few instances where the Appellant's proposals have been accepted by the Council, the section 106 tests for discharge or modification are not satisfied.

Viability

65. Even setting aside the issue of principle in relation to Viability, there are a host of problems with the Appellant's viability case. They may be summarised as follows:

(i) The absence of clarity as to what meaning the Appellant attributes to "viability" in this case;

(ii) The inadequacy of the evidence which it has put forward to support its viability case, with information crucial to testing the robustness of the inputs, withheld from the Councils;

(iii) The use of input assumptions which are variously not objective, unrealistic, fail to reflect the principle of value engineering and are inconsistently applied; and

(iv) Outputs which show that, even on its most optimistic case, the Appellant's modifications and discharges come nowhere near to meeting its viability experts apparently preferred threshold of viability – the Benchmark Land Value as set out in the Agreement and no certainty as to whether the Appellant's proposals would actually lead to the release of funding for the Appellant and the delivery of the development.

66. The Appellant's assessment significantly understates the Gross Development Value of the scheme whilst grossly exaggerating the finance costs which the Plot Developers and Master Developers would bear. No attempt is made within its modelling to reflect the real world position where developers will seek to balance their cash flows and, rather than using an objective Master Developer finance rate, it seeks to rely upon the rate that Hodson as an SME with no experience of delivering a development of the scale of Chilmington Green[47] has been able to obtain. The result, inevitably, is that 'peak debt' is forecast to rise to levels which are challenging.

[47] Hodson XX KCC

67. In contrast, Mr Leahy, himself with relevant developer experience to support his appraisal, has shown how the development can be viable employing the Master Developer model which both parties agree is appropriate to this case. With optimistic but realistic assumptions, the development is shown to deliver a positive land value to the Master Developer when taking account of a realistic place making premium reflective of the services and facilities secured under the Agreement as they come forward. Even *without* a placemaking premium, Mr Leahy has shown that, without any of the discharges and modifications sought, the "return" to the Master Developer is greater than the Appellant's appraisal for its proposals shows.[48]

68. There is no evidence before the Inquiry that even if all of the Appellant's proposals were accepted, Hodson's funders would allow the development to proceed at the levels of deficit shown in Mr Wheaton's base case appraisals. Despite asserting that Mr Leahy's base case deficit of £31.7M would require bridging by further significant modifications to the Agreement, Mr Wheaton was wholly unable to provide any credible explanation as to how, in his world, the larger deficit in his own Modifications base case (- £34.8M) would be bridged if not similarly through further significant modifications.[49]

69. The reality is that both the Appellant and its funders must believe that there is considerably more value in the scheme than Mr Wheaton's appraisals identify.

[48] See Viability SOCG Appx H Leahy No place making -£31,732,000 cf Wheaton proposed no place making -£34,873,168
[49] XX ABC

That is precisely what Mr Leahy's appraisals show. That begs the question, how much value would a Master Developer require to deliver the development.

"Viability"

70. A proper understanding of what a Master Developer would consider a "viable" position is necessary because, as Mr Wheaton accepted, where the public interest (in the form of planning obligations willingly entered into), is being asked to yield in favour of development viability, the extent of flexibility granted should be no more than is necessary to facilitate delivery. Here, although Mr Wheaton preferred the term "grant" to "public subsidy", the Appellant originally contended that it needed to be subsidised by some £99M in order for the development to progress. That has now increased in Mr Wheaton's latest appraisal to £104M but, according to Mr Hodson, that saving suffices for Hodson to allow the development to proceed.

71. Mr Wheaton provided no straight answer on what the viability threshold is in this case. He asserted that the point at which viability is reached is not a binary position and that, were one starting afresh, one should be seeking to achieve the benchmark land value, but that a developer may elect for a lesser return. His FVA stated that with a positive land value, the scheme can proceed[50] which is not consistent with his emphasis on achieving the Benchmark Land Value.

[50] CD 2/17 para.4.6 p.9

72. His appraisal of the scheme with modifications, shows a deficit against the assumed Benchmark Land Value of £144M;[51] nowhere near attaining the BLV or a positive land value of any kind. Given that his evidence was that this base case appraisal i.e. without placemaking, should be given the greatest weight when considering the viability of the development,[52] it cannot be the view of the scheme's funders that achieving the Benchmark Land Value is a pre-requisite to the release of further funds. Mr Hodson claimed that the discharges and modifications sought were sufficient to achieve this, apparently notwithstanding the negative return against the assumed Benchmark Land Value.[53]

73. The further difficulty with any attempt to rely on the Benchmark Land Value is that the Appellant has failed to provide details to BPC of the purchase price of the land it purchased in 2016, so that the claimed need to attain the assumed £100,000 per acre could be established.

74. In contrast, the approach deployed by Mr Leahy in his appraisals more properly reflects the Master Developer approach. The Master Developer owns the land and has that as its source of income. In circumstances where a development is underway, the principle that it is for developers and not local planning authorities to assume the risks of development,[54] means that the land value should diminish before any consideration is given to discharging and modifying section 106 obligations. It is not appropriate to treat the Benchmark Land Value as a necessary requirement of viability in such circumstances.

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[51] See CD14/27 Viability SOCG Appx Pt 2 of 3
[52] XX ABC
[53] XX ABC
[54] PPG ID 10 para.18

75. Provided that a neutral or positive land value is achieved, the development is viable. That, of course, is consistent with Mr Wheaton's proof of evidence in which he advanced neutrality as being a viable position.[55] As Mr Leahy's placemaking appraisal shows, without any proposed discharges or modifications, the scheme can deliver a return of £87M to the Master Developer. That is a viable position.

Appropriate Evidence

76. The weight to be given to a viability appraisal is agreed to be informed by whether it is supported by appropriate available evidence which is transparent and publicly available.[56] Local Plan Policy IMP2 expressly provides that where, by reason of viability, it is proposed that a development should not be required to meet the policy and infrastructure requirements set out in the Local Plan, that the application must be supported extensive evidence which is transparent and which will be rigorously tested by independent advisers.[57]

77. Beyond the absence of any evidence of the land purchase price in 2016, there are other significant issues with the extent of the evidence which the Appellant has put into the public domain to support the viability process.

[55] See CD2/23 para.5.13 p.12
[56] Wheaton XX ABC and see PPG ID 10-018
[57] See CD 3/1/3 Ashford Local Plan Policy IMP2 pdf 345 and supporting text 11.12 – 11.25. There is no separate policy or guidance dealing with section 106A applications.

78. The comparable information provided on house sales is limited in scope and not indexed to the date of the appeal, which is the agreed valuation date. The infrastructure costs information had literally to be dragged out of the Appellant and was provided only on 17 February 2025. However, even then, all that was provided were summaries of costs incurred with no detailed analysis by a quantity surveyor. As Mr Leahy explained,[58] funders of a major development such as this would expect an expenditure monitoring regime to be in place with regular quantity surveyor monitoring reports produced including expenditure to date and forecast expenditure. This would have allowed the *normal* process of discussion between quantity surveyors on the figures. That has not been possible and it has been necessary to work with the rudimentary collection of material which the Appellant has belatedly produced.[59]

79. More egregious still is the failure to produce the details of the Parcel sales to developers. The Parcel sales value is the key input into the Master Developer appraisal. Whilst both Mr Wheaton and Mr Leahy adopt the approach of undertaking a residual land value calculation to identify the plot sales value which would be paid to the Master Developer, where there is available evidence of actual plot sales, that should be used where relevant to sense check the results of the Plot Developer residual appraisals. The RICS guidance Comparable Evidence in Real Estate Valuation[60] stresses that the information derived from comparable market transactions will normally provide the best evidence of value.[61]

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58 Evidence in Chief
59 CD 3.21 Leahy proof p.11 para.4.11 and Leahy evidence chief and response to Inspector's questions.
60 CD14/31
61 Ibid Sections 4.1 and 5.1

80. Whilst Mr Wheaton produced a note[62] asserting that the information which had been requested was not sufficiently recent or similar to the current situation to provide a useful reference, it transpired that Mr Wheaton himself had not seen any of the details[63] and the content of that part of his note was effectively authored by the Appellant. It provides no proper basis for withholding the relevant information.

81. The mere fact that there may be differences between the transactions to be compared does not mean that the viable evidence does not have utility. It would be a rare case in which comparable evidence matches exactly the asset subject to valuation.[64] Where there are differences, those require analysis and interpretation in order to decide whether the comparable evidence is relevant. Further, the mere fact that a transaction may be historic does not mean that it has no utility where it can be combined with market trends between the date of the comparable transaction and the valuation date.[65] The issues raised in Mr Wheaton's note might identify the need for careful analysis and interpretation; they do not justify withholding the information.

82. That leaves the Appellant's sole basis for the withholding of the information being Mr Hodson's claim to confidentiality. The Councils have been provided with sight of no contractual provision providing that there should be no disclosure of the relevant details and, even if one exists, the Appellant could and should have (but

[62] CD14/19
[63] Hodson XX ABC – confirmed by Wheaton XX ABC
[64] CD 14/31 para.3.1 pdf 10
[65] Ibid para.4.1.5 pdf 15

has not) sought consent from those parties entitled to confidentiality to its disclosure. It is difficult to see why, for example, the details of the BDW parcel purchase is confidential given that the purchase price is in the public domain. To the extent that it might have been affected by Hodson agreeing with BDW to deliver elements of the works,[66] nothing has been produced which would support the claim that details thereof are confidential. Even if they were, information could have been presented in a way which respected any confidentiality but still allowed proper analysis. The undisputed evidence that BDW paid £11M which is the equivalent of £66,666 per plot,[67] when Mr Wheaton's revised assessed plot value is £27,826, cried out for an explanation of the works it is claimed Hodson undertook for BDW, but none has been provided. There is no suggestion that these were abnormal works and, therefore, their equivalent value should already be accounted for in the appraisals.

83. The clear inference is 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, by resisting the Councils' reasonable requests for relevant evidence. The result of its refusal to provide the actual prices achieved for actual parcels sold in the real world as Master Developer, has resulted in the only evidence (which is unchallenged) being the BDW purchase at £11M. That is a value which is wholly inconsistent with Mr Wheaton's appraisal and no material weight should be given to his appraisals.

[66] See CD 14/19 p.4
[67] See CD3.21 para.6.1.8 p17

Plot Developer Appraisals

84. Whilst many of the assumptions are agreed in the Plot Developer Appraisals,[68] there are two areas of dispute:

    i) The Open Market Sales Values;

    ii) Development and Land Finance Costs

    Together, these account for a difference of £149,678,486 between the parties.[69]

Open Market Sales Values

85. Mr Wheaton's analysis of Open Market Sales Values is limited to just 49 of the 385 properties which have been sold on the Site.[70] In contrast, Mr Leahy's appraisal takes account of the sales of 280 open market sales which have taken place and are recorded. Mr Wheaton has also confined his assessment to a three year window and a selection of the properties sold within that three year period. That results in a small sample of the properties which have, in fact been sold.

86. Further, only one of the sales relied upon by Mr Wheaton dates to 2024; of the others, 2 took place in 2021, 36 in 2022 and 9 in 2023. However, despite the remove from the valuation date, Mr Wheaton applies no indexation to the values he has taken into account. The result is that his appraisal allows for indexation

[68] See CD14/27 Viability SoCG Table 1
[69] CD 14/27 Table 1
[70] See CD2/17 FVA January 2025 Appx B

of costs to the valuation date, but no indexation of values. That is simply wrong. The values should have been indexed and, given the size of the scheme, even a small difference in the value per square foot of the houses has the potential to impact significantly on the overall GDV.

87. Confining the appraisal to a small sample of just 49 dwellings leads to the sales value being seriously underestimated. Taking the larger sample used by Mr Leahy, the average value psf is £367; some £17 psf greater than assumed by Mr Wheaton. Whilst Mr Wheaton sought to contend that Mr Leahy's sample was skewed by the inclusion of the Jarvis Homes development (with its high specification); Mr Wheaton's maths was wrong. Even without the Jarvis Homes dwellings, the average psf would reduce only to £362 psf i.e. by £4psf or 1.2%. Not the £356 psf Mr Wheaton claimed.

88. In seeking to respond to my request that he agree the effect on the average psf of excluding the Jarvis Homes sales values, Mr Wheaton has sought to introduce the effect on median sales values instead. Other than to seek to distract from his mathematical error, the reason for this is unclear. The agreed note states that Mr Wheaton's preference is to use median sales values when considering a large sample. However, that is not consistent with his use of the average sales value psf used in his appraisal and, if used for his appraisal would, it is assumed, also reduce his GDV to the further detriment of the scheme's viability on his preferred base case appraisal.

89. In contrast, Mr Leahy's use of the average is robust and the inclusion of the Jarvis Homes house sales is also appropriate. The Appellant's attempt to argue that there will be no such further development at Chilmington Green is not consistent either with the AAP, which provides for a very low density across the southern fringe of the development,[71] or with the approved density parameter plan which shows that lower density development comparable with Chilmington Hamlet (where the Jarvis Homes dwellings have been constructed), will be built over sizeable parcels across the development as a whole.[72] That is consistent with the fixed assumption in the viability review mechanism in the Agreement which, in relation to Base Build Costs, uses the last median BCIS rate available before the relevant viability phase review,[73] reflecting the Appellant's view at the time that the development would accommodate a material number of properties of higher specification and therefore higher sales value.

90. There is, therefore, no basis upon which to reduce the average psf assumed by Mr Leahy and it should be accepted as the most robust figure before the inquiry.

Plot Builder Finance Costs

91. The principal difference between Mr Leahy and Mr Wheaton in relation to both the Development and Land Finance costs relates to how the agreed rate of interest (7% in both cases) is applied. Mr Leahy has applied the Development Finance costs of 7% to the average capital employed per annum based on a

[71] CD3/1/1 Policy CG6
[72] See CD14/9A pdf p.4 Density Parameter Plan
[73] See 2/21 Schedule 44 p.384

cash flow for each phase. This reflects the Appraisal Principle that modelling should represent the most effective and efficient way objectively to deliver a reasonable development performance i.e. that it fully reflects the way in which a developer would actually carry out the development.[74]

92. In contrast, Mr Wheaton's appraisal disregards this principle and applies the finance cost as a fixed percentage not connected to the timeline of the scheme. That does not reflect how a housebuilder would seek to balance its cash flow over the course of its development in order to minimise its finance costs. It is therefore unrealistic and particularly so, in the context of a development with an assumed mix of 92% houses and just 8% flats, where it is relatively easier to balance cash flows.[75]

93. Mr Wheaton's attempt to cast doubt on Mr Leahy's appraisal on the basis that, taking the recorded construction finance costs in the Argus modelling, would result in an unrealistically low Development Finance costs of 0.05%, took him nowhere. As Mr Leahy explained, what the appraiser has to do with any model is to stand back and look at the overall interest costs rather than a single element of the model's output. For the development as a whole, his cash flowed appraisal results in an effective rate of 3.8% on development costs excluding land and 3.2% including land.[76] That may be compared with the Development Finance Cost assumption of 3% which is one of the fixed assumptions within the Viability

[74] This principle was accepted by Wheaton XX ABC and is set out in CD14/29 Financial Viability in Planning Conduct and Reporting pdf p.24
[75] Accepted by Wheaton XX ABC
[76] See CD14/27 Table 1 Development Finance cost of £58,293,674 which over the Construction costs of £1,514,121.415 is 3.8%

Review Mechanism under the Agreement.[77] That shows that Mr Leahy's figure is the appropriate one to use, as opposed to Mr Wheaton's blunt and unrealistic approach.

Housebuilder Land Finance

94. There is a similar dispute between the parties in relation to Land Finance. Mr Leahy has applied the 7% finance rate to the residual land value on a cashflowed basis, thus more accurately reflecting the cash locked up in the land. Payment is assumed to be required by the Master Developer from Plot Developers up front on the purchase of the relevant site. Mr Wheaton's assumed percentage against land value does not allow for the reduction in cash locked up as sales progress and is unrealistic. Mr Leahy's effective rate of 3.28% on a cash flowed basis compares favourably with the 4% rate used by Mr Wheaton in his Plot Developer appraisal for Barking Riverside[78] and should be preferred.

Plot Receipts

95. The Appellant sought to raise for the first time on 24th April 2025 a minor discrepancy between Mr Leahy's reported Plot Receipt for Plot 2 and the Argus example appraisal.[79] As Mr Leahy explained this was no doubt due to seeking to report the outputs using Mr Wheaton's appraisal format for consistency. The difference is immaterial; 1% and does not affect the overall analysis.[80] The

[77] See Agreement Schedule 44
[78] CD14/27 Appx E p.15
[79] Leahy Apps CD3/22 Appx F(i) figure £28,264,043 and Appx F(ii) £28,557,057
[80] As Mr Leahy explained in XX and Re-Xn

attempt by Mr Harwood to suggest that a similar issue might exist with the appraisals for the other Plots takes him nowhere. There would be no material effect on the output given the small discrepancy, even if the formatting led to its replication. Further, Mr Leahy's workings have been freely available to the Appellant since February and had there been any substance in the point, it should have been raised through the SOCG process, rather than for the first time at the viability session of the Inquiry.

Master Developer Appraisal

96. The areas of dispute between the parties relate to the Master Developer Finance. They are three fold. Firstly, Mr Wheaton's use of a finance rate of 11.7% for calculating the Master Developer's Finance Cost. Secondly, Mr Wheaton's application of the finance rate to the balance at the end of each year rather than applying it to the average capital employed, as Mr Leahy has done. Thirdly, consistent with his Plot Builder Appraisal Mr Leahy has assumed that the Master Developer will receive payment for the land parcel sales at the beginning of each review phase, whereas Mr Wheaton assumes that income will be spread evenly over the phase.

97. The second and third areas of dispute raise the same issues as the application of the 7% Development and Land Finance costs in the Plot Builder appraisals. Mr Leahy's appraisal properly reflects the requirement that appraisals should seek to replicate the real world and how developers will seek to make

developments work i.e. value engineering of the cashflow. Mr Wheaton's appraisal does not.

