SECTION 106B OF THE TOWN AND COUNTRY PLANNING ACT 1990

AGAINST THE NON-DETERMINATION BY ASHFORD BOROUGH COUNCIL AND KENT COUNTY COUNCIL OF:

APPLICATION UNDER S.106A TO DISCHARGE AND/OR MODIFY VARIOUS OF THE OBLIGATIONS UNDER AN AGREEMENT MADE PURSUANT TO S.106 OF THE TOWN AND COUNTRY PLANNING ACT 1990 DATED 27 FEBRUARY 2017

PINS References:
APP/W2275/Q/23/3333923
& APP/E2205/Q/23/3334094

CLOSING SUBMISSIONS ON BEHALF OF THE APPELLANT

A. INTRODUCTION

1. There is a national crisis in the provision of housing. These appeals are a direct response to a number of factors that have contributed towards that crisis, brought with the purpose of rebalancing an overly burdensome s.106 agreement that is stalling and will act to prevent delivery of much needed housing in this important strategic location.
2. There is also a local crisis in the provision of housing. The Ashford South Garden Community is strongly supported by national government and local policy. has been held up by the abject failure of Ashford Borough Council ('**ABC'**) to approve any applications within it, other than details of Chilmington Green Secondary School, since 2021:

   (i) reserved matters applications submitted for Chilmington Green in December 2022, January 2023 and January 2025 remain undetermined;

   (ii) planning permission for the Chilmington Green waste water treatment works was refused by ABC and allowed on appeal in September 2024;

   (iii) the Kingsnorth planning application was submitted in 2015, and the appeal for non-determination was allowed in November 2023;

   (iv) Possingham Farm, not part of the development plan conception, was approved on appeal last year;

   (v) the planning application for the final part of the Ashford South Garden Community, Court Lodge, was submitted in 2018, and is going to a non-determination appeal this summer.
3. ABC have transferred responsibility for Ashford South Garden Community to the Secretary of State and the Planning Inspectorate. That is a dereliction of duty.

4. Delivering this large site requires a measure of review and flexibility from all parties to ensure that infrastructure delivery matches housing delivery and occupations. Indeed, the Area Action Plan ('**AAP'**)[1], Quality Charter[2] and the report to committee for planning permission all emphasised the need for review and flexibility due to the inevitable challenges presented by front loading of

[1] JC Proof, Paras 2.2.11-2.2.16; AAP, at 1.19-1.24; Policy CG22; Chapter 11; Chapter 12 [CD3.1.1].
[2] JC Proof, para 2.2.17; Quality Charter [CD3.1.8].

infrastructure[3]. At such scale, adjustment will always be required to ensure that infrastructure spending takes place at a time not only a) when the funding is available; but is also funding, b) infrastructure that is actually required; c) at a time that it is actually required; and; d) at a scale that balances the need for mitigation with what the development can actually afford.

5. The consequences of Chilmington Green stalling are severe (and even more severe on the Councils' cases):[4]
   (i) Some 5,350 homes at Chilmington Green will not be provided, housing over 12,000 people;
   (ii) Affordable housing will not be delivered;
   (iii) Associated development, including the district centre and sports facilities will not be provided;
   (iv) Possingham Farm cannot provide its 655 homes if the district centre does not come forward;
   (v) If the dualling of the A28 is necessary or desirable, then it won't happen;
   (vi) Court Lodge planning application for 1000 homes is said to have a severe impact on A28 without dualling – *if so* that ought not to proceed;
   (vii) The community management organization (CMO) goes bust
6. This would be a disaster, not simply in planning and economic terms, but in human terms.
7. The Councils simply fail to recognise this. Ms Tomlinson said that Chilmington Green stalling at 400 units 'wouldn't be positive' – which is the sort of comment you make about forgetting to put the bins out. KCC's case ignores the benefits and desirability of the development entirely, and it took a bit of coaxing for Mr Adams to acknowledge that KCC wishes to see housing brought forward in the county.

   The Councils have shown total disinterest in delivering housing at Chilmington Green. Indeed their cases to this inquiry are that the effect of the planning obligations on whether the development takes place is legally irrelevant. That the role of the section 106 agreement in frustrating new homes should be ignored.

[3] JC Proof, para 6.1.3.
[4] Agreed by FT in XX.

The blunt reality is that the Chilmington Green development, and so most of the rest of the Ashford South sustainable urban extension, will not happen if these planning obligations remain in force without significant amendment.

8. It is also the blunt reality that the Councils don't care. The consistent position of the Councils in this inquiry is that is not their problem. They have no Plan B. They have nothing to offer to bring these homes forward.
9. The local politicians who have given evidence to the inquiry have all though wanted an accommodation to be reached, so that homes can be built and infrastructure provided.
10. The concessions made by the Councils are small, and welcome so far as they go, but do not address the problems for the delivery of the scheme.
11. The Appellant is the only body which is trying to bring Chilmington Green forward; it is the only one offering any solutions.
12. [5]. The reality is that the Inspector, is faced with a stark choice – enable occupations to ease cash flow so as to ensure delivery, or let it the site stall, jeopardising delivery of this crucial strategic site.

SUMMARY BACKGROUND

Chilmington Green planning permission

13. Chilmington Green ("**CG**") is a strategic urban extension located to the south of Ashford town centre that is proposed to deliver up to 5,750 homes; a district centre; two local centres; a secondary school; up to four primary schools; shops; healthcare; sports and leisure facilities; and, significant areas of public open space, including a strategic park. The ambition is for CG to be an exemplar Garden Suburb. The Core Strategy proposed up to 7,000 dwellings. The Area Action Plan reduced this to up to 5,750 dwellings.

14. ABC resolved to grant outline planning permission at its planning committee meeting on 15 October 2014, but it was not until two years later that the decision was issued on 6 January 2017 (Ref: 12/00400/AS, the "**Outline Permission**")[6]. By then, two of the four developers of CG had dropped out, leaving the Appellant to

[5] JC Proof, para 2.2.10-2.2.20.
[6] CD3.1.2.

take up their land, and to assume the role of master developer (which means providing the infrastructure for a massive site and selling development plots to other homebuilders) as well as building some of the homes, with Jarvis building out a small part, and BDW retaining some.

15. Hodson Developments stepped up, when other developers fell by the wayside, and no others were prepared to.

Section 106 agreement

16. The s.106 agreement was entered into on 27 February 2017 in respect of the Outline Permission[7]. Deeds of variation of the s.106 agreement have been entered into on 29 March 2019 and 13 July 2022[8].

Attempts to modify and/or discharge

17. The Appellant has repeatedly sought to modify and/or discharge various of the obligations in the s.106 agreement, including as follows:
    a. By application to ABC on 20 August 2020, which was refused by letter dated 16 October 2020;
    b. By application to ABC and KCC on 27 April 2021, which was refused by letter dated 17 November 2021;
    c. By application to ABC and KCC on 4 May 2022[9], which ABC asserted to be invalid by letter dated 30 June 2022, despite having failed to raise any concerns as to validation during the determination period;
    d. By application to ABC and KCC on 20 October 2022[10] (resubmitted to KCC under cover of a letter dated 15 August 2023), which was the subject of a settlement agreement with ABC on 10 February 2023, but which was not determined within the statutory period.
    e. On 17 October 2023, an appeal was submitted against the Councils' non-determination, which was validated on 5 July 2024, with a start letter issued on 5 November 2024.

[7] CD1.14.
[8] CD1.15-17.
[9] Referred to in the papers as "Application No 1".
[10] Referred to in the papers as "Application No 2".

18. In short, the nature of the obligations, their timing and scale is prejudicing the viable delivery of the CG scheme. The Appellant has done everything in its power to ensure that it can progress matters, but that is proving extremely challenging without some discharge and modifications to the s.106 agreement. These appeals seek to achieve the changes that are necessary to allow all parties to achieve their ambitions for the site[11].

19. Even pursuant to the proposed changes, the majority of infrastructure contained in the s.106 agreement will still be delivered to serve its useful purpose equally well. While it is requested to remove certain obligations, these are in general requested to simplify the process of delivery in order to reduce capital costs. Only where it is considered that facilities do not provide a useful purpose are they requested to be removed in their entirety[12].

Progress of the development

20. The CG development commenced in 2017.

21. As at January 2025, the Appellant has[13] made £12m worth of s.106 payments, including for the delivery of a primary school and has built strategic infrastructure (highways, services, drainage, etc) to service land for approximately 2,000 dwellings.

22. Reserved matters ("**RM**") approval has been granted for 763 homes, the first primary school and the secondary school. 376 homes in Phase 1 have been occupied alongside the first primary school.[14] The secondary school and around another 333 homes are currently under construction.

[11] JC, Proof, Para 1.2.2.
[12] JC, Proof, Para 1.3.39.
[13] WS of TH, JC Appendix I, para 21.
[14] Hodson's information on the number of occupations comes from records of its own build-out, and information from the other developers on site, which are presently Jarvis and Thakeham (for Man Group). The BDW site is sold out and occupied.

23. RM applications were submitted in December 2022 and January 2023[15] for the remainder of the Phase 1 land parcels, which comprises a further 745 dwellings; the district centre; sports facilities; ecological mitigation; flood attenuation and landscaping. All of these remain undetermined by ABC.

24. RM applications for Phase 2 were all submitted by 6 January 2025, including all dwellings covered under Viability Review 4 in the s.106 agreement. However, based on the rate of housing delivery anticipated by the Appellant and set out in the Quod Explanatory Statement[16], the number of occupations required in order to trigger Viability Review 4 (1,800 units) will not be reached for another 4 to 5 years. Until the review is triggered, these applications cannot be built out.

25. In summary, therefore, there are RM applications for 1,874 dwellings, some of which have already been with ABC for over two years and remain undetermined and many more are likely to remain undetermined for at least another five years due to the provisions in the s.106 agreement[17]. This simply cannot be the correct approach to deliver housing at this important strategic location.

26. Moreover, the inability of ABC to approve anything[18], which further (directly and unnecessarily) compounds the delay and any consequential effects, such as increased build costs, compounding effects of indexation, increased borrowing costs and significant planning costs.

Summary of proposed changes to the s.106 agreement

27. The proposed changes seek to make necessary adjustments to the timing of delivery of infrastructure and associated s.106 payments in order to reflect the reality of delivery on site and to ensure that the mitigation proposed in 2012 is adjusted so as to be fit for purpose now and into the future, so as to still serve a useful purpose.