98. As to the 11.7% finance rate, Mr Wheaton seeks to rely upon this as a market rate. However, whilst it might be the rate which Hodson has been able to secure in the market,[81] there is not a shred of evidence that it is appropriate to apply this rate as an input into a developer blind objective appraisal. No information has been provided by the Appellant as to the market exercise which was apparently undertaken by Hodson to establish this as the appropriate rate. As Mr Leahy explained, the rate should reflect the rate payable on a 100% debt basis because that eliminates any developer specific character from the appraisal. The rate should be generic to the type of the scheme.

99. The 11.7% actually reflects the *Appellant's* pay rate on a debt equity basis rather than a developer blind finance cost. Its use results in the interest costs equating to 37.3% of the infrastructure and section 106 costs. Mr Leahy has never seen an allowance of that scale.[82] As with all other appraisal inputs, developer specific ones, should be excluded in favour of an objective rate. That is the 7% rate employed by Mr Leahy. That rate is also consistent with the rate used by Mr Wheaton in his Master Developer appraisal for Barking Riverside on the basis that this reflected a rate that is "*appropriate to a scheme of this scale and nature and consistent with other similar proposals*".[83]

[81] See CD2/17 para.4.2 second bullet p.6
[82] Evidence in Chief
[83] CD 14/27 Viability SoCG App E p.15

100. Mr Wheaton's attempts to distinguish Barking Riverside from Chilmington Green were unconvincing and inconsistent with his own appraisals. The fact that the Master Developer at Barking Riverside is a Joint Venture of standing, simply makes the point that an objective appraisal focusing not on Hodson (with its self-declared SME status) but rather on what a Master Developer used to developing the scale of development involved here would be able to obtain in the market, would conclude that a 7% rate is appropriate. Further, the Chilmington Green development, like Barking Riverside, *has* benefitted from substantial public subsidy e.g. to assist in the provision of the secondary school and therefore there has been de-risking which should be reflected in the finance rate.

101. The use by Mr Wheaton of the 11.7% finance cost in both his existing and proposed scenarios demonstrates that neither is objective. It cannot possibly be correct to apply an 11.7% finance rate in both scenarios given that, with the proposed discharges and modifications, the development is de-risked by £104M. That de-risking is the whole purpose of the appeal. In that context, to maintain the 11.7% rate in both appraisals is wrong and simply reinforces the conclusion that Mr Wheaton's appraisals are designed to inflate costs to the detriment of the viability of the scheme.

Placemaking

102. Whilst Mr Wheaton was equivocal as to the reliance which should be placed on his 2% pa place making premium appraisal, there is no dispute that with the existing obligations, this is a reasonable and realistic assumption to employ.

103. One can quite understand Mr Wheaton's nervousness at placing reliance on a place making premium in the context of his clients' proposed modifications and discharges. Unlike his appraisal for Barking Riverside, in which he undertook a detailed appraisal of a likely placemaking premium by reference to the delivery of highway improvements, open space provision, leisure and recreation facilities and public amenity,[84] he had done nothing to support his placemaking appraisal which is his sole sensitivity analysis. It is stretching credulity to contend that a "place" with the issues outlined in paragraphs 38 to 63 above would deliver any meaningful placemaking premium. The net effect would be that, on Mr Wheaton's proposals, the development would remain in deficit to the tune of -£228M.

Peak Debt

104. Whilst the Appellant has repeatedly sought to rely on the peak debt issue to justify its discharges and modifications, when the correct inputs are made to the appraisal with the appropriate value engineering and place making premium, the levels of peak debt are less than would result on Mr Wheaton's preferred base case appraisal, which is said to by the Appellant to be fundable.[85]

Viability Review Mechanism (VRM)

[84] CD14/27 App E Appx6 BRL Placemaking Uplift Assumptions
[85] Ibid Appx.H Leahy placemaking appraisal peak debt of -£34,008,956; Wheaton with modifications but no placemaking -£34,873,168

105. Whilst not directly relevant to the issue of the appraisals, I touch here on the Appellant's contention that the VRM in the Agreement is constraining land sales to housebuilders. Other than assertions by Mr Hodson or others relying on his assertions, there is no evidence to support this claim. None of Mr Collins' appendices identify this as being a constraint to land sales and, as Mr Leahy explained, whilst not typical, it is in his experience possible to structure land deals to accommodate any longer term uncertainty which the VRM might give rise to.[86]

106. Whilst the Appellant appears to be in denial on the issue, the real constraint on the ability to do land deals is its failure to address the need to secure the A28 improvements. Unless and until that is resolved, no housebuilder will be interested in buying land because it will not know when, if ever, it would be able to build with a prospect of occupancy being possible.[87] It is that single constraint which is constraining development, but rather than providing any solution the Appellant has simply proposed that the Schedule 18 obligations be discharged. That is plainly unreasonable.

VII. Other Matters

(i) Housing Mix

107. I need to touch on the issue of development mix which reared its head at the Inquiry largely as a result of the Appellant seeking to avoid the obligation to provide the fourth primary school. The pursuit of that objective was so

[86] Response to Inspector
[87] Key requirements as Mr Hodson was keen to stress on Day 1 of the inquiry.

determined that it apparently overlooked the fact that the instruction given to Mr Wheaton was to appraise the development with a mix of 92% houses and 8% flats.[88] This inconsistency of approach was symptomatic of the Appellant's overall approach which is not principled, structured or well thought through.

108. There was, in any event, nothing in the point. Whilst Mr Collins sought to raise a number of issues which were said to constrain the ability to deliver 5750 dwellings with the indicative mix, given that the Appellant has itself submitted a Masterplan for Phase 2 of the development which is consistent with the Condition 100 Melton Mix, there can be no sensible contention that the mix is unachievable with 5750 dwellings. Demonstrating otherwise would require a much more detailed assessment than Mr Collins has sought to undertake.[89]

(ii) Appellant's response to Inspector's Questions Q8-17

109. The Council takes issue with the Appellant's responses to Q12 (Public Art Maintenance), Q13 (Indexation) and Q16 Settlement Agreement Clause 2.2.

110. In relation to the maintenance of Public Art the Appellant asserts that the mere identification within the CMO's internal governing documents of maintenance, renewal and replacement of "Public Art required pursuant to the terms of the Section 106 agreement and the Planning Permission only" as one of the "Essential Activities" of the CMO to be carried out using the Rentcharge, imposes

[88] CD2/17 FVA Appx A

[89] CD14/20 is nothing more than a very high assessment based on submitted and not approved RMAs. It does not show that the submitted RMAs are the only way the site could be developed; indeed the submitted Masterplan for Phase 2 shows that it is not.

an obligation on the CMO to maintain *any* installed public art on the site. However, clause 4.1.4 of the Rentcharge Deed provides that the CMO "shall not be obliged to supply the Estate Services in respect of any part of the Estate which the Manager does not hold a freehold or leasehold interest or the Manager does not benefit from an agreed licence to enter on reasonable terms that enable it to carry out the relevant Estate Service.[90] In its relevant proposed discharges and modifications the Appellant provides no provision for the transfer or leasing of land on which it proposes public art is installed to the CMO, nor any provision for a licence allowing the CMO to access land on reasonable terms for the purposes of maintaining the public art. The Appellant's proposed arrangements do not therefore secure the continued provision or maintenance of the public art by the CMO or, indeed, anyone. Further, the effect of the Appellant's proposed discharges of the obligations in relation to the Deficit Grant Contribution is that the CMO would be insolvent by 2027-28 and, in consequence, not in a position to maintain anything.

111. As to Indexation, Clause 27.2 sits within the context of Clause 27.1. The purpose of Clause 27.2 is to provide for a bespoke application of indexation in relation to Schedules 8 and 12, but, in accordance with Clause 27.1, only "where Index Linking applies". Whilst the Appellant proposes the retention of Index Linking in Schedule 8[91] it is not retained in its Schedule 12 proposals[92] which supports the Council's interpretation of the effect of its modifications.

[90] CD13/8 pdf p.8
[91] See CD2/21 Schedule 8 para.1.1.1
[92] CD2/21 Schedule 12 para.1.1.1

112. Finally, in relation to the Appellant's response to Q16, the Appellant chose not to engage with the process laid down in the settlement agreement and to pursue an appeal without allowing the Council first to determine the applications. The suspensory effect of clause 2.2 therefore ceased on 28 May 2024 by virtue of the clear terms of clause 2.3. The characterisation of the Council's actions in the Appellant's response of the Council's actions is not accepted but in any event is irrelevant to the issue.

Conclusion

113. For these reasons and others which have been fully set out in the Councils evidence, the appeals should be dismissed save where the Council has indicated that it specifically accedes to a requested discharge or modification. Owing to the way that the Appellant's requested discharges/modifications have been advanced, amended, withdrawn or partially withdrawn, this applies only to Request 12, as set out in Appendix 2 to the SoCG.

SIMON BIRD KC
JONATHAN WELCH
1 May 2025

Francis Taylor Building
Inner Temple
London
EC4Y 7BY

DX 402 4DE

List of appearances for Ashford Borough Council

Simon Bird KC and Jonathan Welch of Counsel

Instructed by: Jeremy D I Baker, MA, Principal Solicitor and Deputy Monitoring Officer, Ashford Borough Council

Witnesses:

- Faye Tomlinson, BA (Hons), MA (UD), MRTPI. Team Leader, Strategic Applications, Ashford Borough Council.

- Andrew M Leahy, BSc FRICS MIoD. Director, Bespoke Property Consultants.

- Neil Shorter, Chilmington Management Organisation Board Member.

ANNEXE – VIABILITY AND S.106B – RESPONSE TO INSPECTOR'S LETTER OF 17.02.2025

This Annexe responds to the fifth issue raised in the Inspector's letter, seriatim:

1. The general concept of viability has nothing to do with the useful purpose of particular obligations. Viability may be relevant to viability review mechanisms within a s.106 but has no general applicability to obligations for which it is not the purpose.

2. If the scheme would not have been permitted without the particular obligation, then viability can have no bearing on the useful purpose.

3. In response to this question:

    a. Yes, a decision maker may conclude that an obligation is not in or of itself so important for the scheme that permission might not have been granted without the obligation to make the development acceptable in planning terms, and still conclude that it serves a "useful purpose". This point is confirmed by *Renaissance Habitat* at [34] and *Mansfield* at [40] & [48]. Regulation 122 of the Community Infrastructure Regulations 2010 is not relevant to the exercise under s.106A.

    b. Yes, that conclusion may, and in fact *must*, be reached regardless of its effect on viability, since the useful purpose of the obligation in question exists regardless of whether a development will be delivered (which is a separate question).

PINS Refs: APP/W2275/Q/23/3333923 & APP/E2205/Q/23/3334094
LPA Refs: AP-90718 & AP-90647

APPEAL PURSUANT TO S.106B TOWN AND COUNTRY PLANNING ACT 1990

BY: HODSON DEVELOPMENTS (ASHFORD) LIMITED; CHILMINGTON GREEN DEVELOPMENTS LIMITED; HODSON DEVELOPMENTS (CG ONE) LIMITED; HODSON DEVELOPMENTS (CG TWO) LIMITED; AND HODSON DEVELOMPENTS (CG THREE) LIMITED

LAND AT CHILMINGTON GREEN, ASHFORD ROAD, GREAT CHART, ASHFORD, KENT

APPENDIX TO CLOSING SUBMISSIONS

On behalf of

ASHFORD BOROUGH COUNCIL

DEFINITIONS

Request 1

The Appellant's request to modify the definition of "Commence (Statutory) the Development" should be rejected.

The existing wording, as part of the obligations to which it relates, continues to serve a useful purpose. It would not serve that useful purpose equally well if it had effect subject to the modification.

It is accepted that there is a mistake in the definition - the reference to section 91 should be a reference to section 56 (see the General SoCG). However, there is no justification for the other amendments proposed. The definition uses defined terms and already refers to the planning permission granted under reference 12/00400/AS.

RELEASE FROM LIABILITY

Request 4

The Appellant's request that Clause 2.2 be modified to release from liability any housing provider which by purchasing the whole or any part of the land comprised in the Site becomes an Owner or Paying Owner[1] and who develops housing for rental or shared ownership, should be rejected.

The Council does not agree that this request is to modify or discharge a planning obligation; thus, it is outside the scope of s.106A and hence of this Appeal. Section 106 draws a clear distinction between "obligations" and the provisions relating to who is to be bound by those obligations (see section 106(4)). The proposed change to the wording of the Agreement relates to a proposed generic release from an entire range of planning obligations and cannot be progressed through the statutory procedure.

Without prejudice to the above, the Council considers that requiring the planning obligations to be and remain binding upon all successors in title to the site and parts thereof, serves a useful purpose in seeking to ensure that the obligations are fully complied with, whoever is the owner, and avoiding transfers of parts of the site which have as their object or effect (intended or not) the obstruction of enforcement of planning obligations.

Enabling various potential owners of parts of the site to have the benefit of blanket exemptions from enforcement would not serve this purpose equally well, as it would incentivise the structuring of ownership and/or transfers so as to result in obligations not being complied with and/or enforced; it would result in piecemeal compliance with obligations across different parts of the site; and it may mean that obligations are never complied with as intended, all of which would be contrary to the public interest.

The modification of the obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1 & CG22 and the National Planning Policy Framework 2024. This conclusion is also consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM1 & IMP1.

INDEX LINKING

Request 5

The Appellant's request that Clause 28 be modified to replace all references to "index linking" with "Index Linking" should be rejected.

The existing wording, as part of the obligations to which it relates, continues to serve a useful purpose.

Clause 28 sets out the methodology for index linking and the amendment suggested is not required to clarify or correct the drafting. The reason index linking in clause 28 does not refer to the defined term by capitalising is because clause 28 itself describes the process of adjustment. The proposed modification would therefore not serve that useful purpose equally well.

[1] The reference to a purchaser becoming a **Paying** Owner is in fact misconceived. This definition in Clause 1.1 is a closed one and does not extend to any successors in title – see generally clause 2 and particularly clauses 2.11 and 2.18.2.1 for the ways in which Paying Owners and their successors in title are separately dealt with.

BASE DATE FOR INDEXATION

Request 6

The Appellant's requests 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 provide that in the event that an Index Linked payment exceeds the cost of the item for which it is to be paid, the amount payable shall be reduced and only the amount reduced shall be payable

should be rejected.

a. The obligation continues to serve a useful purpose. Indexation ensures the value of the contributions agreed when planning permission is granted, and consequently purchasing power, is maintained in the future and therefore the same level of service/infrastructure can be provided. The Council's planning committee resolved to grant planning permission in 2014. The indexation date of 2014 reflects the cost of the planning obligations when the planning committee made their resolution.[2] Amending the indexation date to 2018 would not serve the useful purpose equally well because it would reduce the contributions by an arbitrary amount equal to 4.3 years indexation, reducing the Council's ability to deliver the required services/infrastructure to serve the new community and reducing the quality of facilities the Owners and Paying Owners are required to deliver under their obligations.

   The Appellant states that "*If these section 106 payments and capital contributions were calculated at today's date they would be significantly lower than the amounts plus indexation being demanded or falling due*". However, the Appellant provides no evidence to demonstrate that this would be the case.

   The Council does not agree that the rate of indexation is over-inflating the obligations. It is already evident from (i) discussions with the Appellant about the budget identified in the s106 Agreement for Play Space 1 and (ii) the Appellant's arguments, under Request 25 below relating to the cost of the Natural Green Space, that the budgets identified in the Agreement, index linked in accordance with the Agreement, do not provide sufficient sums to deliver the quality facilities required by the outline planning permission, the Design Code and the Appellant's design and access statement. Rather than 'over-inflating' the sums as stated by the Appellant, the index linking is generally not keeping pace with the cost of delivering the infrastructure required as is demonstrated by BPC's analysis.[3] Modifying the base date for indexation, as proposed, would undermine the ability to deliver the quality of facilities envisaged for Chilmington Green.

b. The additional paragraph would not serve a useful purpose. There is already provision in the Agreement that requires any unspent or uncommitted contribution to be repaid within 10 years of receipt, ref: clause 27.1.3.

The modification of the obligation is contrary to the Chilmington Green Area Action Plan 2013 Policy CG1 and the National Planning Policy Framework 2024. This conclusion is also consistent

[2] See CD 6/15 Chilmington Green Infrastructure Costs Plan 2014

[3] See CG14/27 Viability SoCG Appx D which shows that taking the three items costed by Brookbanks, the current BCIS median costs exceed the original Agreement sum with indexation from 2014.

with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policy SP1.

AFFORDABLE HOUSING

Request 7

The Appellant's proposed discharge of the obligation to provide 70 dwellings of extra-care housing units should be rejected.

The Extra Care provision secured by the Agreement serves three useful purposes. Firstly, the proposed 70 units represent 70% of the 100 affordable housing units proposed in Viability Review Phase 1 ("VRP1") of the development (CD3/15 para.3.8 p.7). Secondly, those units would contribute to meeting the identified need for Extra Care Accommodation in the Borough. Thirdly, it ensures that the mix and types of housing provided contribute to a mixed and balanced community.

The Council currently has 255 households living in temporary accommodation and circa 1800 applicants on the Housing Register (CD3/15 para.3.4 p.6). The SHMA 2014 (CD4/7) established that around 50% of all future dwellings in the borough should be affordable in order to meet the objectively assessed need. In relation to Extra Care, the County Council, through its "Accommodation with Care & Support Market Position Statement 2021-2026 has identified that by 2031, an additional 72 units of Extra Care housing will be required (CD3/15 para.3.6 p.7).

Discharge of the obligation would result in only 3% of the units constructed in VRP1 being constructed as affordable units despite the pressing need for affordable housing and the need to ensure that a balanced and mixed community is delivered. Further, none of the 10% of affordable dwellings required to be constructed in VRP2 to VRP10 are to comprise of or include extra care housing. Any provision of such housing across the Chilmington Development as a whole would only be able to be required where Viability Review concludes that additional provision of affordable housing would be viable, and the Council concludes that its provision would satisfy the further special considerations set out in Schedule 23 para.3.21.2.