[15] 6 January 2023 was the date by which all reserved matters application for Phase 1 land parcels had to be submitted in accordance with Condition 3 of the Permission.
[16] CD1.12.
[17] JC, Proof, para 2.4.3.
[18] See also ABC's evidence to the Possingham Farm inquiry: JC, Proof, para 1.3.17.

28. The Appellant's Statement of Case contains (at Section C) a summary of the proposed changes to the s.106 agreement. Since then, a number of proposed changes have been refined, modified or withdrawn by the Appellant. The proposed changes are therefore described in the Appellant's evidence, with Appendix II to Mr Collins' evidence[19] setting out a summary of the proposed changes, a summary of the Councils' responses, as well as the Appellant's further response (if relevant) (the '**Consolidated Modifications Table**'). That is then revised to include all changes up to 27 March 2025 in the version circulated this last weekend.

29. The nature of the proposed changes can be broadly summarised as: i) resulting from circumstances outside of the Appellant's control that critically present viability / deliverability challenges; and ii) seeking consequential changes to the s.106 agreement to enable delivery of the development and wider scheme.

30. While the Appellant seeks to push back the delivery of a number of obligations, this is in order to reduce peak debt levels and to ensure that the Scheme can be viably delivered. As can be seen from the Appellant's evidence (and the Consolidated Modifications Table in particular), it is still intended that such obligations will be met, with the useful purpose met equally well for these requests[20].

31. The Appellant's evidence demonstrates that the proposed changes are necessary to enable continued delivery of the Scheme. They are consistent with national planning policy and the original vision for the Scheme as set out in the AAP; they will enable a boost to housing delivery, rapid implementation, diversified delivery and create value which can be captured in the later parts of the Scheme for additional affordable housing delivery.

32. There should be no doubt of the consequences if CG does not proceed. The site has been long-identified by government as a Garden Village. It is strongly supported

[19] At page 142 of the pdf.
[20] JC Proof, para 3.1.18.

by the development plan. It would be disastrous for ABC's housing land supply if CG is not developed.

33. But the harm goes beyond the concerns of planning. What is held up are the homes for over 12,000 people; and the improvements to their lives, and the lives of those who will be able to move into other homes and share in the education, social and environmental benefits of the scheme. A failure to deliver CG will be a disaster for the residents of Ashford and the county. It will be a disaster for ABC and KCC who thus far have shown little apparent concern to ensure that homes are provided and the county develops.

LEGAL AND POLICY CONTEXT

34. A planning obligation may not be modified or discharged except pursuant to s.106A of the Town and Country Planning Act 1990 ('**TCPA 1990'**).

35. On an application under s.106A, the local planning authority (and on appeal, the Secretary of State) may determine[21]: a) that the planning obligation shall continue to have effect without modification; b) if the obligation no longer serves a useful purpose, that it shall be discharged; or c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

36. R (Garden & Leisure Group Ltd) v North Somerset Council [2003] EWHC 1605 (Admin) per Richards J, at [28] identified four questions: (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?

37. The "useful purpose" in s.106A(6)(b) and (c) may, but need not be, the same as the original purpose for entering into the planning obligation: ibid at [46]. See also R (Renaissance Habitat Ltd) v West Berkshire Council [2011] JPL 1209 per Ouseley J, at [33]; and R (Mansfield DC) v SSHCLG [2018] EWHC 1794 (Admin), in which the

[21] Section 106A(6) TCPA 1990.

Court concluded that: i) s.106A does not bring in the full range of planning considerations involved in an ordinary decision on the grant or refusal of planning permission (at [30]); and ii) the question for the authority is whether the obligation served any useful purpose, not just any useful planning purpose ([37]-[38]). The obligation must have been entered into for a planning purpose in the first place (Good v Epping Forest District Council [1994] 1 WLR 376). The debate is a little academic. It would be rare for the useful purpose not to be a planning one; and in the present case, frustrating the development goes to the planning purpose. A modification or discharge of a planning obligation may have a retrospective effect.[22]

38. Thus, if an obligation renders a development incapable of being carried out or completed then the decision maker may conclude that it does not serve a useful purpose. On that basis, it is necessary to take into account not only the benefits of the obligation being carried out, but the consequences of not being possible to do so and the effect that has on other desirable matters, including whether a planning permission can be carried out. Whether there is a 'useful purpose' is to be considered in the round: if the requirement to make the payment means that the scheme does not proceed, then it could be said not to serve a useful purpose for two reasons: frustrating the scheme is not useful; and the payment would not be made, so the obligation will fail to achieve its purpose.

39. If an obligation (whether alone or in combination with other obligations) means that a scheme is not viable and so will not happen, then the decision maker is entitled to conclude that it does not serve a useful purpose. It might be that the obligation is considered to be so important that the scheme should not proceed without it. However, that is a matter of judgement.

40. Although the deed made under s.106 is commonly referred to as the planning obligation, it is the 'instrument by which a planning obligation is entered into' (s 106(4)) which may contain multiple obligation. The planning obligation is an

[22] *York City Council v Trinity One (Leeds) Ltd* [2018] EWCA Civ 1883 at para 58 per Sir Ernest Ryder SPT on s 106BA applications, but the principle is good for s 106A applications.

individual requirement within s.106(1) contained in the deed[23]. It is therefore possible (and, indeed, common) to have several obligations within one s.106 agreement; a deed can contain several different planning obligations. Garden & Leisure Group is not authority to the contrary. Not only can this be of significance when an obligation is to be enforced, since different obligations in the same deed may be enforceable against different people, but it may also be relevant when an obligation is modified or discharged, given that a local planning authority or Inspector could approve the modifications in relation to a specific obligation, whilst refusing the modifications to other obligations. To that extent, it is possible to approve an application (or to allow these appeals) in part and it would be wrong to suggest otherwise.

JUSTIFICATION FOR THE PROPOSED CHANGES

41. The proposed changes are of obligations which either serve no useful purpose, or would serve that purpose equally well if modified as proposed.
42. These fall within the following categories:
    (i) Obligations which do not serve a useful purpose in themselves, or which would serve that useful purpose equally well if modified;
    (ii) Obligations which might serve a useful purpose in themselves (and so considered in isolation) but do not serve a useful purpose (or would serve the actual useful purpose equally well if modified) because of their effect on the delivery of the scheme by:
        (a) Rendering it unviable;
        (b) Being a blocker, by imposing a requirement that the scheme cannot meet;
        (c) Imposing procedures which slow down the development progress (particularly relying on the involvement of ABC or the CMO).

43. The proposed changes are essentially required for the following six principal reasons, which are explored further in the Statement of Case and the Appellant's evidence.

[23] See also regulation 7(2)(c)(iii) which refers to the "instrument by which the planning obligation which is the subject of the application was entered into".

44. Delay in issuing Outline Permission[24]. The planning application was submitted in August 2012, with the resolution to grant outline planning permission passed on 15 October 2014. However, the s.106 agreement was not entered into until 27 February 2017. The extended passage of time led to a s.106 agreement that does not speak appropriately to reality of how the CG development was, by that stage, intended to be delivered[25].

45. Delivery rate and delays[26]. The s.106 agreement was designed for a fundamentally different development model, envisaged to be built out in a completely different manner over a completely different timeframe. The phasing underpinning the s.106 agreement assumed that building would commence at the earliest opportunity, with approximately 300 homes delivered each year (as set out in the original Environmental Statement and Planning Statement[27]) and completion around 2036. However, a number of delay factors have meant that those assumptions are no longer valid, meaning that infrastructure and s.106 expenditure has grown well ahead of housing delivery. The net effect is that the build rate is at most some 150 units per year. The Main Phase 1, which was originally expected to complete within five years of an earlier start date, is not now expected to be completed until 2031. Moreover, the finance costs add c. 40% to the base infrastructure and s.106 costs, indicating the scale of impact of the differential, between expenditure of these costs and receipts from the sale of development plots.

46. The main delay factors are as follows:
    a. Planning-related delays, including:
        1) Delays in discharge of pre-commencement conditions;
        2) Delays in approval of reserved matters applications.
    b. Delays in bringing utilities to site;
    c. Electricity – due to delays in the Outline Permission, the electricity capacity applied for Phase 1 had to be forfeited and re-applied for, giving rise to considerable additional expense and delay;

[24] Statement of Case, para 57-58.
[25] WS of TH, JC Appendix I, paras 11-19.
[26] Statement of Case, para 59-75.
[27] CD6.4.

d. A number of Covid-related delays and impacts have occurred, including impacts on construction (in terms of actual work, as well as build cost increases), borrowing and sales;
e. Nutrient neutrality, including delays in respect of Stodmarsh issues generally, but also arising directly as a result of ABC's unreasonable refusal of an application for permission for an on-site wastewater treatment works ("**WwTW**") despite officer recommendation to approve (twice), which was eventually granted on appeal with a partial award of costs in the Appellant's favour[28].

47. Many of the planning-related delays have arisen as a result of the highly complicated s.106 agreement and its numerous requirements for briefs and consultation with third parties[29], as well as ABC's ongoing track record of planning delay.

48. Developer reconstitution and access to finance. The site was originally promoted by four members of a developer consortium. When the s.106 agreement was being negotiated, it was also modelled on up to 7,000 homes and the relevant parties were a consortium of up to six developers, each planning to build around 60 homes per year, drawing down on land from the landowner incrementally the year before construction. As such, there were no major upfront land costs for any individual party because it was intended that the consortium would split the s.106 and infrastructure costs equally between them.

49. However, on or around September 2016, and in order to avoid the Development from failing, the Appellant took over the land purchases of two of the other three consortium members, taking on a master developer role and, for most practical purposes, sole ownership of the s.106 agreement, which had not been negotiated and/or drafted on that basis; particularly with regards to exposure to liability for significant upfront costs. This has created considerable challenges in relation to access to finance, with the delays also adding considerable funding costs.

[28] WS of TH, JC Appendix I, para 34.
[29] JC Proof, para 3.1.22.

50. The Appellant's evidence demonstrates that this also means that numerous 'triple locks' in the s.106 agreement that were designed for a large consortium of landowners, each bearing a proportion of the financial risk and each paying into a shared capital account to manage the flow of funds between the owners of the obligations and the authorities are not fit for purpose, as they inappropriately require the Appellant to: i) secure bonds to guarantee funds well in advance of financial triggers; ii) deposit funds into a capital account well in advance of financial triggers; and iii) limit occupations according to Grampian conditions secured in the s.106 agreement. Given that CG is being delivered with Hodson as master developer, such triple lock mechanisms no longer serve a useful purpose and require modification to facilitate continued delivery.