The requirement to provide 70 Extra Care dwellings in VRP1ensures that the development complies with AAP policy CG1 and AAP policy CG18 (CD3/1/1 pp.21 & 97 respectively) which aims for the development to provide 30% affordable housing. It also ensures compliance with NPPF paras. 64 and 66. Of the 70 dwellings, the obligation secures 28 as shared ownership and 42 as affordable rent or intermediate affordable housing.

The Appellant's assertion that it has been unable to find a provider to deliver the Extra Care units is unsupported by any evidence and, in any event, should be treated with caution as the interest of any housebuilder/housing provider in the site is likely to be being constrained by the Appellant's failure to deliver a bond for the A28 works, thus restricting occupations to 400 units.

As to the request that the provision of affordable housing units other than through Registered providers should be sanctioned by revising the definition of "Registered Provider", the definition requires a provider of social housing to be registered with the regulator of social housing and to be approved by the Council. This definition continues to serve a useful purpose because it ensures that the social housing provider is known to meet the required regulatory standards for social housing. To modify the definition to allow the affordable housing units to be provided by

providers of social housing that are not registered with the regulator of social housing would not serve that useful purpose equally well because the Council would not know whether the provider meets the required standards for social housing.

The discharge of the obligation and modification of the definition are contrary to the Chilmington Green Area Action Plan 2013 Policies CG1 & CG18 and the National Planning Policy Framework 2024. This conclusion is also consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, HOU1 % HOU18.

Request 8

The Appellant's requested modifications which would provide that:

The 24 affordable dwellings in Viability Review Phase One be constructed prior to the occupation of the 1000th dwelling and occupied as shared ownership units prior to the occupation of the 1300th dwelling, should be rejected.

The need for affordable housing within the borough includes not just shared ownership but also affordable rented properties. The obligation serves the useful purpose of ensuring both that affordable housing need is met to the extent possible and that a mixed and balanced community is delivered. That accords with policies CG1 and CG18 of the AAP (CD3/1/1 pp.21 and 97 respectively) and policy HOU18 of the Local Plan (CD3/1/3). It also accords with NPPF paras.64 and 66.

The Appellant has advanced no evidence justifying its proposed modification which would require all 30 units in VRP1 to be shared ownership units. Whilst it has asserted that the proposed modification has been advanced "in the light of current market conditions and operator response", there has been no meaningful explanation of the issues faced and no evidence produced of the attempts made to engage with registered providers to deliver affordable rented units in accordance with the obligation. It is also the case that the 6 units of affordable housing required to be provided on the Jarvis VRP1 land have already been provided as a mix of affordable rent and shared ownership (CD3/15 para.6.2 p.13), thus showing that affordable rent is achievable.

As to the proposed modification to the affordable housing delivery triggers, the delayed affordable housing provision sought should be rejected. There is an urgent need for provision now. Delaying provision until 1300 market dwellings are occupied would mean that no affordable dwellings are provided in VRP1 (see CD3/15 para.6.3 p.13), given that this phase comprises 1000 dwellings.

The obligation continues to serve a useful purpose and it would not serve that purpose equally well if modified as proposed.

Request 9

The Appellant's request that the obligation should be modified to require the provision of the minimum 10% affordable housing in VRP 2-10 to be provided no later than the occupation of 95% of the market dwellings rather than no later than the occupation of 75% of the market dwellings should be rejected.

The obligation serves the useful purposes of ensuring the timely provision of affordable housing to meet the need which exists and the delivery of a mixed and balanced community as required

by AAP policies CG1 and CG18 of the AAP (CD3/1/1 pp.21 & 97 respectively), policy HOU1and HOU18 of the Local Plan (CD3/1/3) and paras.64 and 66 of the NPPF.

Delaying the provision of the much needed affordable housing until as late in each VRP as 95% would self-evidently not serve either purpose equally well. It would have the effect that between 100 and 120 additional market dwellings would be allowed to be occupied in each of these VRPs before the affordable housing is provided (CD3/15 para.6.4 p.13). Need would go unmet for longer and successfully establishing a balanced community would be delayed throughout the build-out of the Development.

Request 10

The Appellant's request that the tenure split of the 10% affordable housing in each VRP should be modified to 10% affordable rent and 20% shared ownership should be rejected.

There is no dispute that the obligation continues to serve a useful purpose; the delivery of the appropriate mix of affordable housing to meet need. The Council accepts that some modification could be made to the obligation which would serve that useful purpose equally well, having regard to assessed affordable housing need and has indicated that it would be prepared by agreement to amend the obligation so that the 10% affordable housing provision is split 33% affordable rent and 67% shared ownership (CD3/15 para.6.5 p.13). That would accord with the tenure split required by policy HOU1 of the Local Plan (CD3/1/3) applied to a level of provision below the policy requirement. The Appellant has indicated that it is content with that and this issue can be dealt with outside the appeal (see General SoCG).

CARBON OFFSETTING/COMBINED HEAT AND POWER

Requests 11 & 12 are accepted in part for the reasons set out in the Council's Schedule of Responses (CD3/1/1/1). See the General SoCG for the outstanding consequential issues.

CHILMINGTON MANAGEMENT ORGANISATION

Request 15

The Appellant's proposal to discharge the obligation to repair the CMO's First Operating Premises where notified of defects should be rejected.

The obligation continues to serve a useful purpose as the specified defects liability period has not expired in relation to grassed areas. The CMO should not have to bear the cost to repair defects that are identified within the time periods stated in the Agreement, and the CMO is not being provided with any alternative means of obtaining remedy for defects, such as collateral warranties and indemnities from the relevant professional team and contractors involved in the construction. It is therefore the sole responsibility of the 'Owners' who provide the premises to ensure they are of the quality agreed in the Design Brief and Specification and that any defects identified after handover are remedied.

This obligation ensures that a building and associated landscaped areas of sufficient quality is delivered to the CMO and that defects are dealt with promptly to enable the CMO to occupy the premises and undertake the operations required of them. It was the Owners responsibility to

maintain the premises during the period following its construction but prior to handover to the CMO.

The discharge of this obligation would not serve that useful purpose equally well because it would mean that the CMO would have to bear the costs of rectifying any defects in the landscaped areas. The fact that there was a time lag between completion of construction and handover is not a reason to discharge this maintenance obligation.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1 & CG10 and the National Planning Policy Framework 2024. This conclusion is also consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030, policies SP1 & IMP4.

Request 16

The Appellant's request that the obligation to provide the CMO Second Operating Premises should be discharged should be rejected.

The Agreement requires the submission and approval of a Design Brief and Specification ("DB&S") for the Second Operating Premises no later than 750 dwelling occupations (Schedule 4 para.5.1.1) and for them to be competed and provided with a lease granted to the CMO at no later than 1000 dwelling occupations (Schedule 4 para.5.1.3). The Second Operating Premises are defined under the Agreement (Clause 1.1) and are required, inter alia, to be of 300 square metres GIA, located within the District Centre in a permanent building and fully serviced. The budget for the Second Operating Premises is stated as £250,000 index linked up to the date of the reserved matters approval for them (Schedule para.5.1.1). Reflecting the fact that the Second Operating Premises will be provided within a permanent building constructed as part of the District Centre, this budget is for fitting out only and does not cover all the other costs of the provision of the premises.

The CMO require premises on the Site to fulfil their community and charitable objectives. That is a useful purpose. As the population of the Development grows alongside construction, the CMO's requirements for premises will also grow. Under the Agreement, a phased approach has been adopted with the CMO initially occupying temporary premises to meet the needs of up to 2400 residents. When the 1000 dwelling trigger is reached, a second temporary premises is to be provided within one of the retail, office or community spaces within the District Centre to serve the needs of up to 4320 dwellings at which point the CMO's permanent premises located within the Community Hub in the District Centre would be provided.

All three premises enable the CMO to have a presence on the Site facilitating the building of relationships with residents in an effective way. The premises also provide the community with access to community space which can also provide an income stream to the CMO. This accords with the AAP policy CG1(b) (CD3/1/1 p.21) and Local Plan policies SP1, COM1 and IMP1 (CD4/1 pp.9, 303 and 312) and NPPF paras. 96 and 98.

Reflecting their temporary role, under the Agreement, the First and Second Operating Premises are required to be leased to the CMO (Schedule 4 para.4.1.3 (a) and 5.1.3 (b) respectively). Both leases are required to be in accordance with the specified Heads of Terms which provide for 20 year terms (see Clause 1.1. definitions and Schedules 34 and 35).

The Second Operating Premises are necessary to support the growing community and are not surplus to requirements as claimed by the Appellant. The First Premises is located at the northern

end of the Site, close to the A28. This is not a central location in the context of the residents which they would have to serve if the Second Premises were not provided and the delivery of the Community Hub with its permanent CMO premises is delayed as the Appellant seeks (Request 58).

The permanent CMO premises is currently due to be provided within Main AAP phase 2 at 1800 dwelling occupations. The modification requested by the Appellant is to delay this until Main AAP Phase 3 (3250 dwellings). The consequence would be the CMO having to continue to operate from the First Premises being remote from a large proportion of the population (see CD3/17 paras.6.2 &6.3 p.19).

In addition, the First Premises are within a building of temporary construction. It is understood that this building is a temporary building designed to last 15-20 years (CD3/17 para.6.4 p.19). Given the current rate of dwelling construction, it is unclear whether the Community Hub would be delivered before the First Premises reached the end of its life.

The First Premises also has limited capacity and would not be large enough to serve the growing community if further provision is not made until 1800 dwellings are occupied (the point at which the Agreement requires the Community Hub to be delivered). That constraint would be exacerbated were the delivery of the Community Hub pushed back to 3250 dwellings as the Appellant seeks in Request 58. The First Premises has approximately 175 square metres of floorspace with two rooms which could be used by the community. There is a community space of 75 square metres and a meeting room of 28 square metres. Were the Appellant's requests accepted, this small space would have to serve a population of about 7,800 residents (CD3/17 para.6.5 p.19).

Further, the First Premises is located on part of the First Playspace (PS1) – Chilmington Square which, whilst the First Premises occupy it, is undersized. The discharge of the obligation to provide the Second Premises would have the further effect of resulting in a delay in the provision of sufficiently sized playspace and public space to meet the needs of the growing community.

The Appellant's claim that any additional space which the CMO needs over and above the First Premises can be accommodated in other community provision, including the schools. However, within Main AAP Phase 1 the only alternative community facilities proposed are the Hamlet Facilities which the Appellant seeks to push back until 3500 occupations (see Request 29). As a result, there would not be alternative community provision on Site for the CMO to use. It may be possible for some events to make use of facilities at the Secondary School, however this would only be possible outside of school use and would be at the discretion of the school (CD3/17 Para.6.7 p.20). This would be of limited use to the CMO which holds events during school hours in addition to the evenings and weekends.

The deletion of the requirement to provide the Second Premises would result in the CMO being unable to fully perform their functions as set out in the CMO Business Plan (CD13/7). It would also result in there being limited community space on the Site for residents to use, especially when considered alongside the delays proposed by the Appellant to the delivery of the Hamlet Facilities and the Community Hub. This would be detrimental to community relations and would compromise the ability to deliver a key part of the vision for Chilmington Green which is 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" (CD3/1/1 p.19).

The Modification as requested would therefore not serve the useful purpose of the obligation equally well.

Request 17

The Appellant's request that the obligation to pay the Deficit Grant Contribution be discharged should be rejected.

Under the Agreement, "Deficit Grant Contribution" is defined as:

"*The sum of £3,350,000.00 (three million three hundred and fifty thousand pounds) to be paid to the Council in ten instalments and Index Linked accordingly to use as revenue for the CMO and towards the costs incurred by the CMO in carrying out its functions and discharging its responsibilities such as maintaining and managing the facilities provided to it pursuant to the terms of this Deed and engaging in and facilitating community development activities within the Site"*.

Under Schedule 4 para.7 the payment of the Deficit Grant Contribution is required to be made in ten instalments of £330,000 at 125, 500, 750, 1000, 1250, 1500, 1750, 2000, 2250 and 2500 dwelling occupations. As the definition identifies, the monies received by the Council are to be transferred to the CMO to be used as revenue to defray the 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 terms of the Agreement and engaging in and facilitating community development activities within the Site.

Before any material operation was carried out on the Site, it was a requirement that the CMO Operating Business Plan be submitted to the Council for approval (Schedule 4 para.6) and no construction works vertically above foundation level were permitted until that Business Plan had been approved by the Council in consultation the Chilmington Green Partnership CMO Working Group.

The CMO Operating Business Plan 2018-2038 was approved by the Council on 2 August 2018 (CD13/7).

Prior to the occupation of the first dwelling within the development, it was a requirement that the CMO be created (Schedule 4 para.3). The CMO was formed as a Company Limited by Guarantee on 1 August 2019 and the CMO became a charity in March 2021. The Business Plan summarises the objects of the CMO as being to:

(i) Own, maintain and effectively manage the endowed community land, public open spaces, buildings and facilities;
(ii) Initiate, coordinate and delivery community development and cultural activities to create and maintain a thriving community; and
(iii) Promote and support environmental and community sustainability.

The Business Plan was supported by a complex financial model which incorporated all the relevant Section 106 commitments and, (from each trigger point) forecast the anticipated income and expenditure relating to each commitment type. The model used the developers then current Phase 1 housing trajectory and future phases forecasts for predicted house completions and subsequent occupations (see CD 13/7 para.6.1 p.81). The model automatically adjusted the transfer of assets to the CMO according to housing trigger points and calculated the forecast spend and income from the point of the asset transfer.

The CMO Business Plan sets out how the CMO will remain viable over the Business Plan period (2018-2038). Section 6.1 provides the financial strategy (CD13/7 p.98) with seven sources of income identified - one being "pump priming and deficit grant support from the developer consortium" (6.1.1). Para.6.1.1(b) states "*...the developer consortium will provide cash support to the Trust through two principle headings as set out in the S106,"* being the Start up Grant totalling £150,000(Index Linked) and the Deficit Grant Contribution totalling £3.35m (Index Linked) (CD13/7 p.89).

The modelling outputs showed that, before allowing for the Deficit Grant Contribution payments, operating deficits occurred up to and including Year 11 of the modelled period (CD13/7 para.6.2.1-3 pp.99-104 and Appendix K). The dependency of the CMO on the Deficit Grant Contributions and endowments is stressed in the Business Plan:

"*over the first 22 years the financial model shows that the Trust is viable due to a combination of Section 106 "deficit grant" and planned timing of the receipt by the Trust of income generating assets and the receipt of the community liabilities"* (CD13/7 p.99).

A critical part of the Business Plan is the operation of a sinking fund which the CMO will over time need to rely upon in order to replace the community assets.

The Appellant now seeks to rely on the CMO's 2024 10 year business plan for the period 2025 to 2035 (CD14/15) to support the claim that the Deficit Grant Contribution serves no purpose because the Rent Charge Deed Account is shown as being able to cover "all standard estate management service charge costs" of "any regular new build Management Company including the fees paid for estate management and the operating costs of the First Premises (see the Appellant's "Explanatory Note relating to 2024 CMO 10-Year Financial Business Plan and Budget Model in response to Ashford Borough Council's Topic Paper (CD14/15)).

However, the Explanatory Note is thoroughly misleading. Appendix 1 purports to show that for the period 2025-2035 the CMO's Joint Bank Account Balance (consisting of both the Rent Charge Deed Account and the CMO Charities Account) is in surplus without the Deficit Grant Contribution. However, what is clear from Appendix 2 is that the modelling undertaken to support this 10-year plan does not reflect the obligations contained in the section 106 and, contrary to the CMO 2018 Business Plan, assumes the CMO does not assume responsibility for assets such as the Chilmington Hamlet Facilities in accordance with the Agreement. Further, the 2024 10-year plan assumes the occupation of 2182 dwellings by 2034/35 yet the transfer of none of the following facilities in line with the obligations applicable to that level of occupations: the Second Operating Premises, the Chilmington Hamlet facilities, allotments, informal natural greenspace, Strategic Parkland (DP3), community hub and the second playspace. No modelling has been undertaken to show that, with the occupations trajectory now assumed' the CMO could viably discharge all of its obligations in perpetuity without the Deficit Grant Contributions.

Whilst the Appellant in pursuing its discharges and modifications repeatedly refers to a "standard estate management" model, the Agreement does not provide for that and the requested modifications would not result in the creation of an alternative estate management body. It remains entirely unclear who would be responsible for the maintenance of the Chilmington Hamlet facilities, Discovery Park, the Ecology Land, the Ecologically managed farmland and the woodland.

No modelling has been undertaken by the Appellant to demonstrate the effects of its inchoate proposals on the CMO's Business Plan in order to support its claims.

The obligation serves the useful purpose of providing assurance that the CMO will be in a position to manage, maintain and, as necessary replace its assets in perpetuity. It is the product of detailed risk modelling assuming different housing delivery rates and the Appellant has failed to produce any evidence that the obligation no longer serves that useful purpose.

Requests 19-21

The Appellant's proposed discharges of the obligations to provide the Commercial Estate Basic Provision, and the Commercial Estate Second Tranche and Third Tranche (or alternative cash endowment) should all be rejected.

It is essential for placemaking that a suitable management and maintenance regime is in place for the Development to ensure that the Community Assets are appropriately managed and maintained in the long term (CD3/1/1 para.8.4 p.68). The Agreement provides for the Community Assets to be transferred to the CMO (CD3/17 paras.2.2-2.5 p.3) to meet that objective.

The freehold owners of properties on the Site are required by the Agreement to pay an annual rentcharge to the CMO to contribute to the management and maintenance of the Community Assets (Schedule 4 para.8). The AAP supports the community trust model with services provided in return for a "reasonable service charge" (CD3/1/1 p.69). The Rentcharge Deed 2021 (CD13/8) identifies all the services which are contributed to by residents and details of the annual rent charge are set out in the CMO Residents Guide (CD13/10).

The commercial estate/cash endowment is required to ensure that the CMO is financially viable over the long term to enable it to meet its charitable objects. The CMO Business Plan identifies seven sources of income for the CMO, this includes "income derived from endowed commercial assets (land, property and/or money" (CD13/17 para.6.1.1 p,83). The Business Plan explains how the endowment of the commercial estate to the CMO is intended to operate (CD13/17 p.89) and how the commercial estate inputs into the Business Plan (CD13/17 Section 7).

The Business Plan explains that the annual income derived from letting of the commercial estate is intended for direct application for the furtherance of the CMO's charitable objectives (CD13/7 para. 6.1.1(c) p.89) and will, in due course provide13% of its income being a primary source of its funding or community development work and funded activities. It also provides financial security (CD13/7 section 7 p.109).

The option for the CMO to be paid a cash endowment in lieu of the second and third tranche of the commercial estate provides a safeguard enabling the CMO to the manage risk of lower than anticipated demand and yields from the commercial premises than originally forecast (CD3/17 para.3.14 p.15). Following the transfer of the Commercial Estate: Basic Provision to the CMO, it has the option either to take the second and third tranche or alternatively to be paid a cash endowment instead.

The removal of the commercial estate/cash endowment would remove a significant level of income from the CMO's business plan. The financial model shows that by the end of the Business Plan, £694,000 is generated from the commercial investments and the community assets[4]. That is approximately 10% of the forecast income of the CMO (CD3/17 Appx.A p,6).

[4] CD13/7 Appx K pdf 182

The proposed discharges (with the other modifications sought) would imperil the ability of the CMO to function as a stewardship body. The modification would therefore fundamentally contradict the vision for Chilmington Green set out in the AAP.

No sound evidence has been advanced in support of the proposed discharges. The evidence of BNP Paribas (CD2/25 Collins Appx. IV) does not begin to show that commercial premises of the type envisaged for Chilmington Green which would comprise the endowment would not be marketable. It has never been intended that the premises would comprise an office or business park. Further, it is far too early in the development to be asserting that there is no demand for the Commercial Estate. The trigger for the provision of the Basic Provision is 1500 dwelling occupations which, on the Appellant's trajectory, remains some years away.

The obligations continue to serve the useful purpose of ensuring the viable performance by the CMO in perpetuity of the obligations it owes to the residents of the development and, therefore, the requests to discharge them should be rejected.

Two reasons are given by the Appellant in seeking to justify its requests. Firstly, it is said that it is not realistic or the CMO to operate as an independently viable commercial enterprise supported by the Commercial Estate. Secondly, it is asserted that there is little if any market demand for the Commercial Estate.

As to the first contention, the Business Plan shows that it is realistic for the CMO to operate as an independently viable commercial enterprise with its seven income sources. Whilst Development has not progressed at the pace anticipated by the Business Plan, there is no evidence to support a conclusion that the CMO is not capable of being independently viable or, that taking a long term perspective, the Commercial Estate would serve no useful purpose in contributing to the income of the CMO. The Commercial Estate or cash endowment provide a significant element of the CMO's forecast income going forward.

The second contention also lacks any sound or convincing justification. The claim that there is little or no market demand for the Commercial Estate appears to be founded on a single letter dated 4 February 2025 from BNP Paribas (CD2/25 App.IV).That states that since that firm's involvement with the development (2017) "*no noteworthy interest has been received from occupiers seeking B1 office space"* and that this evidences that Chilmington Green is not a suitable location for large scale new office accommodation. This appears to be in connection with a "*business park*" development which, it is asserted, would need a significant pre-let for it to be economically viable.

No evidence of marketing has been produced and the trigger for the provision of the Basic Provision Commercial Estate is 1500 dwellings. On the CMO's 2024 Business Plan, this would not be met until some time in 2032 and to contend that there is no *current* market demand in the context of the early stages of the First Phase of the Development, tells one nothing about whether demand will exist in the future when the residential development has progressed to a point to make Chilmington Green an attractive proposition for commercial development. Further, it has never been part of the rationale for the Chilmington Green development nor the AAP that it would be suitable for a business park development and therefore BNP's opinion has little relevance to the context here.

The evidence shows that these obligations continue to serve the useful purpose of securing the long term financial security of the CMO.

Request 22

The Appellant's request that the obligations requiring them to pay the First and Second Cash Endowments on the election of the CMO be discharged, should be rejected.

The option for the CMO to elect to be paid a cash endowment in lieu of the second and third tranches of the commercial estate is part of the funding principles of the Business Plan. The useful purpose is to help manage any risk of lower than anticipated demand and yields for commercial premises than forecast when the Agreement was entered into. If the CMO elects to be paid the cash endowment it has the power to invest that in cash deposits or longer term investment funds and/or to decide the reinvest the cash in the purchase of income generating assets (CD13/7 para.10.3.1 p.130).

The Business Plan notes that if the cash endowment is taken and invested in residential property, the yields would at least equate to the commercial yields assumed in the original Business Plan modelling (CD3/7 penultimate bullet p.82).

For the reasons set out in response to requests 19-21 above the Commercial Estate obligations continue to serve a useful purpose and the payment of a cash endowment as an alternative to the second and third tranches of Commercial Estate provision serves the further useful purpose of providing necessary flexibility to the CMO in the event that yields from commercial property are lower than anticipated at the time of the preparation of the Business Plan. The ability to pursue an alternative investment strategy is an important element of ensuring the long term financial viability of the CMO.

The Appellant's assertion that a one-off cash endowment does not have a useful purpose in replacing an asset endowment[5] is misconceived. As the Business Plan shows, the cash endowment, if used to fund an alternative investment, is capable of delivering an equivalent return to commercial property and, therefore, there is the potential for the symmetry which the Appellant claims is lacking.

The obligations continue to serve a useful purpose and that would be defeated if the obligations are discharged. Rather, than reducing the level of risk that the CMO's income might be less than forecast in 2018, the discharge of these obligations would have the opposite effect of increasing that risk.

Request 23

The Appellant's request that the obligation requiring payment of the CMO Start up contribution be discharged should be rejected.

The useful purpose of the obligation, as its title indicates, is to fund the creation and establishment of the CMO. It was essential to enable the CMO to establish in the early years of the construction of the Development prior to the first residents moving in and when no other sources of income were available.

Under para.14 of Schedule 4 a total payment of £150,000 index linked is required to be paid in two instalments of £75,000; one at the commencement of the Development, the other prior to the first dwelling occupation. The Council is required to use the CMO Start Up contribution for the purposes of covering the costs incurred by the Council and/or the CMO in creating the CMO

[5] Collins Poof CD2/25 para.5.1.99 p.62

and establishing it as a working organisation including, but not limited to, paying for the provision and recruitment of staff and provision and purchase of equipment (Schedule 4 para.14.3).

The first instalment of the CMO Start-up contribution was due on or before 28 February 2017 and was paid not by the Appellant but buy the Homes and Communities Agency (known as Homes England) on 13 June 2018 but without the indexation payment. The second contribution became payable on 20 September 2019 and was paid by the Appellant on 8 October 2019 but without the associated indexation payment (see CD3/17 para.2.43 p.11). Both payments have been transferred by the Council to the CMO (CD3/17 paras. 2.44 & 2.45 p.11).

The Start Up contribution was essential to enable the CMO to establish as demonstrated by the fact that, when the Appellant failed to make the contributions on time, the CMO had to approach the Council for forward funding equivalent to the missed payment by way of a loan pending the contributions being paid by the Appellant (CD3/17 para.3.8 p.13).

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.

Request 24

The Appellant's request that the obligation to pay the annual Early Community Development contributions be discharged with repayment of the contributions already paid should be rejected.

The useful purpose of the Early Community Development 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. The need for appropriate developer contributions to support early development of the community is recognised by the AAP (CD3/1/1 policy CG1 p.71 and para.8.9 p.69).

The CMO Business Plan outlines the community development work which the CMO will deliver (see CD13/7 section 3.3.2 p.44-45) and this informed the Chilmington Green Early Community Development Strategy (CD13/9). The delivery of the Strategy was led by Ashford Borough Council initially, with handover to the CMO upon its incorporation (CD3/17 para.3.19 p.16). It was adopted in 2022.

The CMO Board Position Statement March 2021 (CD3/17 Appx.D) sets out the early activities undertaken. The Early Community Development Contribution together with match funding from other sources is a major source of funding to deliver the Strategy.

The first instalment of the Contribution was due on 5 December 2017 and was paid on 3 September 2018. The second instalment was due on or before 3 September 2019 and was paid on 9 February 2021. The remaining three instalments were due on 3 September 2020, 2021 and 2022 respectively and were not paid. Under the Settlement Agreement (CD1/17) the three instalments were withdrawn (without indexation) from the Developers' Contingency Bank Account – Council on 6 March 2023.

It was originally anticipated that a community development worker would be appointed to support early delivery but, given the uncertainty about whether all the contributions required under the Agreement would be paid, the Council and the CMO have instead applied the funding

to larger projects provided by expert local community organisations supplemented by smaller projects and programmes reflecting neighbourhood need. The Council has safeguarded the s.106 funding by matching it with other funding which has the benefit of extending its longevity and its ability to meet resident need over a longer time frame (CD3/17 para.3.20). This compensates for the fact that the rate of development has lagged behind the rate anticipated in the Agreement and ensures that the contributions are used effectively for their original purpose.

The deletion of the Early Community Development Contribution would undermine the ability of the Council and the CMO to continue to deliver the activities required to develop community cohesion which was identified as a principal objective of the CMO Business Plan as well as an aim of AAP Policy CG1. If the contribution is not paid, all community development work will cease. This might also imperil the status of the South of Ashford Garden Community and, in turn, threaten access to further Government funding dependent on that status (CD3/17 paa.6.17 p.22).

The Council has separately bid for and received separate DHLUC Garden Communities funding, but this is additional to and not in substitution for any s.106 funding to be provided by developers. The majority of this DHLUC funding has been dedicated to small capital improvements e.g. public footway/cycleway upgrading all of which are independent of the early community development work to be funded under the Agreement. To the extent that the DHLUC funding is used to support community development initiatives, the projects relate to the whole of the South of Ashford Garden Community not just Chilmington Green (CD3/17 para.6.18 and 19 p.22).

Given this context, there is no basis for the Appellant's request.

NATURAL GREEN SPACE

Request 25

This does not appear to be a specific request to modify or discharge, rather an introduction to other Requests that follow. The Appellant has provided no evidence to support the claim that the "*Green Space obligations are proving to be substantially more expensive than is presently allowed for as a cost to the Development at Schedule 29D*", however this claim itself is starkly inconsistent with its position that indexing costs from a base date of 2014 overstates their actual costs (see Request 6 above).

Request 26

The Appellant requests that:

(a) The obligation to transfer the Informal/Natural Greenspace ("the Greenspace") to the CMO be discharged;
(b) The obligations that the Greenspace be free from defects when provided and that the Appellant be responsible for the repair of defects be discharged; and
(c) The obligations that the Appellant pays to the Council a sum equivalent to any SDLT or tax payable as a result of registering the transfer should be discharged.

The useful purpose of the obligations is to ensure that the Greenspaces, as Community Assets are transferred free from defects at no cost to the public purse to the CMO to provide for their management and maintenance in perpetuity by a not-for-profit community stewardship body. (CD3/20 para.6.1 p.7, CD3/1/1 AAP Policy CG10 p.71, CD4/1 Local Plan Policy IMP4 p.315)).

The Appellant's proposed discharges/modifications would see the Greenspace retained in the Appellant's ownership with no provision secured for their management or maintenance in perpetuity, and no obligation to ensure that they are kept open and available to the public to use freely at all times. That would leave the continuing useful purposes served by the current obligation entirely unserved.

The useful purpose of the obligations in respect of the costs pertaining to the transfers of the Greenspaces, is to ensure that the transfers occur at the expense of the Appellant and not the public purse or the CMO's resources. It continues to serve that purpose.

Request 27

The Appellant advances no good reason why it should not be responsible for remedying defects so defined (see Clause 1.1). The purpose of the obligation is to ensure that the onus for remedying defects as defined under the Agreement should rest on the Appellant rather than deplete the resources of the CMO. Unlike the CMO, the Appellant will have a contractual relationship with those responsible for designing, supplying material or, constructing and laying out the Greenspaces and therefore it is appropriate that it should retain this liability. The proposed discharge would have the effect of imposing the liability on the CMO, which would have no legal remedy against any of those responsible for the provision of the Greenspaces but whose default has led to defects. That does not serve the purpose of the current obligation which continues to serve a useful purpose.

Request 28

The Appellant's request that the provision of payment to towards the Council's costs to consider the transfer which the developer wishes to use, but has not agreed with the CMO, should be discharged, should be rejected.

The useful purpose of the obligations in respect of the Council's costs pertaining to the transfers of the Greenspaces, is to ensure that the transfers occur at the expense of the Appellant and not the public purse.

In accordance with para 1.1.10, the Owners can ask the Council to consider a transfer which the developer wishes to use but has not been agreed with the CMO for the required transfer of any asset to the CMO. The payment of the Council's legal costs to consider the transfer serves a useful purpose through enabling the Council to take specialist legal advice upon the wording, and the dispute that has arisen between the developer and CMO as a result of which it was not agreed, and if appropriate to approve the transfer terms so that the asset transfer can proceed. The discharge of this obligation would not serve this useful purpose equally well because without the Owners' payment of the legal costs these costs would fall upon the public purse which would not be appropriate as they arise in connection with the provision and long-term stewardship of mitigation for the impact of the development.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG8 & CG10 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM2 & IMP4.

CHILMINGTON HAMLET

Request 29

The Appellant's requests that the trigger for the provision of the Chilmington Hamlet facilities should be modified to not more that 3500 occupations from the existing 1400 dwellings, that there be no transfer to the CMO with a 21-year lease instead, and for the deletion of the requirement that the premises should be free from defects on passing to the CMO, should be rejected.

Indoor and outdoor sports facilities, strategic parkland and playspace are required to meet the recreational needs of the residents of the Development based on a population of 13,800. The amount of provision required is set out on Table 2 of the Chilmington Green AAP (CD3/1/1 p,57) which was informed by the Public Green Space and Water Environment SPD (CD3/1/5) and the Sport England Facilities Calculator (in respect of indoor sports provision) (CD3/13 para.3.10 p.11).

Consistent with the key principle governing the Development that properly planned infrastructure delivery occurs alongside the development of new housing and that any significant gaps or shortfalls in provision are avoided (CD3/1/1 para.11.30 p.113), the provision of sports facilities is phased. A suite of AAP policies governs the necessary provision of sport facilities (See CD3/1/1 Policies CG8, 9 and 16). Such provision is also required by policy COM2 of the Local Plan (CD/3/1/3) and NPPF paras.96, 98 and 103.

The Chilmington Hamlet facilities ("the Hamlet Facilities") are to be located centrally within the Site in the location identified at land parcel "S1" on the Chilmington Green Open Space Plan (CD6/13) which was approved as part of the outline planning permission (see CD3/13 paras.3.6-3.8 p.10). The facilities to be provided are detailed on Schedule 7 para.1.1 of the Agreement and the total capital cost of £1,266,000 index linked up to the date of the approval of the reserved matters for the facilities excludes fees, contingencies, specification and design costs, supervision fees, access roads and service costs ("fees etc").

A Design Brief and Specification must be approved by the Council no later than 1000 dwelling occupations and the Hamlet facilities must be provided no later than 1400 dwelling occupations. This timing accords with the timing of the delivery of the Hamlet facilities set out in the AAP Infrastructure Delivery Plan ("IDP") and the triggers are set to ensure that there is sufficient provision to meet the needs of the residents of the Development in accordance with the quantitative standards of the SPD (CD3/1/1 AAP Policy CG8). The Agreement's required timing for the delivery of the sports facilities at Discovery Park is behind that set out in the IDP with the result that there is no sports provision at Discovery Park in the early phases of the development. Instead, additional facilities are required to be provided at the Hamlet (a bowling green and tennis courts) (CD3/13 para.3.14 p.11).

Despite this addition, the total amount of facilities at the Hamlet is still less than that envisaged by the AAP (CD3/13 para.3.4 p.10). The enhanced facilities will assist in meeting the needs of 3200 dwellings (the trigger for the delivery of the first phase of the sports pitches and sports hub at Discovery Park). There is no alternative provision in the local area that would be accessible to residents of the Development and that would be able to provide for the needs of both the existing local community and the needs generated by the development (CD3/13 para 3.11-3.13 p.11).

The delivery of the Hamlet facilities within the timescales set out within the Agreement remains integral and essential to meeting the sporting and recreational needs of the residents of Chilmington Green. The obligations in Schedule 7 thus continue to serve this useful purpose.

The Appellant's proposed modifications would not serve that purpose equally well. The Appellant does not dispute the need for the Chilmington Hamlet facilities but argues that their provision should be delayed unto a point it claims there would be sufficient people living on the development to use them. Its proposal is that this would be at 3500 dwelling occupations. The Appellant particularly claims that the proposed cricket facilities would not be viable until 3500 dwellings have been occupied.[6] However, that claim ignores the fact that the Hamlet facilities will provide more than just a cricket pitch and batting cages. Also proposed are a community pavilion, tennis courts and a bowling green. The cricket pitch will be flexibly designed to encourage a range of play and recreational activities beyond cricket (CD 3/1/1 AAP para.5.62 and CD3/13 para.6.3 p.16). This appears to have been ignored by the Appellant in making its request. It also ignores the fact that with the agreed "delay" to the provision of the Discovery Park facilities, embodied within the Agreement already, the provision of sports facilities at the Hamlet by 1400 dwellings has an enhanced importance in terms of meeting need (CD3/13 para.6.5 p.17).

The modifications would delay the delivery of the Hamlet facilities until halfway through Main Phase 3 of the development when circa 60% 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).

The Appellant asserts that sufficient provision would instead be available at the schools on site to meet the needs of residents before the Hamlet facilities are provided. That is not the case. The first primary school which is already open to students does not allow community use of its facilities (CD3/13 para.6.7 p.17) and whilst the secondary school does intend to allow community use outside school hours (CD3/13 para.6.8 p.17), they are not of sufficient size to serve residents of up to 3500 dwellings and no provision is to be made for cricket facilities or a bowling green for which, applying the SPD, there will be a need.

The proposed modifications would therefore not serve the useful purpose of the obligations equally well.