51. Viability and affordable housing delivery. Delivery of CG has been acutely challenging financially, both in overall and cashflow profile terms. In large part, that has arisen from the unsuitable front loading of infrastructure in circumstances that undermines viability and threatens delivery by causing a level of peak funding in advance of sales receipts that cannot be secured in the market. Moreover, the viability review mechanism prevents development, as early sales would require the housebuilder to buy and design a plot without knowing the affordable housing level and that plot housebuilder would not be able to have homes occupied until a viability review had been carried out in relation to other plots

52. Early (and in some instances over) provision of infrastructure. As the Development has progressed, it has become clear that there are a number of elements of the s.106 agreement that have resulted in unnecessarily early (and in some instances over) provision of certain infrastructure. The Appellant has been required to pay substantial, and substantially disproportionate, amounts towards front-loaded infrastructure, including a primary school, roads and facilities and funds for the Community Management Organisation ("**CMO**").

53. Deliverability. The challenges facing the Development and the infrastructure requirements of the s.106 agreement are well in excess of that which is viable and are not appropriately aligned to housing delivery. This causes a level of peak funding requirement which cannot be secured in the market and which jeopardises

delivery of the scheme as a whole. The Appellant's evidence demonstrates that the s.106 agreement and its terms do not continue to serve a useful purpose if their combined practical effect is to stall, delay or prevent the Development (and associated infrastructure) rather than rendering it acceptable in planning terms through mitigation.

54. The principal factors summarised above have been further compounded by other micro and macro-economic problems, such as sharp interest rate increases, inflation and a relatively stagnant economy over the past few years[30].

VIABILITY

As a material consideration

55. The viability of a scheme, and the effect of an obligation and other obligations on viability, may be relevant to whether an obligation serves a useful purpose and is relevant in the present case.

56. First, the Councils' submissions[31] do not engage with the breadth of the 'useful purpose' and that preventing approved development from taking place may not be a useful purpose. If an obligation in isolation is intended to serve a useful purpose, but individually or collectively stops the development proceeding by rendering it unviable or provides an insurmountable obstruction (such as the bonds), then whether it does serve a useful purpose depends upon whether it is better to stop the development entirely if the obligation is not complied with, or whether the benefits of the development outweigh whatever the obligation is said to achieve.

57. Second, and in contrast, the Appellant's approach fits neatly into the broader legislative context. Viability is relevant to the terms of any planning conditions or planning obligations whether the scheme could proceed. It has long been recognised that the viability of a scheme may be relevant to a planning determination: see Sosmo Trust v Secretary of State for the Environment [1983] JPL 806. The relevance of financial considerations generally, for example, enabling

[30] WS of TH at JC Appendix I, para 8.

[31] ABC Statement of Case, para 4.12-4.17; KCC Statement of Case, para 37-51.

development, to whether planning permission should be granted is long accepted: see R v Westminster City Council, ex p Monaghan [1990] 1 QB 87.

58. Third, viability is a component in deciding whether a planning obligation should be required. If an obligation would meet the CIL Regulation 122 tests and so be necessary to make a development acceptable, the decision maker can still decide not to require it because the scheme would otherwise be unviable. The regulation addresses reliance on an obligation put forward as a reason for granting planning permission. It does not prevent a lesser provision on viability grounds still meeting reg 122(1). viability is relevant to whether a planning obligation is required in the first place and also relevant (as a matter of law) when the modification or discharge of the obligation is being considered.

59. Finally, where the effect of the obligation (individually or collectively) is to stall, delay or prevent the Development, then that is a relevant consideration so "obviously relevant", that it is essential to take it fully into account.

60. For these reasons, it is clear that viability may be relevant to the 'useful purpose' test. In the judicial review permission hearing on this site, Lieven J said she was unconvinced that viability was not a material consideration.[32]

The evidence

61. The viability position is stark. On any calculations, the master developer would make a considerable loss. The PPG requires a benchmark land value to be applied, and expects a reasonable developer profit, usually 15-20% (see para 10-010, 013, 018). Para 10-090 on review mechanisms is concerned with avoiding downwards reviews of affordable housing. The present modifications are not about protecting developer profit, but enabling a presently, massively loss-making scheme to go ahead, even without master developer profit.

62. Both viability experts adopt a Master Developer model, reflecting a realistic delivery approach for the site and that which is being taken by the Appellant.

[32] CD12.11, para 7.

63. The viability evidence clearly shows that the significant financial burdening and timing / review mechanisms in the s.106 demonstrate that the collective obligations of the s.106 agreement do not serve a useful purpose as they prevent delivery of the development.

64. Mr Wheaton for the Appellants calculates a negative residual land value for the master developer of minus £228.1 million. Mr Leahy for the Councils produces a residual land value of minus £31.73 million.

65. It is common ground that the development site is worth less than nothing[33]. Even if the land came free, which it does not, the Appellant would make a loss in carrying out the project. The cost of acquiring the land for development – taken for a viability assessment as the benchmark land value – has to be taken into account, along with the costs of financing that. BPC's position that land value should be ignored is not in the real world.

66. The benchmark land value is £109.1 million, so on the Councils' own figures, a loss of £140.8 million would be made. On the Appellants' evidence, the loss is even more eye-watering.

67. The Quod viability assessment indicates the improvements following the s.106 changes, both in overall viability and cashflow. The viability position improves by £194m.

Plot sales values

68. As is made clear in the RICS guidance regarding comparables[34], any previous sales values should be approached with considerable caution[35]. In particular previous sales of development plots are sensitive to multiple matters of detail. On the facts here, as Mr Wheaton identified, there are a number of reasons why previous plot sales are not a proper comparison to what might be achieved moving forward, including that they date from 2017 to 2021 (i.e. before recent substantial increases in build costs and numerous regulatory and taxation changes). The land sales

[33] CD14.27 Viability SoCG.
[34] CD14.31
[35] See pdf 12 and 13 in particular.

achieved to date also often reflected special purchasers, for example Jarvis Homes already owned its plots whilst BDW purchased land but within these included agreements for the Appellant to deliver elements of works. Similarly, the sale of land to Man Group did not represent a normal 'serviced land parcel' transaction because the Appellant had planned and started construction of this land, then stopped and sold to Man Group[36].

69. The sales figures could not be disclosed because of confidentiality agreements, but the particular figures would not be useful for the reasons above in any event. Policy requires the basis of viability appraisals to be transparent and public. The Appellant has done that. Policy does not require the disclosure of particular material as an 'open-book' exercise.

70. As the RICS guidance identifies, it is better to build the plot values up from firmer elements in a development appraisal. That is what Mr Wheaton has done, and Mr Leahy's colleagues sought to do.[37].

71. There are four major areas of disagreement:
    (i) the gross development value of the completed dwellings;
    (ii) the plot developer's financing costs;
    (iii) the translation of plot appraisals to overall values;
    (iv) the master developer's finance costs.

Gross development value

72. The Jarvis plots are atypical, with higher quality specifications – external and internal- in larger houses, larger plots and gardens, detached garages, underfloor heating, log burners, granite worktops. They are more expensive to construct. Jarvis are also selling very slowly, about 1 dwelling a month.
73. The Jarvis density of 13 dwellings per hectare will be replicated in very few places elsewhere. So far as KCC relies on the AAP density parameter plan, 'Southern fringe character area' to assert that there are other areas of the development that

[36] CD14.19, page 4.
[37] Mr Leahy's proof makes six references to the work of 'my colleagues'.

present other "*opportunities*"[38] to deliver similar homes, this is a small proportion of the site[39].

74. At the conclusion of their evidence, and in response to the Inspector's query on sales values excluding Jarvis Homes units, the viability experts produced a further note, which set out the basis for the different calculations when removing the Jarvis values[40]. Mr Wheaton (£356/sqft) had calculated the median of the comparables excluding Jarvis, this being Quod's preferred approach to large datasets. It is noted that Quod had applied the average (the mean) approach to its own comparables per typology in reaching the rate used in the Quod plot appraisals[41]. Mr Leahy's colleagues (£362/sqft) had calculated the mean average of the comparables excluding Jarvis as this is the rate used in the BPC plot appraisals, but have used the median BCIS costs.

75. That illustrates a wider point. The experts have agreed to use median construction costs. Mr Wheaton has used median sales prices for his gross development value. However Mr Leahy's colleagues[42] used the higher mean average sales prices, so a higher value product, at a lower expense.

76. If Jarvis were omitted in BPC's methodology, BPC's value falls by £5/sqft which is £26m across the whole scheme and would worsen their appraisals by roughly this amount (e.g. the appraisal of the current scheme moves from a £32m deficit to a £58m deficit). On Quod's method of omitting Jarvis, BPC's value falls by £11/sqft which is £64m across the whole scheme and would worsen BPC's appraisals by roughly this amount (e.g. the appraisal of the current scheme moves from a £32m deficit to a £96m deficit). On either approach, it is clear that the figures show a very substantial deficit.

[38] XIC Leahy, Day 6.
[39] CD 3.1.1 AAP (pdf 51), Figure 9, Southern fringe character area.
[40] CD 14.44, note by Quod and BPC submitted on 28 April 2025.
[41] CD2.17 Appendix B.
[42] In CD3.21 para 2.5i), 5.2.5a), 6.1.3, Mr Leahy attributes the calculations of values to 'my colleagues'.

77. Mr Wheaton is right to take the last three years' sales, rather than try to deal with the volatility of indexing in a locality over a six year period.

Plot developer finance

78. Mr Leahy produced an example financial viability appraisal (App Fi)) which his colleagues had prepared,[43] as part of the calculation of plot values. That appraisal is obviously seriously wrong, but Mr Leahy was incapable of explaining what the error was or correcting it. According to the appraisal, the finance costs of £131m of construction would total £87,511. For such an expensive project, building 190 dwellings a year (see App F(ii)), and taking (on Mr Leahy's evidence at least six months on each), that figure is wrong, and wrong by a massive margin. As the witness producing the viability appraisal, Mr Leahy should have been able to explain it. He was not.

79. The plot developer's costs are therefore understated, and so the residualised land price and the value of each plot (so the price paid to the master developer) is overstated.

Plot development values

80. Mr Leahy's plot values then come from the calculation in App F(ii) where the residualised land prices from f(i) and the other plot calculations are brought all together. As Mr Leahy accepted, the figure for plot 2 in app F(i) was not transposed correctly, put as £28,557,057 in app F(ii) when the F(i) figure was £28,264,043. He was not able to explain the error or say that the remaining figures in F(ii) had been checked once this was pointed out. The F(ii) calculations by Mr Leahy's colleagues, which are the basis of the master developer's plot receipts are therefore wholly unreliable since:

(i) they rely on too high GDVs;

(ii) the finance calculations are wrong (see F(ii));

(iii) appraisal figures have not been transposed correctly or there is doubt whether they have been.

Master Developer finance[44]

[43] CD3.21 para 6.1.6.

[44] CD 14.27 Viability SoCG, Row 3.3(e) (pdf 21).

81. A key difference between the experts is the finance rate adopted with regards to the Master developer, with Quod adopting 11.2% - 11.7%[45] and BPC adopting 7%.

82. As explained by Mr Wheaton, BPC's approach in adopting the same figure that they have adopted for the plot developer is misconceived because there has to be a premium to reflect the higher risk taken by the Master developer. In any event, 11.2% is the Hodson current rate[46] that has been secured after competitive process to find the cheapest lender available. There is no dispute it is the current figure.

83. In the viability SoCG Mr Leahy said 'a finance rate of 7% on a 100% debt basis is a normal assumption' (app A, point 3.3(e)). In his oral evidence he contradicted this, saying that 7% was a blend of 70% debt and 30% developer's capital. That would mean that the debt alone (the pay rate) would be around the 11.2% being paid by Hodson. Since in the SoCG Mr Leahy accepted 100% debt funding, it follows from his oral evidence that the 11.2% figure used by Quod is the appropriate one.

84. The return on the capital debt was said to be from the developer's profit, but it is common ground that there would be no developer's profit. Any return on capital would have to come from another source, or put more simply, the 100% debt finance approach was appropriate. No cheaper finance has been put forward, so 11.2% should be adopted.

85. Mr Wheaton had also calculated the Master Developer's finance costs on the correct basis that the plot developer would pay in increments, rather than all at the start. Mr Leahy's team's assumption to the contrary was wrong, resulting in BPC understating the master developer's finance costs.

86. All in all, the Quod developer finance figures should be preferred, being £64m higher in the unamended section 106 (Viability SoCG para 2.3.1, page 8, table 2). It is also notable that none of the master developer finance costs included the costs of financing the purchase of the land.

[45] Subject to variation in the SONIA overnight rate.
[46] The rate varies as it is 7% plus SONIA (Sterling Overnight Index Average). 11.2% has been used for the assessment.

87. The financing of Barking Riverside is very different, involving, a joint venture between L&Q (a registered charitable housing association) and the Greater London Authority. Master developer activity at that site is also supported by £161m of grant funding. The scheme is entirely different from the CG development, which has no grant funding nor public authority behind it.

Placemaking premium

88. The placemaking premium operates as a *sensitivity test*, on the hypothesis that the scheme viability, cashflow and review mechanism changes would enable accelerated, diversified delivery and create the critical mass to achieve placemaking benefits. Increases in delivery rate would help reduce finance costs and placemaking would help achieve improved sales values. These points would offer the Appellant some potential to achieve a positive land value and overall scheme return, although not for some years. The return and the timings of this would remain below the reasonable market levels which would be required if commencing a new project today but would give the Appellant sufficient incentive to continue the scheme and secure ongoing finance support.

89. Quod's analysis indicates a deficit to the BLV of 143m after the proposed modifications[47], with the sensitivity test of applying a 2% placemaking premium reducing the deficit to £20m, which represents a positive land value of £89m compared to a target BLV of £109m.

90. This 'placemaking' is a real terms growth in sales values often associated with large scale developments which create a new place by delivering infrastructure and community benefits. Whilst not certain, potential placemaking growth is a factor which it is reasonable to consider when proceeding with large-scale, longer-term development.

91. No increase in house prices above costs can be assumed. Whilst Mr Leahy said that house prices had increased by 2% pa above the retail price index (RPI) since 1995, that was at the bottom of the housing market and just before a massive boom. He professed to be unaware that house prices are now lower in real terms (so adjusting

[47] Viability SoCG, Appendix A, item 3.3(h).

for RPI) than they were 20 years ago. The RICS guidance (Assessing Viability in Planning Under the NPPF 2019, Glossary - Date of Valuation) states that all costs and values for the purposes of planning viability should be assessed at the valuation date, that being the date of decision. That discourages speculation about future value and cost changes, although as the Appellant says, they are relevant to the decision of the developer and funders to proceed.

Threshold of viability

92. As Mr Hodson said clearly, the scheme cannot proceed on the current viability figures. The planning obligations have to be changed to give the scheme a chance. Even then, Hodson Developments and the funders would have to take a chance on being able to boost the site values and the project would still make a loss given the need to cover the cost of the land.

93. BPC's figures are wrong for the reasons set out above, but even if they were accepted, the scheme would not proceed under their assumption of minimal changes to the planning obligation. It is noted that they come out at similar levels to Quod's modified 106 figures.

94. It was never put to Mr Hodson that he could proceed with the development on BPC's figures. If the Councils' case is that the scheme is viable on BPC's figures, they should have put the point to Mr Hodson.

95. Mr Wheaton explained in chief why the BPC figures would not render it viable. They assume higher sales prices and lower finance costs, which involve much higher risks but still result in a deficit. Since in this scheme there is a large element of risk-judging, as well as pure calculation, the calculations are not comparable. In contrast, the scheme inclusive of the s106A modifications is of lower risk – it is less vulnerable to programme delay due to approvals, allows more plot housebuilders to be engaged earlier with land sold to them (and receipts received), has lower overall s106 costs and better aligns payments to housing delivery (therefore avoiding the risk that payments again run ahead of delivery). All of these points are important in Hodson and its lender weighing up the risk of proceeding. Whilst

there can be no simple "pass / fail" test of viability and risk in the round (particularly in the context of a scheme that is part way through delivery), there can be full confidence that the modifications sought substantially shift the balance towards the scheme proceeding.

96. Allowing proposed modifications in part will have different effects on viability. They may be steps in the right direction, but there cannot be confidence that they will be sufficient. Viability-driven changes can be supported even if they are not the whole package. They contribute towards the aim, and if the scheme does not proceed because they are insufficient, nothing is lost by the change.

Errors in BPC approach

97. All in all, Mr Leahy was an unconvincing witness, who relied heavily on the work of unnamed colleagues which was obviously wrong on its face, but without correcting or being able to explain these errors. Mr Wheaton's analysis is balanced, fair and reliable.

Summary

98. The proposed modifications are necessary to create a viable scheme and would enable development to proceed if approved. The level of affordable homes and other planning obligations following the changes would remain in excess of that which would be considered the maximum reasonable, assessed in line with relevant policy and guidance.

99. The changes sought would enable the Appellant to secure ongoing finance and engage a range of plot delivery partners, whilst also giving the potential for a return late in the development. 5,750 homes including 575 affordable homes would be delivered and £182m spent on community, site and social infrastructure. If growth enables the BLV to be reached, then the viability review mechanism would secure additional affordable homes.

100. **THE PROPOSED MODIFICATIONS**

Viability reviews

Schedule 23	Appellant evidence
Modifications 100 – 102, 103, 104 - To fix viability review 2-4. - To link viability reviews to submission of RM applications. - To revise the definition of PVRS.	JC Proof, paras 5.1.77 CW Proof, paras 5.14 – 5.18

Purpose of modification

101. The changes sought by the Appellant will support delivery, whilst securing the ability to deliver more affordable homes later in the scheme if viability improves[48].

102. The proposed modifications remove viability reviews 2, 3 and 4 on the basis that the evidence clearly shows that the scheme's viability will not improve until viability review phase 5 at the earliest. The short-term delivery of affordable housing is impacting viability, but from viability review phase 5 and beyond, the hope remains that more affordable housing can be provided.

103. Moreover, the occupational triggers are out of step with how the CG development has opened up; for example, land in viability review phase 2, 3 and 4 has been serviced and could be sold subject to these points. Infrastructure has generally been delivered for up to 2,000 odd units, but the Appellant cannot sell land because plot developers cannot get planning.

Consideration of purpose and justification

104. The current viability review mechanism operates as follows[49]:

a. Reviews occur at specified review stages, with nine reviews in total at review phases two to ten (review phase 1 has a fixed level of affordable homes).

b. Occupation restrictions apply broadly every 500 dwellings after the first 851 dwellings, preventing further occupation until submission of the viability review.

[48] CW Proof, para 6.5.

[49] Schedule 23; CW Proof, para 5.14.

c. The earliest date at which each viability review can be submitted is specified by a number of occupations.
d. Works cannot commence within each viability review phase area until the relevant review outcome (i.e. whether additional affordable homes can be delivered) has been agreed with ABC.

105. Housebuilders or developers will not purchase land unless they can clearly see how they can build and occupy their units. Mr Wheaton's evidence illustrates how the operation of the viability review mechanism creates multiple barriers that prevent accelerated delivery by multiple plot developers with differentiated products[50]. As each review determines the number of affordable homes within the review phase, the phase cannot be designed in detail and contracts entered into with a plot developer / registered provider of affordable homes until the review is concluded. Real-world experience indicates that housebuilders cannot get board approval without having an affordable housing tender as part of their pack, so the present arrangements are not certain enough. The relatively tight tolerance between the earliest date at which a review can be submitted and maximum occupations prior to its conclusion inevitably causes a 'stop start' programme and slows overall delivery.

106. The above is illustrated by Mr Wheaton with reference to review phase 3, as follows:
- Earliest submission of review 3: 1200 occupations.
- Number of homes which can be designed/planned prior to concluding review 3: 300 (i.e. 1500 less 1200).
- Maximum homes which can be designed/planned prior to conclusion of review 3 (i.e. when resultant affordable housing is known) – say 3 months to conclude the review outcome, 3 months to engage with developers, 12 months to prepare and gain approval to RMAs, 18 months to construct homes = 36 months.
- Maximum annual delivery which can occur due to review process – 100 (i.e. 300 units divided by 36 months).

[50] CW Proof, para 5.16.

107. Thus, the review structure also delays delivery due to the limitations on both the earliest date at which a review can be submitted and the number of homes which can be occupied or commenced prior to its approval.

108. Mr Leahy said 'hand on heart', that no increase in affordable housing could be anticipated in reviews 1 to 4. It must follow that they do not serve a useful purpose, and instead are a waste of time and money, and a block on development.

109. The proposed modifications are to fix viability reviews 2 – 4 (to the end of phase 2), before then linking reviews to the submission of RM applications for each stage of the development, rather than occupations, which will enable the Appellant to enter into more partnerships sooner and allows delivery to accelerate. The modifications also adjust Premature Viability Review Submission limits to protect against front loading of review submissions by restricting the earliest date at which a review can be submitted and a requirement to resubmit if this is more than 12 months in advance of the relevant RM applications. Reviews at each stage of development through to the final review phase 10 are maintained, ensuring that any viability improvement later in the scheme will enable additional affordable homes to be delivered.