The Appellant also proposes that the Agreement be modified to remove the requirement that the Hamlet Facilities should be free from any defects identified by the CMO (other than those of a cosmetic nature). No justification is advanced by the Appellant for this proposed modification. The useful purpose of the obligation is to ensure that on transfer to the CMO, the Facilities are free from defects as defined in the Agreement (see para.1.1 Definitions). The relevant defects are those attributable to design, materials failings, workmanship, supervision or site preparation i.e. all actions for which the Appellant will be responsible and should remedy before, or if necessary after, transfer to the CMO. The obligation thus ensures that the facilities are of the correct quality when transferred and that, should they not be, the CMO does not have to deploy its resources remedying the defects. The Appellant's proposed modification does not serve that useful purpose and it thus also fails the test of equivalence.

The Appellant also proposes the discharge of the obligation to transfer the ownership of the facilities to the CMO and for the facilities instead to be the subject of the grant of a 21-year lease. That should be rejected.

[6] See CD 2/25 Collins proof paras.5.1.135 & 5.1.136 pp67/8

The transfer of the Community Assets to the CMO is an essential part of the approach to community stewardship being delivered at Chilmington Green (see CD3/1/1/ AAP para.3.7 and policy CG10). The transfer of the Community Assets is necessary to ensure that they are managed, maintained and utilised for community benefit. Transfer to the CMO ensures that they will be managed in perpetuity in accordance with the CMO's charitable objects (see CD3/17 paras.3.5 & 3.6 p.5). By this means the quality and long-term availability of the assets can be ensured in perpetuity (see CD 3/1/5 SPD para.8,6 p.29). That is the useful purpose of the transfer obligation.

The residents of the Development are required to pay a rentcharge to the CMO to contribute to the cost of managing and maintaining the Community Assets. If the CMO is only involved in the management and maintenance for a limited period of time e.g. 21 years as the Appellant proposes, the residents will be paying a rentcharge to an organisation that, after the expiry of the lease, is unable to use the monies. The Appellant's proposed modification provides no means by which the lease is capable of renewal, nor any provision which secures after expiry of the lease public access to those facilities or their future maintenance in perpetuity. The proposed modifications do not therefore serve the purposes of the obligation equally well (CD3/13 sections 6 & 7 pp.7-9).

Request 30

The Appellant's proposed modifications to delay the requirement for approval of the DB&S for the Hamlet Facilities and for the total capital cost of those Facilities to include fees etc should be rejected.

The submission and approval of the DB&S within a timely manner enables the Council to ensure that design quality is embedded in the development at an early stage. The 1000-dwelling occupations trigger for submission and approval of the DB&S serves this useful purpose. The Appellant's proposed trigger reflects the modification in Request 29 to delay provision of the Hamlet Facilities to 3500 dwelling occupations. If that request is rejected, there is no residual merit in this element of Request 30, indeed it would be perverse.

As to the inclusion of fees etc in the total capital cost and removal of indexation, this would reduce the total budget available to deliver the facilities and undermine the ability to deliver the required extent and quality of the sports facilities (CD3/13 para.6.23 & 6.24 p.21). The request that the facilities provided should match the total capital cost including fees etc will simply lead to quantitative and qualitative deficiency in provision (CD3/13 para.6.25. p.21).

The statutory test of equivalence for modification is not met.

Request 31

The Appellant's proposed modifications to modify the consultation requirements for the DB&S for the Hamlet facilities, should be rejected.

The express requirement to consult the CMO on the DB&S for the Hamlet Facilities and to undertake consultation in a manner approved by the CMO ensures that the consultation is fit for purpose and involves all necessary parties. The CMO is an important stakeholder at Chilmington Green. Under the Agreement they will take on the management and maintenance of the Facilities and it is therefore important that they have early input into the design process including costing (CD3/13 paras.6.27 p.22). That is the useful purpose of the obligation. The CMO is best placed to advise on the necessary consultation strategy given its close relationship to residents of the

development and other local groups (CD3/13 para.6.28 p.21). It is also important that the CMO's comments on costings are fed back to the Council prior to approval of the DB&S so that any concerns of the body ultimately responsible for the management and maintenance of the sports facilities are taken into account at an early stage (CD3/13 para.6.29 p.22).

The proposed modifications to the obligations would not serve their useful purposes equally well.

Request 32

The Appellant's proposed discharge of the obligation requiring defects on the Hamlet facilities to be repaired within three months of notification should be rejected.

The useful purpose of the obligation is to ensure that the CMO does not have to bear the cost of remedying "defects" in the facilities which are transferred to it. The relevant defects (as defined in the Agreement) are those attributable to design, materials failings, workmanship, supervision or site preparation i.e. all actions for which the Appellant will be responsible and should remedy before transfer, or if necessary, after, to the CMO. The obligation thus ensures that the facilities are if the correct quality when transferred and that, should they not be, the CMO does not have to deploy its resources towards remedying the defects. That is plainly a useful purpose.

No sensible justification is advanced for the proposed discharge. The CMO should not be obliged to repair "defects" as defined in the Agreement and the Appellant advances no explanation as to the basis on which it contends that the obligation serves no useful purpose.

Request 33

The Appellant's request that the provision of payment towards the Council's costs to consider the transfer which the developer wishes to use, but has not agreed with the CMO, should be discharged, should be rejected.

In accordance with para 1.1.10, the Owners can ask the Council to consider a transfer which the developer wishes to use but has not been agreed with the CMO for the required transfer of any asset to the CMO. The payment of the Council's legal costs to consider the transfer serves a useful purpose through enabling the Council to take specialist legal advice upon the wording, and the dispute that has arisen between the developer and CMO as to the wording, and if appropriate to approve the transfer terms so that the asset transfer can proceed. The discharge of this obligation would not serve this useful purpose equally well because without the Owners' payment of the legal costs these costs would fall upon the public purse which would not be appropriate as they arise in connection with the provision and long-term stewardship of mitigation for the impact of the development.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG8 & CG10 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM2 & IMP4.

CHILDREN AND YOUNG PEOPLE'S PLAYSPACES

Request 34

The Appellant acknowledges that the obligation to provide Playspaces serves a useful purpose in line with good placemaking and planning policy (CD2/13 para.8.38). The proposals to delay the

provision of Design Briefs and Specifications ("DB&S") for the Playspaces (within the context of the request 36 proposal to delay the provision of three of the playspaces), to cap the total costs of provision at £2,585,143 to include fees etc, and for the scope of Playspaces to be altered to match the stated capital cost should be rejected.

Each main phase of the development is required by policy to be sustainable in its own right, including through the provision of necessary social and physical infrastructure (CD 3/1/1 AAP policy CG1(b)). Public open space is required to be provided in accordance with the parameters and spatial requirements of the Public Green Space and Water Environment SPD (AAP policy CG8) and in a way that meets the needs of the development as it evolves. Policy CG8 states that the majority of the equipped play facilities at Chilmington Green should be provided within 4 large (minimum 1.5 ha) "strategic play space areas" which cater for a range of differing age groups.

The submission and approval of DB&Ss within a timely manner enables the Council to ensure that the design quality is embedded into the Development at an early stage and ensures sufficient time is allowed to enable playspace of sufficient design quality to be agreed and delivered "on time" to meet the recreational needs of residents. This safeguards against poor quality development and ensures sufficient time is given to consultation with residents and stakeholders. That is a useful purpose.

With the Appellant's anticipated acceleration of delivery to around 300 dwellings after 2028 (CD2/13 para.4.3) the proposed triggers would effectively reduce the timescale between the approval of the DB&S and the trigger for delivery of the relevant Playspace to 6-8 months which is not adequate to serve the useful purpose of the obligation equally well (see CD3/6 para.6.8 p.18).

In relation to costs, including fees etc in the total capital cost of the Playspaces would reduce the total budget available to deliver the facilities and undermine the ability to deliver the required extent and quality of the Playspaces. The scale of the reduction is clear from the DB&S submitted by the Appellant for Playspace 1 which indicates fees etc of £88,441 which would be 38% of the PS1 budget of £235,013 for that playspace. (CD3/6 para.6.9 p.18). The request that the facilities provided should match the total capital cost including fees etc will simply lead to quantitative and qualitative deficiency in provision (CD3/6 para.6.10 p.18). The statutory test of equivalence for modification is not met.

Request 35

The Appellant's proposed modifications to modify the consultation requirements for the DB&S for the Play Space facilities, should be rejected.

The express requirement to consult the CMO on the DB&S for the Playspaces and to undertake consultation in a manner approved by the CMO ensures that the consultation is fit for purpose and involves all necessary parties. The CMO is an important stakeholder at Chilmington Green. Under the Agreement they will take on the management and maintenance of the Playspaces and it is therefore important that they have early input into the design process including costings (CD3/6 paras.6.11 & 6.13 p.19). That is a useful purpose. The CMO is also best placed to advise on the necessary consultation strategy given its close relationship to residents of the development and other local groups (CD3/6 para.6.13 p.19.). The proposed modifications to the obligations would not serve their purposes equally well.

Request 36

The proposal to delay provision of three of the Playspaces (PS2, 4 and 5) would not serve the purpose of the obligations equally well and the request should be rejected. In addition to its responses to requests 34 and 35, the Council relies on the following.

The site safety justification for the Appellant's proposed delay of the Playspace provision has no proper basis. There is no evidence either on-site, in the case of Main AAP Phase 1 Playspace ("PS1") or on the parameter plans or masterplan drawings approved or submitted to date in the case of PS2, PS4 and PS5, that construction activity would prevent delivery of the Playspaces within the timescales currently specified in the Agreement.

Most of the site of PS2 is bounded by land where construction would be complete prior to the required delivery of the Playspace. The north-western boundary is located adjacent to housing land parcel "M" which is due to be delivered in Main AAP Phase 1 and which proposes a road running alongside the Playspace site which could provide safe access. On the eastern boundary is the site of the Hamlet facilities which will be delivered 600 dwelling occupations earlier than PS2 is required to be delivered. The southern boundary is to Chilmington Green Lane, an existing road alongside which housing on Parcel "P" is nearing completion. The north-eastern boundary is with housing parcel in Main AAP Phase 2 and the western boundary abuts SUDS/greenspace; both boundaries could easily and safely be fenced off from the Playspace to ensure site safety (CD3/6 para.6.3 p.17).

Whilst the Masterplans for Main AAP Phases 3 and 4, where PS4 and 5, are located, are yet to be submitted, there is no reason why safe access and site safety cannot be secured with the current provision triggers specified in the Agreement (CD3/6 para.6.4 p.17).

The timing of the delivery of the Playspaces in the early phases of the development already lags behind what the AAP and SPD require, resulting in a deficit in those early phases. The proposed modifications would exacerbate that under-provision in Main AAP Phase 2 with "catch up" only being achieved in Main Phase 4 (CD3/6 para.6.5 p.17).

There are no play facilities and a considerable lack of access to play facilities in the Development now and delay beyond the current triggers would be to the detriment of the existing and future community. The timely delivery of social facilities to meet the needs of young people in new development, including Playspaces, is an integral and essential part of good placemaking. The obligations plainly serve a useful purpose i.e. the timely delivery of playspaces to meet need as it arises. The proposed modifications would not serve either of these two purposes equally well.

Request 37

The Appellant's proposed discharge of the obligations requiring that the Playspaces be transferred to the CMO and replaced by a long lease; and that any defects in the Playspaces be repaired within three months of notification should be rejected.

The transfer of Playspace facilities to the CMO is an essential part of the approach to community stewardship being delivered at Chilmington Green and detailed on the CMO Operating Business Plan. It ensures that that the CMO has ownership of all assets which it is to maintain in perpetuity which, in turn, ensures the long term management of the facilities to a consistent high standard. That is its useful purpose. The Appellant has not explained how the retention of these assets in their ownership would impact on the CMO Business Plan or how the Playspaces would be managed or maintained or kept open to the public and by whom at the end of the lease. The principle of equivalence is not met.

The requirement that the Playspaces should be free from defects on transfer, ensures that the responsibility for and cost of remedying defects in Playspaces which are transferred to the CMO rests with the Appellant. The useful purpose is to ensure that neither the CMO's resources or the public purse are used up remedying defects which are defined in the Agreement as:

"*Any defects in the relevant facility that are due to a defect in design or materials or workmanship or supervision of contractors or site preparation works"*.

The Appellant advances no good reason why it should not be responsible for remedying defects so defined. Unlike the CMO, it will have a contractual relationship with those responsible for designing, supplying material or, constructing and laying out the Playspaces and therefore it is appropriate that it should retain this liability. The proposed Modification which would have the effect of imposing the liability on the CMO, which would have no legal remedy against any of those responsible for the provision of the Playspaces but whose default has led to defects does not serve the purpose of the current obligation whether equally well or otherwise.

Request 38

The Appellant's proposed discharge of the obligation to repair defects in the Playspaces transferred to the CMO upon being given notice should be rejected.

The Appellant advances no good reason why it should not be responsible for remedying defects so defined. The useful purpose of the obligation is to ensure that the onus for remedying defects as defined under the Agreement should rest on the Appellant rather than deplete the resources of the CMO. Unlike the CMO, it will have a contractual relationship with those responsible for designing, supplying material or, constructing and laying out the Playspaces and therefore it is appropriate that it should retain this liability. The proposed discharge would have the effect of imposing the liability on the CMO, which would have no legal remedy against any of those responsible for the provision of the Playspaces but whose default has led to defects. That would leave the useful purpose unserved.

Request 39

The Appellant's request that the provision of payment towards the Council's costs to consider the transfer which the developer wishes to use, but has not agreed with the CMO, should be discharged, should be rejected.

In accordance with para 1.1.10, the Owners can ask the Council to consider a transfer which the developer wishes to use but has not been agreed with the CMO for the required transfer of any asset to the CMO. The payment of the Council's legal costs to consider the transfer serves a useful purpose through enabling the Council to take specialist legal advice upon the wording, and the dispute as to wording that has arisen between the developer and CMO, and if appropriate to approve the transfer terms so that the asset transfer can proceed. The discharge of this obligation would not serve this useful purpose equally well because without the Owners' payment of the Council's legal costs these costs would fall upon the public purse which would not be appropriate as they arise in connection with the provision and long-term stewardship of mitigation for the impact of the development.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG8 & CG10 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM2 & IMP4.

ALLOTMENTS

Request 40

The Appellant's proposal to delay provision of the Main Phase 1 allotments to no later than 1450 dwelling occupations should be rejected.

Policy CG8 of the AAP states that allotments will be promoted at Chilmington Green in line with the Public Green Spaces and Water Environment SPD (CD3/1/5). The Local Plan encourages allotment provision in accordance with the SPD (CD3/1/3 policy COM3)) and as a community and recreational land use, allotments are also supported by Local Plan policies COM 1 and 2.

The trigger in the current obligation of 1000 dwellings is broadly in accordance with the SPD and is based on the population that would be living on the site when the allotments are due to be delivered. There is a small 0.22 ha over-provision in Main AAP Phase 1, but with the secured provision in AAP Phases 2, 3 and 4, it is brought back into line with the SPD (CD3/6 para.3.11 p.10). The allotment provision for the development is shown on the Chilmington Open Green Space Plan (CD 6/13) which was approved as part of the outline planning permission for the development.

The triggers for the provision of allotments on the Site are therefore set to ensure that there is sufficient provision to meet the needs of the residents of the development in accordance with the quantitative standards identified in the SPD. That is their useful purpose. There is no alternative provision in the local area that would be accessible to residents of the development and capable of meeting their needs. Existing allotment provision is failing to meet demand within the borough with waiting lists at all existing closest allotments (CD3/6 para.3.13 p.10).

The trigger of 1450 dwelling occupations proposed by the Appellant in its requested modification finds no support in policy or the SPD. Although the Appellant asserts that this is the point at which the minimum viable size of allotment is reached, that trigger is not consistent with the SPD which states that allotments should be laid out in a development of qualifying size before the completion of the 400th dwelling (CD3/1/5 Table 5 pg.24).

As proposed to be modified the useful purpose of the obligation would not be served equally well. Rather than allotment provision being made to enable use as the population of the new development grows, provision would instead be delayed and beyond the point at which even the Appellant considers there would be a population to support them (1375 dwellings).

Request 41

The Council relies on its reasoning above in response to Request 40. The current trigger for the provision of Main Phase 2 Allotments is set broadly to accord with the SPD which, in turn ensures that the allotments are in place at a point at which a need for them exists. Delaying their provision would not serve this useful purpose equally well.

Request 42

The Appellant's requested discharge of the obligation to provide the Main Phase 3 allotments by 1400 dwellings should be rejected.

Policy CG8 of the AAP states that allotments will be promoted at Chilmington Green in line with the Public Green Spaces and Water Environment SPD (CD3/1/5). The Local Plan encourages

allotment provision in accordance with the SPD (policy COM3)) and as a community and recreational land use, allotments are also supported by Local Plan policies COM 1 and 2.

The current obligation ensures that there is sufficient provision to meet the needs of the residents of the Development in accordance with the quantitative standards identified in the SPD. That is a useful purpose. There is no alternative provision in the local area that would be accessible to residents of the Development and that would be able to provide for the needs of existing communities as well as the needs generated by the Development. The provision of allotments is integral and essential to meeting the recreational needs of the residents of Chilmington Green (CD3/6 para.3.14 p.10). The obligation continues to serve a useful purpose and should not be discharged.

Request 43

The Appellant's requested discharge of the obligation to provide the Main Phase 4 allotments by 1400 dwellings should be rejected.

Policy CG8 of the AAP states that allotments will be promoted at Chilmington Green in line with the Public Green Spaces and Water Environment SPD (CD3/1/5). The Local Plan encourages allotment provision in accordance with the SPD (policy COM3)) and as a community and recreational land use, allotments are also supported by Local Plan policies COM 1 and 2.

The current obligation ensures that there is sufficient provision to meet the needs of the residents of the Development in accordance with the quantitative standards identified in the SPD. That is a useful purpose. There is no alternative provision in the local area that would be accessible to residents of the Development and that would be able to provide for the needs of existing communities as well as the needs generated by the Development. The provision of allotments is integral and essential to meeting the recreational needs of the residents of Chilmington Green (CD3/6 para.3.14 p.10).