Bonds

Generally

Purpose of modification

110. The appellant is unable to obtain the Bonds required by the s.106 agreement. Since bonds are merely one mechanism for securing payment, the benefits of the development proceeding any benefits that might have and so the obligations do not serve a useful purpose. The effect of the changes is to make this obligation redundant.

Consideration of purpose and justification

111. The Appellant is developing a major scheme which is still forecast to be loss making even if the other modifications are made. Hodson, and any other developer will not be able to raise the bonds required, without sufficient liquid security.

112. A payment due under a planning obligation can be enforced against the persons with interests in the land subject to the obligation and anyone bound by the obligation when the liability to pay arose. That duty to pay can be enforced under contract or the statute, and is a local land charge.[51] A section 278 highways agreement can be enforced against the parties to the agreement and persons with an estate of interest in the land for which the works are being carried out.[52] The liability is a local land charge.[53]

113. The Appellant has provided a letter from its Finance Broker[54], which acknowledges the single bond secured for CG by Close Brothers, but confirms it was supported by an equivalent amount of cash. The letter confirms that "*[a] Bond is only available to [the Appellant] if the actual funds (at equivalent amount) are placed in account as supporting security*" before concluding that "*in the absence of [the Appellant] depositing the equivalent amount of cash as supporting security there is no bond market open to [the Appellant]*".

[51] Town and Country Planning Act 1990, s 106(13).
[52] Highways Act 1980, s 278(5)(b).
[53] Highways Act 1980, s 278(8).
[54] JC Appendix 6.

114. Further, and in any event, KCC's evidence says nothing more than it is possible to get bonds for s.106 or s.278 guarantees generally. It does not address whether bonds could be secured by anyone, or Hodson in particular, for this scheme. NatWest do not address that question at all[55].

115. The Inspector has to weigh the benefits of the bonds (if any), against the harm caused by stopping the scheme. That is not the exercise the High Court undertook, which was concerned solely with whether it was irrational – in that no public authority properly directing itself on the law and facts – to stop the scheme by insisting on the bonds.[56]

Bonds by topic area

Schedule 15 (education)	**Appellant evidence**
Modifications 67, 70, 72, 74 and 76 (Appellant relies on Deed of Variation): - Discharge provision of Bonds to the value of Primary School 1 Contributions 2, 3 and 4. - Discharge provision of Bonds to the value of Primary School 2 Contributions 2, 3 and 4. - Discharge provision of Bonds to the value of Primary School 3 Contributions 2, 3 and 4. - Discharge provision of Bonds to the value of Primary School 4 Contributions 2, 3 and 4. - Discharge provision of Bonds for Stage One and Stage Two Secondary School Contributions (Appellant relies on DoV)	JC Proof, paras 5.1.296 – 5.1.2 BH Proof

116. The requirement for Bonds currently requires the primary payments to be secured well in advance of need, in some cases up to six years.

[55] KCC topic paper, para 3.3.3 - meeting with NatWest, to which "they have provided the following opinion", but that email (pdf 16) followed the meeting then referred to and is i) second-hand evidence that someone else said s.106 and s.278 guarantees had been provided previously; ii) but that it would be subject to review. Turning back to paragraph 3.3.3, the email is not a comment on the particular draft and bonds within the schedules. It is simply a comment being relayed from someone else that was not on the call at all. Paragraph 3.3.4 then refers to a meeting on 4 December, but no note of that meeting has been provided. In any event, the first sentence does not assist with this scheme and it then merely provides a high-level cost indication for a £30m bond, making a generalised assumption about 1%. On that example, the cost of the bond would be about £1.6m. What NatWest are certainly not doing there is saying that a £30m bond would be provided for the A28DS or CG scheme or that it would be provided to the Appellant.

[56] CD 12.11, para 20 per Lieven J.

117. Mr Hunter considers the Bond in the s.106 agreement (modifications 67, 70, 72, and 74) and finds that there is no basis for its continued inclusion. It does not serve a useful purpose, and is outside the realms of what is usually necessary when agreeing planning obligations, which is that payments are made at appropriate trigger points. It is notable that the DfE only discusses Bonds in their best practice guidance[57] in relation to developer delivery of schools, making this highly unusual. Moreover, the Bond is counter-productive (and self-defeating) if it jeopardises delivery. Firstly, a Bond requires the bank to have sufficient comfort that the developer will be good for the money if the bond is called in. For this project, at least, that requires cash deposited with the bank to the value of the bond. That has cashflow implications and financing costs. Secondly, a bond will attract an annual payment to the bank of 1% or more. For a long-term bond, that gets expensive.

118. KCC suggests that the Appellant provided a Bond for PS1 contribution 4 (£1,461,800) on 29 March 2019, 18 months prior to the August 2020 request to amend the s.106 agreement. It is suggested that this is evidence that Bonds can be secured. However, these are currently only available at face value[58]. As such, these fundamentally undermine the viability of the development. The current s.106 agreement in respect of Primary Schools requires Bonds to the value of contributions 2, 3 and 4 to be put up simultaneously, which equates to £5.85m indexed linked. This situation is made worse because although the s.106 agreement has triggers by when Bonds and Payments are due, there is no way of ensuring that this runs parallel with the delivery of housing, as they are not occupation based.

119. KCC argues that the triple lock is required for three main reasons[59]. First, occupation clauses act as a deterrent to ensure infrastructure and house building progress in tandem, but do not provide financial security. Second, removing the requirement for Bonds removes the only non-occupation clauses with a financial

[57] CD9.6, page 34 – when developer delivery falls through.
[58] JC Appendix 6.
[59] KCC Topic paper, paras 3.3.8 to 3.3.11.

link to funding school provision. Third, the Developer's Contingency Account does not provide the level of security required by KCC when entering into third party build contract.

120. However, KCC have the benefit of a duty to pay, enforceable against landowners. In addition, there are several examples of developments providing for a primary school in relation to which KCC has not sought bonds. Moreover, where funding is pooled to provide a school, no Bonds are required. Also, the triggers for payments are not occupation based and therefore there is no relationship between delivery of housing and infrastructure.

121. In any event, the Developer's Contingency Account provides a third mechanism that safeguards KCC and adds costs to the scheme in terms of tying up capital. As such, the three Grampian measures all serve to prevent development and, when combined, do not perform a useful purpose.

122. The dispute over Primary School 1 contribution 4 merely demonstrates problems with a bond, rather than support for the concept. KCC called on the bond when primary school pupil numbers from the development did not require the school. There was a clear dispute at that time what the costs of the school were and KCC refused to itemize the expenditure two years after the school had opened.[60] They said there was an anticipated total spend of *£8,053,235.* A later table indicated that £991,593.89 of costs were incurred after the opening of the school: a position which seems incomprehensible and has not been justified. The figures are well in excess of the Appellant's figures[61].

[60] On 7 December 2023 KCC argued that under the s.106 agreement they were not obliged to provide this information yet, as the school "*had not yet reached practical completion due to a number of unresolved defects, in particular in relation to the school playing field. The anticipated date for resolution of these outstanding defects is April 2024*."

[61] The Appellant appointed cost consultants who have priced the cost of a school using the planning consent for Primary School 1. They concluded that the price of provision of Primary School 1 was £5.28m based on Q4 2024 costs. As the school was built in 2019 / 2020 it is therefore believed that the actual costs would be c. £4.5 to £4.7m. It is therefore entirely legitimate that the Appellant be provided a detailed cost breakdown of expenditure incurred for Primary School 1 prior to KCC requesting contribution 4, given that the school had been open for over 2 years.

123. By the time the bond was called in, Hodson had applied for it to be discharged. It was not lawful for KCC to seek enforcement of these contributions at this time without giving consideration to that request. The 4th contribution saga illustrates some of the problems of bonds.

Schedule 18 (A28 Improvement Works), 18A (s.278)	**Appellant evidence**
Modification 91, 93	JC Proof, paras 5.1.45 – 50 ID Proof, section 2

124. Schedule 18 requires a bond payment towards works on the A28 once no more than 400 Dwellings have been occupied. In reality, if it remains a requirement then the CG scheme will not proceed beyond 400 units. Modification 91 deals with the bond, whilst modification 93 also removes the need to fund the A28 works themselves.

125. A negative obligation is capable in some cases of serving a useful purpose. This does not. It stops this vital scheme proceeding. It is not possible in the financial markets to obtain a bond in the form or kind required by the s.106 agreement. In any event, it would be prohibitively expensive and self-defeating to be required to do so. Bonds are sometimes obtained for the construction costs when the developer is carrying out the works (which Hodson are not under the s 278 agreement) and only for the short duration of the works. The A28 bond is for KCC to do the works, would last for ten years, and covers a considerably wider and larger expenditure (including the financing costs).

126. Mr Dix's evidence demonstrates that a bond is not appropriate given the funding structure for those works[62]; in particular, the requirement for a bond in a s.278 agreement typically relates to the potential for a default by the Developer in completing the highway works covered by the s.278 agreement. KCC would be able to recover the money pursuant to s.278(5) from any person benefitting (i.e.

[62] Request number 91.

it is wider than the person entering the s.278), with a charge over land that has the benefit of the works.

127. Mr Dix explains that it is also unusual to link the provision of the Bond to the occupation of an identified number of units. In this instance, there does not appear to be any evidence to justify and/or provide any rationale for the requirement for a bond at the arbitrary 400-unit occupation level.

128. First, at a practical level, as Mr Dix discussed, the A28 works cannot commence for some years irrespective of the bond issue, with the best estimate being that the road is not going to be available for the works until 2027. It also appears that third party land has not been secured to allow the works to proceed, no agreement with Network Rail for bridge works being in place, with detailed design required to be undertaken and the contract still to be let. Despite all of this, KCC is still seeking to enforce the requirement for the bond now.

129. Second, KCC has proposed to push back the A28 bond requirement to 764 occupations[63], but it only willing to do so on terms that are clearly unacceptable and unreasonable, including the provision of a company guarantee. The figure of 764 is derived from the number of units with RM approvals (763 units), rather than calculated on the basis of highway capacity or any other relevant evidential measure. The requirement for a bond at 400 units does not serve a useful purpose. On KCC's own statements, it is too early.

130. Mr Hogben has a view on when a severe impact would occur on the A28 due to Chilmington Green, but has refused to tell the inquiry when that is.[64] The only suggestion he makes in the SoCG is 2426 units at Chilmington Green, and only then employing the sensitivity test: so a higher level of traffic generation from Possingham Farm.

131. In short, no modelling has been undertaken to show that the A28DS is needed before 764 or to support the 400-occupation limit. Both are arbitrary and will stall the CG development and prevent the associated benefits, including any

[63] CD14.35 Letter before claim dated 28 February 2025; CD14.36 Letter before claim dated 10 April 2025.
[64] Hogben XX.

improvement of the A28, a further 5350 dwellings, new schools and other facilities. Indeed, the tone of the relevant sessions revealed that this is KCC's position – the Ashford South residential development, despite being strongly supported by policy, does not happen because KCC is not prepared to shift between having the bond in advance and getting paid over the course of a 10-year period over the course of a loan, with the protection of having a charge on the land.

132. KCC's examples of where Bonds have been secured[65] are neither comparable nor address the points above. For example, CA/20/02826 – where the s106 includes draft bond wording for provision of £8.8m security for the "Sturry Link Road". However, it should be noted that: i) the s.106 agreement there also provides for a Land Charge to be provided to the KCC instead of the Bond, so a Bond is not the only option within the legal agreement to secure delivery; ii) payments for Sturry Road are based upon the number of completions in the previous quarter; and iii) in the event that SELEP Funding was not secured (and/or additional borrowing costs were incurred by KCC and/or additional foul infrastructure costs were incurred) the additional funding / costs necessary would be deducted from other contributions in that s.106 agreement[66]. Moreover, the same s.106 agreement requires total primary school contributions totalling £2,579,858, together with the provision of land for a primary school and yet there is no requirement for a Bond. It is therefore clear that in that instance KCC did not consider Bonds necessary for the delivery of a Primary school. So the bond is attached to a fundamentally different legal agreement that is tied to delivery of the scheme. This makes delivery of that school viable and ensures that payments towards the road are commensurate with the delivery of the scheme, all of which makes that scheme attractive to investors and deliverable.

133. Further, KCC suggests that a number of bonds have been provided within s106 agreements, as part of agreed s278 works[67]. However, these are for significantly

[65] KCC Topic paper, para 3.3.5.
[66] The adult social care contribution, Community Learning contribution, Library contribution, Youth Services contribution and Secondary Education Contribution.
[67] KCC Topic paper, para 3.3.6.

reduced scopes of work compared to the A28DS; by way of examples, i) Manston Green, Thanet – a new roundabout – bond value £2,433,806.22; ii) Strode Farm, Herne – removal of roundabout and provision of 2 new signal control junctions – £2,112,220.74; iii) Wises Lane, Sittingbourne – new four arm roundabout - £1,517,258.70. it is clear that these examples are not comparable to the requirement to provide the A28 bond for £28m.

134. If the prohibition on occupation of more than 400 dwellings until a bond has been provided in respect of the A28 improvement works is removed, then consequential amendments should be made as required to the s.278 agreement on the basis of the principles to be derived from Warwickshire v Powergen (1998) 75 P & CR 89[68]. Not only would a refusal to do so be unreasonable, but it would also frustrate the legislative scheme relating to planning and highways, as well as the purpose of that scheme, of which both s.106A and B, as well as s.278 are part. Removal of the requirement for the bond does not remove the requirement on Hodson to pay for the A28 works if KCC let a contract. It simply removes the sole block on more than 400 homes being occupied. It is apparent that no harm arises from more homes being occupied: indeed, providing more housing is a considerable benefit.

Highways

Schedule 18 (A28 improvement)	**Appellant evidence**
Modification 93 - To discharge payment of pre-contract and post-contract costs and any shortfall.	JC Proof, paras 5.1.44 - 55 ID Proof, section 2

Purpose of modification

135. The application to discharge the payment obligations in respect of the A28DS is advanced for reasons of viability and deliverability.

Consideration of purpose and justification

[68] CD12/12.

136. Such are the costs of these obligations that the burden of payment is undermining the viability of Main Phases 1 and 2 and in turn the deliverability of the development as a whole - without discharge the payments required will likely cause the loss of the funding available to the Appellant to carry out the Development at all. In the circumstances, these payment obligations cannot sensibly be regarded as serving any useful purpose.

137. Further, the requirement for the A28DS in combination with the provision of a bond at such an early stage is not evidentially justified. First, the report to planning committee on the application summarises the results of the relevant highways modelling[69]. This indicates that the works need to be done at 2,500 occupations. Second, the evidence from Possingham Farm[70] accounted for 2426 units at CG, along with some of Court Lodge and delivery at Possingham, before a severe highways impact arose,[71] and it is that which Mr Hogben relied upon in the Highways SoCG.

138. Taken together, therefore, it would appear that the Inspector can note that KCC considers that a severe impact will only arise at around 2426 occupations at CG; KCC is prepared to have 763 dwellings without a bond; and Mr Hogben refuses to say what his view is on when a severe impact arises. The evidence is that there would be a severe impact on the A28 in tidal weekday peak hours (AM into Ashford; PM out) if Chilmington Green proceeds in full. That has to be balanced against the consequences of Chilmington Green not proceeding at all, which is the alternative. So there would be some delay to some journeys at those times, against the benefits of the scheme, including over 5,000 homes and the social and economic benefits which follow.

139. As with the A28 bond, KCC and ABC would be required to agree to the termination of the s.278 agreement if the Inspector agrees that Appellant should not be required to contribute to the A28 improvement works.

[69] CD6.1, page 1.47 (pdf 47), para 99 – part of section dealing with transport assessment and supplementary assessment.
[70] CD10.5, ID Possingham Farm Proof, Tables ID7.9 and ID7.10, which assumed committed would include 2426 at CG and some of Court Lodge.
[71] MH XX, Day 5.

Education

Schedule 15 (Education)	**Appellant evidence**
Modifications 67, 68, 69, 70, 71, 72, 73, 74; - To remove requirement for the provision of bonds to the value of PS1, PS2, PS3 and PS4 Contributions 2, 3 and 4 - PS1 Contributions 1 to 4; - PS2 Contributions 1 to 4; - PS3 Contributions 1 to 4; - Stage 1 SS Site Transfer and Adoptable Access, Provision of Bonds, and SS Contributions (Appellant relies on DoV dated 13 July 2022).	JC Proof, paras 5.1.296 – 5.1.2 BH Proof

Schedule 15A (KCC General Site Transfer Requirements)	**Appellant evidence**
Modification 78 - Provision of an account of expenditure and repayment of any surplus	JC Proof, paras 5.1.2 BH Proof

Purpose of modification

141. To ensure delivery of education infrastructure in line with the needs of the CG development. Even on KCC's evidence, there is "*scope for adjustment in terms of when those schools come forward and when payments are made*", with Mr Adams agreeing that "*PS2 and PS3 could be pushed back with appropriate monitor and manage*"[72].

Consideration of purpose and justification

142. Although the demand for school places has been significantly lower than expected, the Appellant has nevertheless funded and provided primary provision in line with previous forecasts of demand and triggers for payment, and secured the very early delivery of the secondary school. Indeed, Primary School 1 was fully open and operational despite there only being 100 homes occupied at that stage.

143. The main Education SoCG identifies the two critical issues that are not agreed between the parties, as follows:

    a. First, the housing mix that should be applied to the education assessment. The Appellant's position is that in order to achieve the densities required

[72] DA XX, day 5.

by the Permission, the housing mix is likely to be in the region of 74% houses and 26% flats, which is in accordance with Condition 100[73] (and its requirement for 'no less than' and 'no more than').

b. Second, the Appellant does not agree that it is appropriate for KCC to assume that forecast roll numbers in Step 3 will stay the same beyond 2033/34 up to 2048/49, as this represents a fundamental change in the trend forecast over the previous ten-year period[74].

144. Bond to the value of PS1, PS2, PS3 and PS4 contributions 2, 3 and 4 respectively. As noted above, the trigger points in the s.106 agreement already provide KCC with surety of funding to be able to forward fund the school build costs. In any event, the bond is counter-productive if it impacts development viability[75].

145. PS1 contribution 4 The payments already made in respect of PS1 are more than sufficient to cover the costs of PS1

146. PS2 contributions 1 to 4. As a result of spare capacity across the Ashford South Primary Planning Area, and falling birth numbers across Ashford, it no longer serves a useful purpose to deliver PS2 at the trigger points detailed in the original s.106 agreement[76].

147. PS3 contributions 1 to 4. It would not serve a useful purpose, as it would be detrimental to the education landscape, and a poor use of public funds, to deliver PS3 close to the opening of PS2. This would amount to over-provision, and would draw future applicants away from more established facilities[77].

148. It is appropriate to defer the trigger points for PS2 and PS3 on the basis of the updated housing mix that is consistent with the Reserved Matters applications and submissions, and Condition 100, which confirms that the schools are not required at the current triggers in the s.106 agreement. It is common ground that

[73] Education SoCG, para 4.1.
[74] Education SoCG, para 4.2.
[75] BH Proof, para 3.5.
[76] BH Proof, para 3.11-3.16.
[77] BH Proof, para 3.21.

the triggers should be deferred. Whilst not entirely aligned – KCC would push some triggers further back – the proposed changes are justified.

149. PS4 contributions 1 to 4. If pupil numbers continue to fall in the Ashford South Planning Area at the same rate that they are forecast to do between 2024/25 and 2033/34, then by 2049 there will only be 1,183 pupils in the planning area, which not only removes the need for PS4, but also leaves significant surplus capacity after PS3 is delivered. Future birth rates are uncertain, but the downward trend is established

150. The proportion of flats in Phase 1 is higher than expected 14 years ago. Phase 2 is following the same trend. As Mr Collins explained, changes to design expectations (car parking, street trees) are driving up the space required outside dwellings, so meaning that more flats are needed to achieve 5750 homes. This will reduce the pupil yield, and so the need for new schools. It is common ground that if Mr Hunter's mix applies, and births level off as KCC predict, then there will be too few pupils for a fourth primary school (only 16 pupils per year). The cost of building and operating a school that is not required does not serve any useful purpose. Yet that cost has to be built in at the present.