The obligation continues to serve a useful purpose and should not be discharged.

Request 44

The Appellants requests to modify the obligation adding the words "and the planned cost for that Allotment" to para.1.1.1 of Schedule 9 and removing the obligation that the allotments be transferred to the CMO and instead to be provided by way of a bi-annual licence should be rejected.

This additional clause is not necessary and would result in duplication. The definitions set out the total cost for each allotment. It is not necessary to refer to the cost in para 1.1.1.

The Transfer of the allotment facilities to the CMO is an essential part of the approach to community stewardship being delivered at Chilmington Green and detailed in the Business Plan submitted by the Owners. This ensures that that the CMO has ownership of all assets which it is to maintain in perpetuity which, in turn, ensures the long-term management of the facilities to a consistent high standard. That is its useful purpose. The Appellant has not explained how the retention of these assets in their ownership would impact on the CMO Business Plan.

The Appellant has not explained how the retention of these assets in their ownership would ensure their effective management, maintenance and provision to the public wishing to use them in perpetuity.

It is appropriate for the Owners to meet the costs of any SDLT/other tax payable to register the transfer of the land and to cover the CMO legal costs. That is a useful purpose. It would not be reasonable for the CMO to have to meet these costs for land endowed to them as a community facility.

It is not clear what is meant in the Appellant's statement "It will also provide additional flexibility in relation to land use, catering for varying demand for allotments without detracting from the provision of these Facilities where they are wanted".

This obligation continues to serve a useful purpose. Its discharge (in part) would not serve a useful purpose. Its modification would not serve a useful purpose equally well.

The request to discharge (in part) and modify this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG8 & CG10 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM3 & IMP4.

Request 45

The Appellant's proposed discharge of the obligation to repair defects in the Allotments transferred to the CMO upon being given notice should be rejected.

The Appellant advances no good reason why it should not be responsible for remedying defects so defined. The useful purpose of the obligation is to ensure that the onus for remedying defects as defined under the Agreement should rest on the Appellant rather than deplete the resources of the CMO. Unlike the CMO, it will have a contractual relationship with those responsible for designing, supplying material or, constructing and laying out the Allotments and therefore it is appropriate that it should retain this liability. The proposed discharge would have the effect of imposing the liability on the CMO, which would have no legal remedy against any of those responsible for the provision of the Allotments but whose default has led to defects. That does not serve the useful purpose of the current obligation.

Request 46

The Appellant's request that the provision of payment towards the Council's costs to consider the transfer which the developer wishes to use, but has not agreed with the CMO, should be discharged, should be rejected.

In accordance with para 1.1.10, the Owners can ask the Council to consider a transfer which the developer wishes to use but has not been agreed with the CMO for the required transfer of any asset to the CMO. The payment of the Council's legal costs to consider the transfer serves a useful purpose through enabling the Council to take specialist legal advice upon the wording, and the wording dispute that has arisen between the developer and CMO, and if appropriate to approve the transfer terms so that the asset transfer can proceed. The discharge of this obligation would not serve this useful purpose equally well because without the Owners' payment of the legal costs these costs would fall upon the public purse which would not be appropriate as they arise in connection with the provision and long-term stewardship of mitigation for the impact of the development.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG8 & CG10 and the National Planning Policy Framework 2024. This conclusion is

consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM2 & IMP4.

DISCOVERY PARK

Request 48

The Appellant's requests that

(a) the requirement for the approval of the DB&S for the sports pitches and sports hub be delayed from no later than 1000 dwelling occupations to not later than 2650 dwelling occupations; and
(b) the total capital cost of those facilities includes fees etc and not be subject to indexation

Should be rejected.

The Appellant accepts that the requirement to submit a DB&S for approval serves a useful purpose but seeks to delay it to 2650 dwelling occupations, in conjunction with revised triggers to the delivery of the Discovery Park facilities (see requests 50 and 51).

The submission and approval of the DB&S within a timely manner enables the Council to ensure that design quality is embedded in the development at an early stage. The 1000 trigger for submission and approval of the DB&S serves this useful purpose. It also ensures that sufficient time is given to consultation with residents and stakeholders which must happen before the DB&S is approved by the Council (CD3/13 para.6.12 p.20).

Based on the Appellant's expected housing delivery, its proposed modification to the trigger would allow for just three years between the approval of the DB&S and the delivery of the Discovery Park facilities. That would be insufficient time. The Agreement currently allows for seven years which allows for sufficient time for contracts to be let and construction of the first phase to be completed (CD3/13 para.6.22 p.20). The proposed modification would fail the test of equivalence.

As to the inclusion of fees etc in the total capital cost and removal of indexation, this would reduce the total budget available to deliver the facilities and undermine the ability to deliver the required extent and quality of the sports facilities (CD3/13 para.6.23 & 6.24 p.21). The request that the facilities provided should match the total capital cost including fees etc will simply lead to quantitative and qualitative deficiency in provision (CD3/13 para.6.25. p.21),

The statutory test of equivalence for modifications is not met.

Request 49

The Appellant's proposed modifications to modify the consultation requirements for the DB&S for the Discovery Park Facilities, should be rejected.

The express requirement to consult the CMO on the DB&S for the Discovery Park Facilities and to undertake consultation in a manner approved by the CMO ensures that the consultation is fit for purpose and involves all necessary parties. The CMO is an important stakeholder at Chilmington Green. Under the Agreement they will take on the management and maintenance of the Facilities and it is therefore important that they have early input into the design process including costings (CD3/13 paras.6.27 p.22). That is a useful purpose. The CMO is also best placed to advise on the

necessary consultation strategy given its close relationship to residents of the development and other local groups (CD3/13 para.6.28 p.21). It is also important that the CMO's comments on costings are fed back to the Council prior to approval of the DB&S so that any concerns of the body ultimately responsible for the management and maintenance of the sports facilities are taken into account at an early stage (CD3/13 para.6.29 p.22). These are all useful purposes.

The proposed modifications to the obligations would not serve their useful purposes equally well.

Request 50

The request to modify the trigger for the delivery of the first phase of the Discovery Park from 3200 dwelling occupations until 3650 dwelling occupations should be rejected.

The modification would delay the delivery of the Discovery Park Facilities until 63% of the dwellings have been occupied (CD3/13 para.6.12 p.18). Whilst the AAP allows for the scope of the Discovery Park facilities to be informed by the facilities provided and available for public use at the Secondary School (CD3/1/1 para.6.23), it does not sanction delayed provision on that basis. The trigger for the provision of the Discovery Park facilities is already currently later than the AAP IDP requires (CD3/13 paras.3.1 – 3.5 pp.9-10) but was compensated for by the provision of additional facilities being made available at Chilmington Hamlet (CD3/13 para.3.5 p.10). Further delaying provision of the Discovery Park facilities without any counterbalancing sports provision, will result in a deficit of provision. The current trigger is set to avoid a deficit which is its useful purpose. Further, the Appellant is seeking in conjunction with Request 50 that the delivery of the Chilmington Hamlet facilities also be delayed (until 3500 dwelling occupations – see Request 29) which would mean that 60% of the development would be occupied before any of the principal sports provision serving the development is provided (53% if account is taken of the MUGA at the Community Hub) (CD3/13 paras.6.12 & 6.13 p.18).

The modification would not satisfy the test of equivalence.

Request 51

The Appellant's request that the second phase of the Discovery Park sports facilities should be delayed until the 5,500th dwelling occupations should be rejected.

a. The timely provision of sport and recreation facilities to meet the needs of the new community is essential to good placemaking. The delivery of the Discovery Park sports facilities is integral to meeting the sporting, recreational and health needs of the residents of Chilmington Green and wider South Ashford.

   The obligation to provide the second phase of the sports facilities by 5000 occupations continues to serve a useful purpose because it ensures that the growing population at Chilmington Green and the wider population of South Ashford, including residents of proposed neighbouring developments are provided with sufficient sports facilities to meet their needs. Delaying delivery until 5500 occupations (alongside any delay in delivery of the Chilmington Hamlet facilities and the Community Hub) would not serve that useful purpose equally well and will result in a deficit of facilities in proportion to the number of residents. There could also be a risk that the second phase is never brought forward.

b. The Appellant's modifications table proposed a (now withdrawn) modification to the trigger for payment set out in Schedule 29D item 30. However, the submitted amended

S.106 Agreement proposes that the whole of Schedule 29D is deleted which the Appellant has clarified is its request (Request 116).

Payment into the "Developers Capital Bank Account – Council" 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.

Payment at 5100 occupations, is too late and will result in an unacceptable delay to delivery. It would not serve the useful purpose of the obligation equally well.

Furthermore, the discharge of the obligation would also result in an unacceptable delay to delivery if there were a breach of the obligation and would therefore not serve that useful purpose equally well.

The modification of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG9 & CG16 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1 & COM2.

Request 52

The Appellants request to modify obligations so as to delay delivery of

(a) DP3 from no later than 1500, 3500, 4000 and 5500 dwelling occupations respectively to 2650, 3500, 5000 and 5750 respectively; and
(b) PS6 from no later than 4000 occupations to no later than 5000 occupations

should be rejected.

a. This obligation continues to serve a useful purpose. The timely provision of strategic park and play facilities to meet the needs of the new community is essential to good placemaking. The delivery of DP3 and PS6 is integral to meeting the recreational and health needs of the residents of Chilmington Green and wider South Ashford.

   A delay in delivery of these facilities (alongside any delay in delivery of the Chilmington Hamlet facilities, the Discovery Park sports facilities and the other play spaces) would not serve that useful purpose equally well because it would have a significant impact on local provision and result in a deficit of facilities in proportion to the number of residents. There could also be a risk that the final phase is never brought forward – especially of DP3, since the reserved matters approved for the Development may never reach 5750 and/or the last unit may never be built.

   Without prejudice to the Council's position on viability, *the application contains insufficient information to enable the Council to assess the claim that the timing of this obligation "will adversely affect the Paying Owner's cashflow in Main Phase 1 and compromise the viability of this phase. It will also jeopardise the funding presently available and further put at risk the delivery of the Development"*.

b. The Appellant's modifications table proposes a modification to the trigger for payment set out in Schedule 29D item 22. However, the submitted amended S.106 Agreement and request 116 proposes that the whole of Schedule 29D is deleted which the Appellant has clarified is its request.

Payment into the "Developers Capital Bank Account – Council" 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 in payment proposed is too late and will result in an unacceptable delay to delivery. It would not serve the purpose of the obligation equally well.

Furthermore, the discharge of the obligation would also result in an unacceptable delay to delivery if there is a breach of the obligation and would therefore not serve that useful purpose equally well.

The modification of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG9 & CG16 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1 & COM2.

Request 53

The Appellant's requests:

(a) To modify the obligation to delay the requirement for the DB&S for DP3 and PS6 to be approved by the Council from no later than 1000 dwellings occupations to no later than 2100 dwelling occupations;
(b) To remove the requirement for the total capital cost of DP3 to be index linked and to allow the total capital cost to include "the cost of PS6" plus fees etc; and
(c) To discharge the obligation for the CMO to agree the details of the consultation exercise or for the Council to approve the details if the CMO does not respond and for the DB&S to include the CMO's responses on costs

Should be rejected.

This obligation continues to serve a useful purpose. Submission of design briefs within a timely manner enables the Council to ensure design quality is embedded in the development at an early stage. and safeguards against poor quality development. The DB&S needs to be agreed in good time prior to commencement of construction of Phase 1 to enable contracts to be let, etc. A delay to the agreement of the DB&S is unlikely to allow sufficient time to enable the facilities to be delivered by the required deadline. The Appellant has not demonstrated that their proposed delay would provide sufficient time. The proposed modification would therefore not serve the useful purpose equally well

In relation to costs and index linking, if accepted, this would reduce the total budget available to deliver the facilities and undermine the ability to deliver the required extent and quality of the facilities. The request that the facilities provided should match the total capital cost including fees etc will simply lead to quantitative and qualitative deficiency in provision. That does not serve the useful purpose of the obligation equally well.

The express requirement to consult the CMO on the DB&S for the Discovery Park Facilities and to undertake consultation in a manner approved by the CMO ensures that the consultation is fit for purpose and involves all necessary parties. The CMO is an important stakeholder at Chilmington Green. Under the Agreement they will take on the management and maintenance of the Facilities and it is therefore important that they have early input into the design process including costings

(CD3/13 para.6.27 p.21/2). That is a useful purpose. The CMO is also best placed to advise on the necessary consultation strategy given its close relationship to residents of the development and other local groups (CD3/13 para.6.28 p.21). It is also important that the CMO's comments on costings are fed back to the Council prior to approval of the DB&S so that any concerns of the body ultimately responsible for the management and maintenance of the sports facilities are taken into account at an early stage (CD3.13 para.6.29 p.22).

Request 54

The Appellant's requests that (a) the total capital costs of the first and second phases of the Sports Facilities should be added to paras.2.2.1, 2.3.1 and 2.6.5 of Schedule 10 and (b) the Facilities should not be transferred to the CMO but leased to it, should be rejected.

a. The additional wording proposed would not serve a useful purpose because the cost of the facilities is clearly stated in paragraphs 2.1.1 and 2.5.1 and this would result in duplication.

b. This obligation continues to serve a useful purpose, its discharge would not serve that useful purpose equally well because the transfer of the Discovery Park facilities to the CMO is an essential part of the approach to community stewardship being delivered at Chilmington Green and detailed in the CMO Operating Business Plan submitted by the Owners. The Appellant has not explained how the retention of these assets in their ownership would impact the CMO Business Plan or how the facilities would be managed and maintained and made available to the public for use and by whom at the end of the lease.

   The obligation for the Owners to meet the costs of any SDLT/other tax payable to register the transfer of the land and to cover the CMO's associated legal costs continues to serve a useful purpose because having to pay these costs would reduce the monies the CMO has available to deliver their charitable objectives and would simply serve to increase the deficit the CMO operates under. For this reason, the discharge of this obligation would not serve that useful purpose equally well.

The modification of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG9, CG10 & CG16 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM2 & IMP4.

Request 55

The Appellant's proposed discharge of the obligation to repair defects in the Sports facilities transferred to the CMO upon being given notice, should be rejected.

The Appellant advances no good reason why it should not be responsible for remedying defects so defined. The useful purpose of the obligation is to ensure that the onus for remedying defects as defined under the Agreement should rest on the Appellant rather than deplete the resources of the CMO. Unlike the CMO, it will have a contractual relationship with those responsible for designing, supplying material or, constructing and laying out the Sports facilities and therefore it is appropriate that it should retain this liability. The proposed discharge would have the effect of imposing the liability on the CMO, which would have no legal remedy against any of those responsible for the provision of the Sports facilities but whose default has led to defects. That does not serve the useful purpose of the current obligation.

CEMETERIES

Request 57

The Appellant's request that the obligation requiring the payment of a financial contribution towards new cemetery provision in south Ashford be discharged should be rejected.

The purpose of the obligation is to secure provision of cemetery space to meet the needs of the Development over time. The AAP identifies a need for the Development to contribute towards new cemetery provision in the borough (CD3/1/1 para.6.60 p.61) and the Public Green Spaces and Water Environment SPD identifies that financial contributions will be sought from developments rather than on-site provision. In accordance with the SPD, provision for cemeteries should be made at 0.6 ha per 1000 population (CD 3/1/5 Table 1 p.12).

The £800,000 secured by Schedule 11 of the Agreement is substantially less than a contribution calculated in accordance with the SPD (£1,978,000). It is understood that this reflects the fact that additional provision would only be required post 2020 (CD3/6 para.3.18 p.11). The triggers for the payment of financial contributions are set to ensure that there is sufficient provision to meet the needs of the Development in accordance with the SPD. The available evidence is that with a rapidly expanding and ageing population, existing cemetery capacity is predicted to fall dramatically in the coming years (CD3/6 para.3.21 pp11-12).

Whilst the Appellant states that burial is declining in popularity, and challenges the quantitative standard set out in the SPD for cemetery provision, it does not dispute that the development will give rise to the need for some burial space and, therefore, it is not in a position to dispute that the obligation continues to serve a useful purpose. The Council is obliged to spend the contribution on a new cemetery in South Ashford which will serve the development.

COMMUNITY HUB

Requests 58 & 59

The Appellant requests that Schedule 12 para.1 should be modified to:

- change the amount of internal floorspace to be provided at the Community Hub from 3462 sm to up to 4000 sm to be delivered in two tranches;
- alter the scope of the space to be provided to identify less space for specific uses and instead to provide multi functional space with the removal of the requirement to provide car parking;
- delay the submission and approval of the DB&S for the Community Hub from 1400 dwellings to 2850 dwelling occupations (first tranche) and 3850 dwelling occupations (second tranche);
- discharge the obligation for the DB&S to include the information contained in Schedule 12A of the Agreement;
- delay the delivery of the Community Hub from no later than 1800 dwelling occupations to no later than 3250 dwelling occupations (first tranche) and no later than 4250 dwellings (second tranche);
- reduce the capital cost of the Community Hub from £5,152,127.00 Index-Linked to £2,000,000 (first and second tranche combined) and to allow those costs to include fees,

contingencies, specification and design costs, supervision fees, access roads and service costs whilst removing the requirement for that cost to be Index Linked;
- discharge the requirement for designated parts of the Community Hub to be made available for use by the County Council or an organisation approved by the County Council as a family and social care facility, youth facility, library access point and community learning facility;
- discharge the obligation to transfer/grant a Long Leasehold interest to the CMO of the facilities and replace it with an obligation to grant leases to individual tenants on terms acceptable to them;
- to reserve the right to carry out the requisite building works to the Appellant;
- to add an obligation providing that no building contract shall be entered into nor construction begin prior to confirmation of the public service leases.

The Appellant acknowledges that community space is essential to providing necessary facilities and services to new residents (see CD2/13 para.8.17) and that the obligation serves a useful purpose save in respect of the community learning space which it contends is surplus to requirements.

The AAP identifies the community facilities to be provided at the District Centre (see CD 3/1/1 AAP policies CG 16B p.92, CG17 p.94) which include a 1000 sq/m multi-purpose community leisure building to be completed by 1300 dwelling occupations. This is to be designed in such a way that it can accommodate a range of community uses such as meeting space and indoor sport/recreation (AAP para.10.21 p.91).