Affordable Housing and release from liability

Schedule 1 (Affordable housing); Clause 2.2 (release from liability)	**Appellant evidence**
Modifications 4, 7, 8, 9 - Affordable housing tenure mix – amendment of the base mix and review mechanism target to 70/30 affordable rent / shared ownership. - Extra care homes – amendment of extra care homes to market housing due to lack of market interest to date in extra care holding up the delivery of phases. - Amendment to consider potential for non-registered providers (with prior approval from ABC) to operate shared ownership tenure homes. This will allow sales of sites and enable investment in infrastructure. - Review mechanism – amendment to the timings of viability reviews, allowing engagement of a greater range of partners in parallel, accelerating delivery and achieving critical mass. - Occupation restrictions – amendments to the restrictions on private vs affordable housing occupations, to allow greater flexibility in delivery and improve cashflow (whilst still ensuring all affordable homes are always secured via occupation restrictions for an appropriate number of private homes. - Currently the s106 agreement makes no provision for institutional investors who deliver affordable housing (but are not registered providers) to be released from the obligations within the agreement upon completion and occupation of their development.	JC Proof, paras 5.1.26 - 50

Purpose of modifications

151. The proposed modifications will allow plot sales, allow greater flexibility in delivery and improve cashflow so as to enable investment in infrastructure. They will enable engagement with a greater range of partners in parallel, accelerating delivery and achieving critical mass.

152. The s.106 agreement currently makes no provision for institutional investors who deliver affordable housing (but are not registered providers) to be released from the obligations within the agreement upon completion and occupation of their development.

Consideration of purpose and justification

153. These proposed changes offer numerous benefits to both ABC and the Appellant[78], including:

a. Timely, on-site, additional affordable housing delivery – the review process is undertaken for each phase of development and any resultant additional affordable homes can be incorporated directly within that phase.

b. Capture of value uplift – the reviews take place throughout the scheme, ensuring that value growth can be captured for additional affordable housing delivery. Given the cost of preparing Reserved Matters applications and the time limits for implementing these, the Appellant is naturally incentivised to make Reserved Matters applications / viability reviews only for those areas which can be delivered in the near term.

c. Delivery – adjustment of Premature Viability Review Submission limits and linking reviews to Reserved Matter approvals rather than occupations enables the Appellant to enter into more partnerships sooner. This in turn enables a wider range of developers to build a variety of homes, accelerating housing delivery and achieving the critical mass / momentum essential to place making value growth. Realisation of such growth and land receipts will in turn enable more affordable homes and the delivery of the necessary phases of infrastructure.

d. Responsiveness to the market – allowing the potential for non-registered providers to (subject to ABC approval) operate shared ownership homes will allow the Appellant to respond to market interest and remain flexible to maximise delivery partner options.

154. Release from liability. The current release from liability clause is actively reducing the supply of homes that can be delivered to the social detriment of Ashford. The effect is that corporate owners of built dwellings, who are not registered providers, are subject to the obligations in the 106. That particularly affects private sector providers of affordable housing (such as the Man Group) and Build to Rent operators. The modification ensures the that clause 2 will serves it purpose better, or at least equally well, if it is modified. The current

[78] JC Proof, para 3.1.76.

clause does not appropriately enable adequate provision in meeting the needs of people who wish to rent their homes (in accordance with NPPF, para 63). It also fails to address the important evolution there has been in institutional capital investing to develop homes, which a strategic development needs to allow for.

155. ABC asserts that the proposed modification does not fall within the scope of s.106A, but it is clearly the modification of a planning obligation. It modifies the scope of the planning obligations – when and to whom they apply - and so is a modification within

156. The proposed modification of Clause 2.2 (release from liability clause) will promote the delivery of affordable housing by ensuring any housing provider (registered or not) who by purchasing the whole or any part of the site and develops housing for rental or shared ownership will be released from liability on like terms to that contained in clause 2.2 upon the occupation by a tenant or purchaser (including shared ownership) of the last of their homes to be developed on their land.

157. The Appellant has provided a letter from Man Group setting out the problem[79], namely that the current s.106 agreement only allows for two delivery models: i) affordable housing provided by a registered provider in line with the s.106 percentage requirements; and ii) traditional "*build to sell*" units. However, as noted by Man Group, this outdated approach creates significant barriers to housing deliver in Ashford and slows the rate of delivery at CG. In particular, it prevents the delivery of additional affordable housing – some 225 units (4% of total housing) just on the Man Group site alone. Registered providers are unable to deliver Homes England grant-funded affordable homes beyond the minimum percentage set out in the agreement. It also excludes build to rent housing, institutional investors seeking to deliver build to rent homes cannot do so under the current agreement.

[79] JC Appendix 3, letter dated 31 January 2025.

158. The effect is that the restrictions have serious social consequences for the local area; families in Ashford will miss out on access to good-quality, affordably priced homes for affordable and social rent, shared ownership, and private rent. Affordable housing will not be delivered because providers such as Man Group will be "*left with no choice but to sell the homes at market prices*".

159. The Appellant and Man Group have been seeking amendments for over two years without resolution. As a consequence, Man Group are now seeking to sell completed properties for private sale rather than affordable rent.

160. It is agreed that the 70 extra care units are not required. The Appellant is agreeable to ABC's suggestion of affordable housing for older persons. However ABC have failed to respond to the latest proposals to agree the form of this.

Children and Young Peoples Playspace

Schedule 8	Appellant evidence
Modifications 34, 35, 36, 37, 38, 39 - Defer delivery of design brief and specification for each playspace and/or other facilities in each Main Phase 1, 2, 3 and 4, by altering the triggers from 50, 50, 750, 650 and 1150 to 350, 500, 850, 850 and 1350 respectively. - To modify the planned costs to include fees and other costs. - To remove the requirement to consult with the CMO and to obtain approval in respect of the details of the consultation. - To modify the current 500, 1100 and 1100 occupation limits in respect of the provision and construction of each Playspace (PS2, PS4 and PS5) in the relevant Main Phase to 700, 1200 and 1300 respectively. - To remove the powers of veto effectively given to the CMO. - To discharge the obligation to transfer the facilities, substituting an obligation to grant a long lease. - To discharge the repairing liability following transfer. - To discharge the provision for payment towards ABC costs.	JC Proof, paras 5.1.156 - 184

Purpose of modifications

161. To bring provision of facilities in line with building trajectory and occupation levels. The level of capital cost (£2.585m) also represents another significant factor in terms of viability and deliverability, which justifies the deferment of these obligations so as to support the delivery of the CG development.

Consideration of purpose and justification

162. The modifications sought are intended to bring the provision of facilities into line with occupation levels in a policy compliant manner.

163. The current arrangements provide the CMO with excessive powers, including in respect of consultation and to demand that repairs are carried out. This despite the CMO being neither equipped nor competent in these matters.

164. The delays experienced as a result of the current s.106 agreement can be illustrated with reference to Playspace 1, which has to be delivered by 500

occupations at a cost of no more than £235,013 plus indexation. The Design Brief for PS1 needs approval by 50 occupations.

165. The CMO Temporary first premises is located on part of Playspace 1. The CMO building was granted planning permission on 20 September 2019, with Condition 8 requiring that within 12 months of the consent, full details of both hard and soft landscape works for the whole of Playspace 1 shall have been submitted and approved. Condition 9 requires all parts of Playspace 1 not covered by the CMO building to be delivered by 250 occupations. An application to discharge Condition 8 was submitted on 20 June 2022.

166. However, under the terms of the Settlement Agreement, ABC required the Appellant to withdraw this application, to submit a fresh RM application and to submit an application to remove and vary the conditions attach to the CMO building to separate the delivery of Playspace 1 from the CMO building permission. This was duly done. It is understood that ABC wanted to ensure that the Appellant would be required to consult with the CMO and undertake consultation on the proposed Design Brief and Specification.

167. Consultation with the CMO took around 5 months to complete and, in any event, ABC have not agreed to a way forward on Playspace 1 despite constant requests from the Appellant. This provides a good example of: i) the delays introduced by the requirement to consult with the CMO; ii) the limited value of this consultation given that the Appellant is no further closer to delivering it. The Appellant has been trying to bring Playspace 1 forward for over two and a half years and ABC is still not bringing this forward despite the desire of residents for this facility to be delivered quickly.

Allotments

Schedule 9 (Allotments)	**Appellant evidence**
Modifications 40, 41, 42, 43, 44, 45, 46 - Defer triggers for provision of Main Phase 1 and 2 allotments to the point at which demand for the minimum viable size of allotment is reached. - Discharge provision of Main Phases 3 and 4 allotments at 1400 occupations. - Modify and discharge some of the conditions attached to the provision of allotments in each main phase. - Discharge of repairing liability.	JC Proof, paras 5.1.185 - 210

- Discharge of payment obligation.	

Purpose of modifications

168. The current triggers are adversely affecting cashflow in Main Phase 1, compromising its viability. The purpose of providing allotments will be equally well served by the proposed modifications.

169. The requirement for Main Phase 3 allotments represents over provision and therefore serves no useful purpose and can be discharged.

Consideration of purpose and justification

170. The Public Green Spaces and Water Environment DPD is now some 12 years old with its evidence base reliant on an open space study that is some 17 years old. The allotments Quantitative Standard at Table 1 is 0.2h per 1000 persons. However, there is no evidence of a particular need for an increased number of allotment pitches.

171. The current arrangements provide the CMO with excessive powers, including in respect of management of facilities and to demand that repairs are carried out, despite the CMO being neither equipped nor competent in these matters.

Cemeteries

Schedule 11 (Cemeteries)	Appellant evidence
Modification 57: - To discharge payments towards cemeteries	JC Proof, paras 5.1.254 - 261

Purpose of modification

173. The obligations to make these payments is unnecessary and represents over provision of such facilities given the available off-site facilities. The significant cost (£800,000) is also serving only to undermine the viability and deliverability of the CG development.

Consideration of purpose and justification

174. Ashford's Green Space Standards state that cemeteries are required based on the rate of 0.6ha per 1,000 people. The SPD requirement[80] is grossly wrong by confusing the space required for a number of burials with the number of residents, the great majority of which will be cremated. Based on publicly available assumptions on death rates and burial rates, including Ashford's own evidence presented to cabinet, the need appears to be more in line with 0.6ha per 10,000 people - without adjusting for the declining rate in burial rates (vs cremation). As set out in Ashford's evidence base, "*1 hectare in Ashford would provide 1,680 graves to cover 30 years of new burials*". This is for the whole area, not just for CG. The Space Standard is incorrect by a factor of 10 and the £800,000 obligation is also grossly wrong. Even with estimated demand, there is very considerable spare capacity in existing cemeteries nearby – in Bybrook, Willesborough and Tenterden, so the payment is not needed at all.

[80] SPD [CD3.1.5] (pdf14), summary of quantitative standards at Table 1 - 0.6ha per 1000 persons is given as a standard.