The AAP also identifies that the social and community facilities will be required to meet the needs of the community including adult education, youth facilities, library provision, family and social care services, primary health services, the emergency services and places of worship (CD3/1/1 para.10.24 p.93).

The AAP also recognises that the provision may need to be phased as demand for services will build incrementally (AAP para.10.27 p.93).

The requirements of the Agreement in terms of the nature and extent of provision secured was informed by consultation with the relevant service providers including the Ashford Clinical Commissioning Group and the County Council (see CD3/9 para.3.5 p.10).

The NHS (Kent and Medway) has advised that there remains a requirement for health care facilities of the scale indicated in the Agreement (CD3/9 para.3.6 p.10). The County Council have also advised that the floorspace indicated is still required, although this could now be provided in a more flexible way with shared use of facilities (CD3/9 para.3.6 p.10).

The amount of floorspace required and the triggers for the delivery of the Community Hub are set to ensure that there is sufficient provision of community services and facilities to meet the needs of residents of the Development. Those are useful purposes. The Council has no issue with the Community Hub being developed in phases to meet demand if this can be done cost efficiently (see CD3/9 para.3.7 p.11), however the delivery of at least part of the Community Hub within the timescales set out in the Agreement remains integral to meeting the social and community needs of the residents of Chilmington Green.

This is because the Community Hub is to provide a home and central focus for the community and its early development is pivotal to its success. Delaying provision until 56% of the

dwellings are occupied as the Appellant proposes and at that point providing just a third of the provision required would result in a large proportion of this new community having no local access to services and facilities on Site. They would have to travel to other locations in the Borough to meet their health and social needs assuming that there is availability elsewhere which, given the size of the population involved is unlikely for at least some of the services (CD3/9 para.6.2 p.18).

The NHS (Kent and Medway) have advised that they cannot support the proposal to delay and phase the provision of the health facilities proposed by the Appellant (CD3/9 Appx.C) as it would be impractical to deliver healthcare to the numbers of people necessary in a building of only 500sq/m. This emphasises the weakness of delaying the provision of the DB&S for the Hub and seeking to provide for phased provision. The AAP seeks a detailed design strategy for the whole of the District Centre prior to the approval of reserved matters for the area (CD3/1/1 para.5.24 p.36). The DB&S needs to be agreed in good time prior to commencement of construction to enable contracts to be let etc. A delay is unlikely to allow sufficient time to enable the facilities to be delivered by the required deadline.

The Agreement allows 700 dwellings to be occupied once the DB&S has been agreed but prior to the completion of the Community Hub. Based on the Appellant's housing trajectory that would allow approximately 2 years to let contracts and to construct the Hub which is sufficient time. That is a useful purpose. The Appellant's proposed modifications would reduce this to just 400 dwellings which is a little over a year in terms of build rates which is likely to be insufficient to secure delivery on time. Any delay to the agreement of the DB&S would exacerbate the delay in delivery (CD3/9 para.6.20 p.22).

Further, splitting the submission of the DB&S into two phases and removing the requirement for it to provide all the details in Schedule 12A would make it impossible to design the community hub as a whole and would result in piecemeal design of a single land parcel with no ability to understand how or whether the second tranche would work with the first tranche.

As to the capital cost provided in the Agreement, that is expressed as a maximum cost subject to indexation. The figure is based on the capital cost included in the infrastructure delivery Plan submitted by the Appellant in support of the outline planning application (see CD615) which identified the cost at circa £5M. The obligation requires the Appellant to deliver the Community Hub and there is no constraint provided by the Agreement on it doing so at less than the specified cost if that can be done in accordance with the specification. There is therefore no justification for modifying the total capital cost as proposed.

The Appellant now relies on the recent report by Brookbanks in favour of a total capital cost of £2M but that must be treated with caution. Firstly, it does not rely on BCIS data and BPC's assessment is that the using BCIS data, the maximum specified with indexation will be insufficient to deliver the Hub (see CD14/27 Appx.D). Secondly, the claim that costs of construction will not be much less than assessed in 2017, sits uncomfortably with the Appellant's position in relation to a number of other costs which it is obliged to pay under the Agreement where it argues that the costs have materially increased over the costs specified in the Agreement (e.g. natural green space and PS1) (see CD3/9 para.6.7 p.19 & 6.22 – 6.24 pp.22-23)).

The Council is also deeply concerned that in conjunction with the revised capital cost, the Appellant seeks to provide that indexation should be excluded but fees etc included and that

it should be entitled to vary the scope of what is provided by the cost cap of £2M. That provides no confidence that the £2M is a robust estimate of the likely capital cost of the facilities required.

The proposals in terms of leases to occupiers are also deeply inadequate. No details are provided as to the length of term or the head of terms and the responsibility for long term maintenance and repair is both unstated and unsecured. Further, if any potential occupier were to decline to take a lease of the premises, for whatever reason, there would be no obligation to provide any of the Community Hub under the modifications proposed (see CD3/9 para.6.10 p.20).

The modifications sought do not begin to satisfy the principle of equivalence.

Request 60

The Appellant's proposed modifications to modify the consultation requirements for the DB&S for the Community Hub Building, should be rejected.

a. . The CMO is an important stakeholder at Chilmington Green. They will take on the management and maintenance of the Community Hub. It is therefore important that the CMO can input at an early stage in the design process. The value of early consultation is reflected in National Planning Practice Guidance (NPPG) which identifies the benefit of "working collaboratively and openly with interested parties at an early stage to identify, understand and seek to resolve issues associated with a proposed development" (ref: NPPG, para: 001 Reference ID: 20-001-20190315). It is noted that the Appellant does not propose to remove the requirement to consult with other relevant stakeholders and the public. This obligation continues to serve a useful purpose. Its modification would not serve that useful purpose equally well.

b. The approval of the details of the consultation by the CMO/Council prior to the consultation taking place ensures that the consultation is fit for purpose and involves all necessary parties. This obligation continues to serve a useful purpose. Its modification would not serve that useful purpose equally well.

c. The requirement for the Design Brief and Specification to include the CMO's comments on the costings ensures that the CMO can input into the specification and cost of facilities that they will manage and maintain and raise any concerns they may have, at any early stage in the design process and for the Council to be aware of their comments when reviewing the document. This obligation continues to serve a useful purpose. Its modification would not serve that useful purpose equally well.

The modification of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policy CG1, CG10 & CG17 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM1 & IMP4.

Request 61

The Appellant's proposed discharge of the obligation to repair defects in the Community Hub transferred to the CMO upon being given notice should be rejected.

The Appellant advances no good reason why it should not be responsible for remedying defects so defined. The useful purpose of the obligation is to ensure that the onus for remedying defects

as defined under the Agreement should rest on the Appellant rather than deplete the resources of the CMO. Unlike the CMO, the Appellant will have a contractual relationship with those responsible for designing, supplying material or, constructing and laying out the Community Hub and therefore it is appropriate that it should retain this liability. The proposed discharge would have the effect of imposing the liability on the CMO, which would have no legal remedy against any of those responsible for the provision of the Community Hub but whose default has led to defects. That does not serve the useful purpose of the current obligation.

Request 62

The Appellant's request that the obligation that upon transfer to the CMO the designated parts of the Community Hub be made available to the County Council be discharged should be rejected.

The useful purpose of the obligation is to ensure that once the Community Hub is transferred to the CMO, the relevant parts of it will be made available for use by the County Council or an approved County Council nominee for the provision of County Council services to the community.

The obligation bites only once the transfer to the CMO has taken effect. The Appellant is the landowner and it can ensure that the land is transferred to the CMO on terms which ensure that the designated parts of the Hub are in due course made available for use by the County Council. The obligation therefore continues to serve a useful purpose.

Request 63

The Appellant's request that the provision of payment to towards the Council's costs to consider the transfer which the developer wishes to use, but has not agreed with the CMO, should be discharged, should be rejected.

In accordance with para 1.1.10, the Owners can ask the Council to consider a transfer which the developer wishes to use but has not been agreed with the CMO for the required transfer of any asset to the CMO. The payment of the Council's legal costs to consider the transfer serves a useful purpose through enabling the Council to take specialist legal advice upon the wording, and the wording dispute that has arisen between the developer and CMO, and if appropriate to approve the transfer terms so that the asset transfer can proceed. The discharge of this obligation would not serve this useful purpose equally well because without the Owners' payment of the legal costs these costs would fall upon the public purse which would not be appropriate as they arise in connection with the provision and long-term stewardship of mitigation for the impact of the development.

The request to discharge this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG10 & CG17 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, COM1 & IMP4.

DISTRICT CENTRE

Requests 65 & 66

The requests as now amended are limited to:

a. a modification of the Main Phase 1 District Centre obligation to permit a revised scheme for the District Centre to be the subject of a separate planning application;
b. modification to include a new requirement that the DB&S should have regard to any reserved matters approval or alternative planning permission which may have been granted for the District Centre facilities;
c. modification to delete the floorspace requirements for the supermarket, small retail units and office building and the requirement that there be at least five small retail units with a floorspace greater than 150 sq/m.

The requests should be rejected.

The useful purpose of the obligations is to secure the provision of small retail units and provide a guide as to the nature and extent of the premises which are likely to be acceptable in the District Centre having been the subject of appraisal as part of the planning application and through the Environmental Statement and the objectives for the District Centre itself. For the requirement that any alternative development have no significantly greater impact than that assessed (see Planning Condition 15 in CD6/3) to have effect, it is necessary for what has been assessed to be specified.

The AAP identifies the indicative composition of the District Centre (CD3/1/1 AAP policy CG3 p.39, CG16 p.92, CG17 p.94).

The Appellant asserts that the deletion of the floorspace figures is necessary because there is no market demand for premises of the size indicated in the Agreement. However, no evidence has been provided by the Appellant to demonstrate 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 (CD3/9 paras. 6.13 and 6.14 p.21).

As to the timing of the DB&S, this obligation continues to serve a useful purpose. The obligation to submit a DB&S within the timescale set out in the Agreement continues to serve a useful purpose. The submission of the DB&S within a timely manner enables the Council to ensure design quality is embedded in the development at an early stage and safeguards against poor quality development. The DB&S needs to be agreed in good time prior to commencement of construction to enable contracts to be let, etc. A delay to the agreement of the DB&S is unlikely to allow sufficient time to enable the facilities to be delivered by the required deadline thus defeating the useful purpose. The Appellant has not demonstrated that their proposed delay would provide sufficient time. The proposed modification would therefore not serve the useful purpose equally well.

The modification of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG3 & CG22 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1 & COM1.

ECOLOGY

Request 90

This request to discharge the obligations contained in Schedule 17 to the Agreement should be rejected.

This obligation continues to serve a useful purpose. Its discharge would not serve a useful purpose.

The transfer of the ecological enhancement areas to the CMO is an essential part of the approach to community stewardship being delivered at Chilmington Green and detailed in the CMO Business Plan submitted by the Owners. The useful purpose served by the transfer is that it secures the management of these areas in perpetuity. The Appellant has not explained how the retention of these assets in their ownership would meet that purpose or impact the CMO Business Plan.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1, CG10 and CG21 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, ENV1 & IMP4.

BUS SERVICES

Request 95

The Appellant's proposed Modifications to Schedule 20 should be rejected.

The Appellant seeks to:

- Delay the provision of the temporary bus stop to no later than 500 dwelling occupations from the current trigger of 100 dwelling occupations;
- Delay the start of the bus service from 100 dwelling occupations to no later than 500 dwelling occupations and to replace the current minimum 30 minute frequency with a peak hour frequency of 30 minutes and an hourly service outside peak hours;
- Delay the initial bus related infrastructure for Main Phase 1 to no later than 1222 dwelling occupations from 200 dwelling occupations;
- Discharge the obligation that a half hourly bus service commence operation between the Site and Ashford Town Centre no later than 1222 dwellings, increasing to a frequency of 13-14 minutes not later than 2772 dwelling occupations and a frequency of at least every 10 minutes no later than 4017 dwelling occupations;
- Discharge the requirement that all bus services connect with the first train from Ashford International to St Pancras International and finish at a time to connect with the last train from St Pancras;
- Delete the option for the Council to agree to the tendering for an alternative service if no bids are successful and instead to require the Council to agree to an alternative service and not unreasonably withhold its consent to delaying the trigger point by allowing more dwellings to be occupied before the bus service starts operating;
- Replace the obligation to increase the frequency of the bus service at specific points in time based on dwelling occupations and instead require the Appellant to undertake bus service monitoring and to submit bus service monitoring reports to KCC to establish whether a revision to the bus service should be implemented;
- Insert an obligation that the bus priority measures should be transferred at nil consideration and nil cost to the specified body; and

- Delete the requirement for the Appellant to subsidise the bus service.

The Agreement currently secures the delivery of a bus service and associated infrastructure, subsidies and incentives. The obligations serve a useful purpose because the provision of a bus service is essential to deliver the non-car mode share required for a sustainable development.

The modification proposed would not serve that purpose equally well because the delay on the commencement of the bus service result in up to 500 dwellings having to rely on the private car to meet their day to day transport needs. The target bus mode share for the site in the approved travel plan, whilst less than the 20% mode share contained in the AAP at 14% for Phase I and rising to 17% over the course of the development, is an exacting one. To deliver the bus patronage required to achieve that mode share it is necessary to provide a high frequency bus service before travel patterns and behaviour have become established.

Delaying the provision of the initial bus service until 46% of the dwellings are occupied, the provision of a high frequency bus service and bus priority measures until 62% of the dwellings are occupied and, consequently delaying all further bus obligations, would not assist in achieving the required mode share. The Appellant has not provided any assessment of the impact its proposed modifications would have on the ability to achieve this mode share.

Reducing the frequency of the service to hourly, reducing the hours within which the buses will run, and being dependent on monitoring of patronage to decide whether a more frequent service is required. would not serve the purpose of the obligations equally well. The proposed monitoring would only trigger a revision if the service were found to be significantly over or under-utilised. That is an ill-defined high bar which appears designed to minimise the prospect of a revised service having to be provided.

The Appellant relies heavily on the approach it adopted at Possingham Farm with the blessing of that Inspector, but it is not appropriate to seek to draw parallels between a development of just 655 dwellings and a Garden Community of 5750 dwellings. Further and in any event, the Possingham Farm decision does not support the proposed commencement of the bus service at 500 dwellings. The Possingham trigger was 100 dwellings which does not support the Appellant's position. Mr Dix attempted to argue that the disparity was explained by the existence of a bus service along the A28, but that ignores the fact that there are no bus stops for those services that run along the A28 close to Chilmington Green.

Finally, planning permission was granted on the basis that the bus service would not be viable and self-sustaining in the early years of the development, consequently a subsidy was required and secured. The discharge of the subsidy obligations would remove this support from the bus services but the Appellant has not provided any evidence to demonstrate that a subsidy would not be required. Instead, its contention is that the required level of subsidy is unaffordable which is not a material consideration[7].

The Appellants' proposed modifications would not serve the useful purpose of the obligations equally well.

Request 96

[7] See CD2/26 Dix proof para.4.9 p14

The Appellant's request that requirement that the first occupiers of each dwelling be provided with vouchers with a face value of £450 index linked for use on the bus service be discharged, should be rejected.

The obligation continues to serve a useful purpose. Incentives to encourage patronage of the bus service are essential to resident's adoption of sustainable patterns of travel when they move into the development in order to meet the challenging mode shift required. A direct incentive to occupiers, whilst an indirect subsidy to the Bus Service, is not double counting. The service subsidy enables the bus service to operate. The Bus Vouchers seek to maximise its use.

REGIONAL INFRASTRUCTURE FUND

Request 99

The Appellant's request that the obligation to contribute to the repayment of the forward funding provided by the Regional Investment Fund ("RIF") for the infrastructure and road improvements to Junction 9 M20 and the Eureka Skyway footbridge, and the Drovers Roundabout ("the Improvements") should be rejected.

Policy CG11b of the Chilmington Green AAP requires the development to contribute to the repayment of the forward funding for these improvements (CD3/1/1 p.79). That accords with Local Plan policies COM1 and IMP1 which require the delivery of infrastructure the need for which is generated by the development (CD4/1 pp.303 & 312). The Local Plan identifies why the Improvements were needed to accommodate growth in the Council's area.

The useful purpose of AAP policy CG11b and the obligation is to ensure that the Council complies with its obligations under legal agreements entered into with both SEEDA (succeeded by 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 Improvements were necessitated by the scale of the growth planned for Ashford with the capacity of both Junction 9 M20 and the nearby Drovers Roundabout inadequate to cater for it. Highway improvement schemes to upgrade both junctions were required and designed to alleviate these two constraints. The provision of the Eureka Skyway Bridge was an integral part of the scheme to provide greater capacity for road traffic at junction 9 by providing an alternative route for pedestrian and cycle traffic to cross the motorway between the Eureka Leisure Park and the Warren Retail Park (see CD3/12 para.1.3 p.2).

The improvement scheme commenced in June 2010 with the benefit of £15.1M of forward funding from SEEDA and the works were completed in 2011. Without this forward funding the schemes would not have been delivered which would have constrained growth (CD3/12 para.1.4 p.2).

Under the agreements (CD10/6 and 10/9) the Council is required to use reasonable endeavours to maximise contributions for development to repay the forward funding.

The methodology for calculating the contributions is set out in the Council's "RIF Repayment Contributions for Development (April 2014)" (CD10/19). That methodology is not disputed by the Appellant.

The Supplementary Transport Assessment provided in support of the Chilmington Green Development by the Appellant, acknowledged that a payment towards the RIF Fund was required

(see CD10/10 para.24 p,5) and the total financial contribution secured under the Agreement (£5,622,589) was calculated by reference to the number of PM Peak trips from the development which would pass through the M20 J9 and Drovers Roundabout. The calculation was undertaken by Mr Dix on behalf of the Appellant and his calculation (which includes a small error in the Appellant's favour) was adopted for the purposes of the Agreement (CD3/12 para.1.7 p.3).

To date, total contributions of £11,728,104.75 (as at January 2025) have been secured from relevant developments (CD10/21). This includes the £5,622,589 contribution secured from the Appellant under the Agreement. There is a remaining residual deficit of £3,371,895.25.

The Appellant advances no claim that the obligation does not serve a useful purpose. The High Court has confirmed that repayment of forward funding is a useful purpose (see Mansfield v SSHCLG [2018] EWHC 1974 (Admin).

The only point made in Mr Dix's proof of evidence is that if all the forward funding has been collected then further contributions are not needed and the obligation would not serve a useful purpose (CD2/26 Section 6 p23). As the Council has demonstrated, taking into account the Chilmington Green contributions and including a contribution of £563,918.75 which the Appellant accepted was necessary in respect of Possingham Farm (CD3/12 para.1.8 p.3, 3.5 p.5), there remains a residual deficit of £3,371,895.25. The obligation therefore continues to serve a useful purpose even on the Appellant's case.

Deleting the requirement for Chilmington Green to contribute towards the RIF would mean that the Development would not contribute towards the cost of a significant highway improvement scheme that, if not implemented, would have meant that the Development could not have been brought forward due to significant constraints on the highway network. Discharging the obligation would mean that the shortfall in monies secured to repay the forward funding would increase very significantly to a sum of £8,994,484.25. That is directly contrary to the continuing useful purpose and to the legal agreements entered into by the Council and KCC which released the forward-funding for the Improvements.

The Appellant therefore falls back on its viability case to justify the discharge sought. For the reasons set out in the Council's viability submissions, that is not an issue which is relevant to the tests which are to be applied in determining the appeals.

VIABILITY REVIEW

Requests 100 – 104

The Appellant's requests to:

- discharge the requirements for Viability Phases One to Four (Requests 101 and 102);
- tie the submission of each viability review submission to a date no earlier than when a specified cumulative number of Reserved Matters Applications have been submitted (Request 103); and
- change the definition of "Premature Viability Submission" to mean a submission made more than12 months in advance of each of the cumulative Reserved Matters Applications totals set out in Request 103.

should be rejected.

The Viability Review Mechanism provided by the Agreement serves the purpose of ensuring that the Council is at all times in the best position to maximise the provision of affordable housing over the course of the development. Given the need for affordable housing (see CD3/15) and the acceptance that, for viability reasons, the provision of affordable housing is likely to be limited (hence the minimum provision of only 10%), it is essential that the Council is in the strongest possible position 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. That is plainly a useful purpose.

Whilst it is accepted that it is unlikely that additional provision over the 10% minimum will be secured in Viability Review Phases 2-4, the prospect that some additional affordable housing provision might be provided cannot, at this early stage of the development be ruled out. The Council does not accept the Appellant's assertion that any additional provision can definitively be ruled out at this stage. Deletion of Viability Review Phases 2-4 would result in circa 46% of the Development (2624 dwellings) being constructed with only 10% affordable housing (CD3/15 para.6.9 p14).

Whilst it is asserted by the Appellant that the Viability Review Mechanism is frustrating land sales, that is not a reason given in any of the feedback contained in Mr Collins' evidence,[8] and, as Mr Leahy explained, it is possible to structure land deals to accommodate any uncertainty as to the level of affordable housing which will ultimately be required.[9]

Even if there were an issue with the present mechanism, the modifications do not serve the useful purpose equally well. They would effectively allow Viability Review Submissions to be submitted without any reference to a dwelling occupation trigger. That would defeat the purpose of the obligation. Reserved Matters Applications can be submitted many years before dwellings are built and occupied and the time lag between the submission of an application and occupations on site would deprive the Council of ability to review the appraisal inputs in the light of actual costs and values.

Under the Appellant's proposed modification, the Viability Review Submission for VRP Five should not be submitted because the cumulative total of dwellings in reserved matters submissions is already 2625 dwellings. If a viability review were submitted now for VRP Five, it could only be based on the costs and values of circa 389 dwellings currently complete and occupied. This would not provide an accurate reflection of the costs associated with construction and sales values likely to be achieved many years in the future and would deprive Schedule 23 of its practical utility. The test of equivalence is not met.

The discharge of this obligation is contrary to the Chilmington Green Area Action Plan 2013 Policies CG1 and CG18 and the National Planning Policy Framework 2024. This conclusion is consistent with the Council's wider approach in other parts of its area: see the Ashford Local Plan 2030 Policies SP1, HOU1 & IMP2.

PUBLIC ART

Requests 105, 106, 107 and 108

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[8] See CD2/25 Apps III and X

[9] Answer to Inspector

The Appellant's requests that the obligation to pay the public art contributions to the Council and to require it to provide public art within the Site in accordance with revised timescales should be rejected.

The useful purpose of the obligations is to comply with the Design Guidance within the AAP which refers to the requirement for public art to be integrated into the public realm in the District Centre (CD 3/1/1 AAP para.5.24), Local Centres (para.5.40) and the strategic east/west pedestrian/cycle way (para.5.83). The Chilmington Green Design Code SPD also refers to locations where public art would be appropriate (CD3/1/6).

The Council's Ashford Art and Cultural Industries Strategy Report (2016) (CD4/13) which formed part of the evidence base of the Local Plan, highlights that the arts and creative industries make a significant contribution to the quality of life of the residents of a place (CD3/9 para.3.17 p12). The arts and creative industries also have a role to play in placemaking through the creation of high quality public spaces and public art (CD4/13 para.1.2.4 & 1.2.4 pp5 & 5). Public art is broadly defined to include more than just physical provision of pieces of art.

The financial contribution was calculated in accordance with the Arts Council England "Arts, Museums and New Development – A standard charge approach" (2010). The contribution of £750,000 included a payment of £50,000 to be spent by the Council on producing a public art strategy for the Development (CD3/9 para.6.1 p.13). This contribution was spent on producing the "Creative Chilmington Strategy" adopted by the CMO in November 2019 (CD4/14) and endorsed by the Council on 19 December 2019.

The Strategy set out the ways in which public art will be integrated within the development through a variety of means which are intended to be delivered over more than 20 years. The Strategy sets out how the financial contribution secured in the Agreement is to be allocated and identifies seven projects to be delivered (CD3/9 para.3.18 p.13).

The second payment of £100,000 secured in March 2023 has not yet been spent however the Council is currently working up a brief to commission specialist art organisation to develop, manage and oversee the delivery of the public art for Chilmington Green over a three year period (CD3/9 para.3.19 p.13).

The first instalment of the contribution was spent on the preparation of a brief for the provision of public art within the Site (the Strategy) and the Council therefore fulfilled its obligations under the Agreement. There is no requirement in the Agreement which requires the initial payment to be spent on the provision of art itself.

The remaining payments totalling £700,000 are based on the number of dwelling occupations and this aligns with the timetable for the delivery of the Public Art Strategy. The Appellant's suggestion that the timetable for the performance of the obligations is out of step with the building trajectory is misconceived. Delaying the payments as proposed would prevent the delivery of the Strategy within the timescales currently envisaged (CD3/9 para.6.29 p.24).

The proposed modification which would allow the Appellant to take the role of commissioning, acquiring and placing the public art has a number of weaknesses and would not serve the purposes of the present obligations equally well. There would be no obligation on the Appellant to comply with the Creative Chilmington Strategy or to produce an alternative strategy to inform the commissioning or disposition of the art. The Appellant would also be under no obligation to maintain, repair or replace the any installed public art as that obligation is proposed for discharge

and no alternative maintenance arrangements are provided for in the Appellant's proposals. Those proposals also appear to focus on the installation of physical art as opposed to the broader public art proposals of the approved Strategy.

Request 111

The Appellant's request that the Quality Agreement obligations contained in Schedule 26 should be discharged should be rejected.

The purpose of the Quality Agreement obligations is to provide the Council with the appropriate resource to ensure that the Development is delivered to the level of design quality sought by the AAP, the Chilmington Green Design Code and the outline permission. The Council has recruited a Quality Monitoring Officer to meet the obligation contained in Schedule 26 para.4 whose role it is to monitor on-site build quality, to identify and tackle build issues and to deliver a coordinated pattern of approval and monitoring, to hold reviews with developers/site managers and local residents to capture and respond to any issues arising. The Officer also reviews compliance with conditions (CD3/8 para.3.8 p.9).

The report to Committee on the planning application encapsulated the useful purpose of the obligation:

"a new level of control over build quality can be achieved both for homes and the wider public environment outside the home. Over time the intention is to consolidate a 'virtuous circle' where better quality build and a nicer place to live creates a stronger market interest, higher returns for developers and a stronger community. When combined with the excellent maintenance and management of community assets and green space that will arise from the operation of the Community Management Organisation, there is every reason to believe that a place of real and lasting quality will be created at Chilmington Green. All this will encourage a self-sustaining, high-quality place" (CD6/1 para.391 p.1.217).

That is particularly important in the context of a development where viability will depend on a placemaking premium.

The Local Plan supports the approach taken by the Agreement:

"if good design is undermined during the construction process then any amount of good design on paper can be undone" (CD 4/1 para.2.172).

"…creating great places demands an attention to detail and care in construction. The Council has had too many examples of poor delivery on site which lets down residents and undermines the quality of places aspired to in Ashford. As a result a "Quality Monitoring Initiative", has been set up which involves specialist officers working with site managers to regularly check that schemes are being delivered correctly. Spotting any issues early will reduce the risk of repetitive mistakes being made and the costs of putting things right. Developers are encouraged to work with the Council in this way to the mutual benefit of all parties" (CD4/1 para.2.173).

The AAP identifies the importance of the commitments contained in the Chilmington Green Charter being delivered on the ground and the role that monitoring will play (CD3/1/1 11.53 p.122, 11.55 p.123) with the objective being to:

"ensure that there is no degradation in the eventual built product from the quality aspired to through this AAP, whoever the developer is and however long the development takes to fully build out" (CD3/1/1 para 11.56 p.123).

The obligation reflects the actual costs of monitoring (CD3/8 para.6.1 p.13) and the evidence to date shows that the quality monitoring is identifying issues of build quality which need to be addressed going forward (CD3/8 Appx A). The role of quality monitoring is crucial to ensuring that a high-quality environment is delivered.

The discharge of the obligation would mean that the Council would not have the financial resource to maintain the Quality Monitoring Officer role and the quality of the development would go unchecked and issues arising unaddressed.

Contrary to the Appellant's assertions, it is not the case that the role of the Quality Monitoring Officer duplicates the Council's function in relation to the discharge of reserved matters or condition. Not all of the documents which are which the Quality Monitoring Officer is responsible for appraising under para.4 of Schedule 26 will be submitted to the Council with reserved matters or condition discharge applications. For example, the Design Brief and Specifications to be submitted for each of the Community Assets, are required to be submitted before and independently of any such applications. The Appellant is not required to pay any planning fee associated with the review, agreement to or monitoring of each DB&S which is submitted. Without the Quality Agreement obligation, the costs of this would fall on the public purse.

The argument that Building Control visit the site and undertake monitoring provides no meaningful substitute. As the history of monitoring to date shows, there are a range of quality issues which have been identified and which need to be addressed which extend well beyond the remit of Building Control. Moreover, there is no requirement that any developer use Local Authority Building Control; private-sector 'approved inspectors' may be used instead.

The criticisms made of the standard of the Quality Monitoring to date relying on CD14/22 are not accepted. As Ms Tomlinson confirmed, the Quality Monitoring Officer visits to the site have included visits with her and, whilst various issues are raised by the Appellant about when the quality assurance issues first arose and the time taken to pick them up, as a matter of fact there is no dispute that a variety of quality issues have been identified and notified to the Appellant and other housebuilders. Those include stepped access, brickwork not matching, open space not laid out in accordance with the approved plans and failed landscaping. As Ms Tomlinson explained, the Council has sought to use the funding for the post carefully to date given the slow progress of the development. Highlighting defects with the aim of ensuring that they are not repeated is a useful purpose in ensuring that, overall, the development is delivered to the level of design quality envisaged by the AAP. The Appellant's reliance on the conclusion of your colleague in the Possingham Farm decision that a Quality Monitoring Fee was not justified because ensuring that development comes forward in accordance with the approved plans is part of the day to day functions of a planning department, is misplaced. The context here imposes specific functions on the Quality Monitoring Officer which go well beyond ensuring that the development complies with the submitted plans. Further, the issue here is not whether or not the obligation meets the statutory tests. It is whether the obligation willingly entered into by the Appellant continues to serve a useful purpose. The evidence shows that it does.

Request 112

The Appellant's request to modify the monitoring payment obligation to reduce the monitoring contributions from £25,000 each and to discharge the anniversary payments of £25,000 save the first anniversary payment, should be rejected.

There is no dispute that the monitoring contributions serve a useful purpose; the Appellant argues instead that the level of contribution is disproportionate.

The contributions are proportionate to the scale and nature of the Development and reflect its scale and complexity and that of the Agreement. The Agreement comprises 50 Schedules and the planning conditions attached to the outline planning permission number 103 (CD3/8 para.6.7 p.14).

The Agreement provides for a very wide range of onsite and off-site community assets and infrastructure to be provided, a minimum of 575 units of affordable housing, the creation and financing through a variety of means of the CMO and requiring the payment of contributions totalling well over £100M plus indexation.

The monitoring of the Agreement and planning conditions is not a simple or straight forward task and requires and will continue to require a significant resource over a long period of time. The reduction in the amount to be paid is significant and equating to a reduction of 85%. This would result in insufficient sums being available to monitor the Agreement and planning conditions properly to the detriment to the delivery of the development.

ABC BANK ACCOUNTS

Request 113

The Appellant's request that the obligation to maintain the Council Minimum Balance in the Developers' Contingency Bank Account – Council be discharged, should be rejected.

The payments required by the Agreement into the Developer Contingency Bank Account – Council together with those into the Developers' Capital Bank Account – Council provide the Council with security of funding to provide for the timely delivery of infrastructure to support the development if the Appellant fails to meet their obligations under the Agreement.

Recital U to the Agreement records that the security provisions within the Agreement were one of the main reasons why the Council and the County Council agreed to the Agreement taking the unusual approach 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 are bound by the Positive Obligations to Pay (see clause 2.11).

The Developers' Contingency Bank Account – Council has been shown in practice to have a useful purpose. The Appellant's non-payment of a number of the financial contributions due under the Agreement has necessitated the Council drawing down monies from the Account to ensure that the required community infrastructure or other service can be delivered. This avoided, at least for a time, the need for the Council to commence enforcement proceedings which can be lengthy and costly. The bank accounts provide the certainty that funds are available which can be accessed in a timely manner (CD3/8 para.6.10 p.15).

The fact that the Council has already had cause to seek redress from the Developers Contingency Bank Account – Council at an early stage of the Development shows that it continues to serve a useful purpose.

The Council rejects the Appellant's assertion that its interests are adequately secured by the Paying Owners covenants because enforcement action takes time and cost to pursue and any non-compliance results in delay in the provision of necessary infrastructure at the point at which it is needed. Further, the legal costs and officer and management time of taking formal enforcement action which generally falls on the public purse partly or wholly, even if the action is ultimately successful, are avoided or reduced.

Contrary to the Appellant's assertions, the sums in Schedule 29A are not substantially more than is required to mitigate the impact of the Development. The sums are those which are required to deliver the necessary infrastructure.

Request 114

The Appellant's request that the payments required to be made into the Council Contributions Bank Account should be modified to exclude or reduce those payments to reflect its other proposed modifications/discharges and that the payment and withdrawal triggers should be aligned at whichever is the later, should be rejected.

In accordance with para.3 and 4 of Schedule 29, the Appellant is required to pay all the financial contributions that are payable to the Council in accordance with the Agreement in advance of their use by the Council. The triggers in Schedule 29A are in advance of the triggers for payment stipulated in each relevant schedule in the Agreement. The payments are also required to be indexed (paras.5 & 6) in accordance with Schedule 29B. The Council is required to pay all monies received under Schedule 29 into the Contributions Bank Account. Under Schedule 29 para.8 the Council may not withdraw any monies from this Account (other than interest) otherwise than in accordance with Schedule 29C.

The Account serves a useful purpose being a mechanism whereby the Council can be satisfied at the funds to deliver required infrastructure are in place at a point which is likely to ensure that the appropriate trigger is met.

Request 115

The Appellant's request that paragraph 8 of Schedule 29 should be amended to the effect that the Council should be prevented from withdrawing interest from the Council Contributions Bank Account should be rejected.

The existing wording, as part of the obligations to which it relates, continues to serve a useful purpose because it is provides clarity about when interest accrued in the bank account can be withdrawn. The proposed modification would not serve that useful purpose equally well because it would be unclear when interest could be withdrawn from the account. This would result in the interest being held permanently in the account as it would be a breach of Sch. 29 para. 8 for the Council to withdraw it.

The Appellants does not propose any alternative text setting out what is to happen to the interest if the words "other than interest" are removed.

Request 116

The Appellant's request that the obligation to open and maintain the Developers' Capital Bank Account – Council and not to occupy dwellings in excess of the triggers contained in Schedule 29D unless the corresponding amount relating to the obligation specified in that Schedule had been paid into the Account be discharged should be rejected.

The amounts specified in Schedule 29D correspond with the total capital cost of the community asset(s) or infrastructure to be provided as specified in the relevant schedule of the Agreement. The Council is permitted to use the monies in the account if the Appellant fails to provide on the Site each of the community assets required by the triggers set out in the Agreement.

The obligation relates to the bus service; children and young people's play space, CMO second operating premises; informal/natural green space; allotments, the Hamlet facilities; CMO Commercial Estate; community hub; Discovery Park.

Notwithstanding that payments relating to the first instalment of the bus service subsidy (due 1 March 2021) and the first playspace (due 1 October 2023) should have been paid into the account, the balance has always been zero.

These payments provide the Council with security of funding to provide for the timely delivery of infrastructure to support the development. The Paying Owners non-payment of financial obligations due within the Agreement to date, has required the Council to seek and withdraw funds towards mitigating the absence of a bus service from the Developers' Contingency Bank Account – Council. This demonstrates that this obligation continues to serve a useful purpose.