Chilmington Hamlet Sports Facilities

Schedule 7	Appellant evidence
Modifications 29, 30, 31, 32, 33 - Modify obligation to deliver Hamlet facilities at 1,400 units to now be delivered at 3,500 units and the terms of the transfer to 21-year lease. - Modify obligation to submit Design Brief at 1,000 units to 3,000 units - Modify obligation to remove requirement to consult with the CMO, secure CMO approval of consultation, or to specifically include CMO consultation responses on costs. - Discharge 12 month repairing obligation after transfer. - Discharge obligation to pay Council costs associated with transfer of facility.	JC Proof, 5.1.129 – 155

Purpose of modification

175. The proposed modifications will serve a number of purposes that will enable delivery, including:
    a. To push back delivery of facilities to reflect that the early delivery of the Secondary School means a very significant level of sports provision will be available.
    b. To simplify and remove duplication the approval process and of the facilities.
    c. To remove unreasonable requirement for developer to repair any matters that arise after the transfer of facilities
    d. To remove unnecessary costs.

176. The level of capital cost (£1.266m) is another significant factor in terms of viability and deliverability, justifying deferral to support the ultimate delivery of the CG development.

Consideration of purpose and justification

177. Where these matters combine to raise peak debt levels and harmfully impact viability, they no longer serve a useful purpose. Where the proposal is to delay provision, appropriate provision is made elsewhere during the interim period.

178. The Secondary School is delivered early and with a very significant level of sports provision will be available to residents from September 2025 under the community use arrangements.

179. The AAP (paragraph 6.23) acknowledges that there may be scope for community use of school facilities, stating that "*if applicants can demonstrate that, once the school is in active use, its sports pitches will be able to actually contribute to meeting the needs of the residents of Chilmington Green*", then this could be taken into account when planning the latter stages of the development. The same must also apply to the MUGA and indoor facilities.

180. The level of provision is far greater than would usually be expected in a settlement of less than 1,000 (or even 3,000) dwellings and enables other provision to be pushed back to assist with peak debt levels and viability.

181. The Appellant applies to discharge the obligation to transfer the Facilities, substituting an obligation to grant a lease of the same for a term of 21 years rather than freehold. This will not detract from the duty to provide the Facilities and the obligations will serve their useful purpose equally well if modified as proposed. Not only will a lease include provisions for renewal on terms acceptable to the CMO, but it is also considered appropriate given the difficulties that the CMO has had in adequately maintaining existing facilities – the developer has a little more control during development built out.

182. The design brief process should be simplified to remove unnecessary consultation and cost. The requirement to consult the CMO in the design brief process has already led to delay in Playspace 1 with no added benefit. At present there is approval for 763 dwellings. The Appellant envisages securing planning permission for two further Land Parcels in the near future which would bring the total of dwellings with RM approval to for 1081 (beyond the trigger to secure approval of the Design Brief for the Hamlet facilities). A RM application for the Hamlet facilities was required by January 2023 and has been submitted. However, to date, there has been no comment back from ABC. As noted above in the case of Playspace 1, the current triggers would delay the delivery of housing unnecessarily and through no fault of the Appellant.

183. The consultation with the CMO (and the requirement to consult over the details of the consultation) is clearly surplus to requirements, given that ABC will have the opportunity already to consult with all interested parties when approving the design brief and specification. The delays experienced to date indicate that the process serves no useful purpose and needs to be simplified.

184. Amendments are also sought such that the budget for the facilities includes professional costs within the overall costs, to keep overall costs under control.

185. ABC and the CMO should be responsible for costs incurred. There is currently no requirement for the CMO to act reasonably or for ABC to efficiently secure the transfer. In this regard, the challenges faced during transfer of the CMO first premises[81] demonstrate that these provisions significantly increased the Appellant's legal costs to bring forward the transfer.

186. Ongoing liability for repairs is neither fair nor reasonable and those managing the facilities must assume responsibility once the facilities are transferred. If the transfer of facilities takes place promptly then the CMO will benefit from warranties. However, the management of the facility rather than the developer should be liable for repairing matters that result from the use of the facilities.

[81] See Mr Hodson's oral evidence. The Appellant had to make amendments to the building on matters already approved by ABC's Building Control and Planning teams in order to effect the transfer.

DP3, Discovery Park Sports Hub and Sports Pitches

Schedule 10	Appellant evidence
Modifications 48, 49, 50, 51, 52, 53, 54, 55, 56 - Modify obligation to submit Design Brief for Sports Hub and Pitches from 1000 units to 2,650 units. - Modify obligation to consult the CMO or to obtain their approval to consultation or to specifically detail consultation responses from CMO on costings. - Modify obligation to provide 1st Phase sports facilities by 3,650 units rather than 3,200 units. - Modify obligation to provide 2nd Phase sports facilities by 5,550 units rather than 5,000 units - Modify obligations to provide DP3 and PS6 to the following occupations 2650, 3500, 5000, 5750 rather than 1500, 2500, 4000, 5500. - Modify obligation to provide design brief at 2100 rather than 1000	JC Proof, paras 5.1.211 – 226; 5.1.236 – 237; 5.1.244 – 253.

Purpose of modification

187. The obligations either serve no useful purpose as they unnecessary delay delivery or any useful purpose will be served equally well if modified as proposed; in particular, as a result of the early delivery of the Secondary School and the associated community use agreement.

Consideration of purpose and justification

188. The design brief obligation simply delays the delivery of housing in the event a design brief (which is for facilities that are not due to be delivered for many years) is not approved. Moreover, it is taking a very long time to get approvals of the design briefs and specifications agreed which adds to delays and increases costs and peak debt levels. There is also a significant chance that between approval of the design brief and specification and delivery, any associated costs and/or requirements will have changed. As such, the requirement for the approval of the Design Brief and Specification should be brought closer to the trigger to deliver the facilities. Moreover, the process for seeking agreement of the Design Brief and Specification should be simplified, noting the normal application process and proper engagement between the parties would serve any such purpose equally well.

189. The same points arise in respect of the requirement for CMO approvals, given that this also adds to delays and costs, which in turn adds to the financial burdens and impacts viability. It will still be consulted. The modification will therefore serve the purpose of local public consultation equally well.

190. The modifications are for deferment of delivery rather than removal of provision. In any event, extensive facilities at the Secondary School will be available to residents from September 2025, under the community use agreement[82]: Natural Turf Pitches, MUGA, Sports Hall (and ancillary facilities including toilets, change and shower facilities), drama studio, classroom space (with IT provision), school hall, dance studio, and car parking. These extensive facilities will provide opportunities for all activities required as part of the Hamlet facilities apart from a Bowling Green and cricket pitch, but existing local facilities are adequate for present needs.

191. As with all requests for deferral, this will assist with managing the peak debt of the development. Given the availability of alternative sports facilities and assets that precede the delivery of this first phase, the re-timing of this obligation is such that it will serve its purpose equally well if modified as proposed.

192. As to the provision of DP3 and PS6 and the associated design brief requirements:
    a. Discovery Park is located to the east of the site and will be relatively remote from the majority of the development until later phases come forward.
    b. Considerable informal and natural green space, as well as play spaces will be provided as land parcels come forward. This, together with the public access to the secondary school facilities and further MUGA at the hub, more than justifies the proposed deferral, which will serve the useful purpose equally well.
    c. Deferring provision of facilities will assist in the management and maintenance of this strategic parkland as there will be a bigger pool of rent charge payments to sustain it.

[82] An updated CUA was published on the ABC website on 20 January 2025 (OTH/2024/1997).

d. The Appellant has already been required to submit two RM applications for land in DP3[83] ahead of the Council publishing a masterplan and enabling Design Briefs to be produced. The Design Brief serves no useful purpose as there are specific proposals now in the public domain. As such the process for the approval of the Design Brief should be simplified

193. In October 2021 the Appellant paid ABC £20,000 to produce and publish the masterplan, which it has not done. The Appellant has already submitted two RM applications for DP3. which should have been informed by the masterplan.

194. Finally, and as noted above, the grant of a 21-year lease is considered necessary as Discovery Park will be delivered in a series of phases with on-going maintenance of areas not brought forward resting with the Appellant. A lease will enable greater control of the area during implementation, but will be renewable on terms acceptable to the CMO and will ensure the provision of the facility in perpetuity. Upon completion, it would enable the transfer or lease of a single area covering Discovery Park. Taken together, this will serve the purpose equally well.

195. ABC and the CMO should be responsible for costs incurred in the transfer. Ongoing liability for repairs is neither fair nor reasonable and those managing the facilities must assume responsibility once the facilities are transferred.

[83] In January 2023 and January 2025.

District Centre Facilities

Schedule 14	Appellant evidence
Modification 65 - Remove the specific amount of floor space required such that the obligation is to deliver a supermarket, other retail units, an office building, a public house and a day nursery.	JC Proof, paras 5.1.290 - 295

Purpose of modifications

197. The current design brief requirements are too specific and rigid to reflect changes in the market since the agreement was signed. The proposed modifications are intended to simplify matters to enable delivery.

Consideration of purpose and justification

198. A RM application was submitted in January 2023. As such, there is limited value in submission of a Design Brief, the purpose of which is to inform the RM application.

199. The Outline Permission governs nature and form; for example, Conditions 98 and 99 limit the size of the supermarket to 2000sqm (NIA), with no other retail unit to be bigger than 500sqm (GIA). Condition 43 requires a Detailed Design Strategy for whole of District Centre and High Street Character Area to be approved prior to RM application. The Appellant now seeks a modification which (1) requires ABC to act reasonably and having regard to any reserved matter approval or alternative planning permission which may be granted for district centre facilities in Main Phase 1 when deciding whether to approve the design brief; and (2) removes the floorspace requirements.

Community Hub Building

Schedule 12 (Community Hub Building)	Appellant evidence
Modifications 58 - 63 - Deliver in two tranches at 3,250 and 4,250 occupations rather than 1,800 occupations - Design Briefs to be approved by 2,850 and 3,850 occupations rather than 1,400 occupations	JC Proof, paras 5.1.263 - 288

- Building to be transferred by way of leases or tenancies on terms suitable for their uses and that are acceptable to them. - Cap cost to £2m and make amendments to the specific requirements. Costs to include fees and other costs. - Omit requirement to consult with CMO or secure its approval for consultation. - Discharge obligation to make designated parts of Community Hub Building Available for use by County Council in accordance with the booking system agreed between the CMO and County Council. - Requirement for public sector leases to be in place prior to construction of building instead of obligation to transfer freehold of building to CMO.	

Purpose of modifications

200. To defer delivery of this social facility, as well as to not commence building of facility ahead of confirmation of need for all facilities.

201. To simplify approval of Design Brief process and align it to realistic cost, rather than over-specified budget.

Consideration of purpose and justification

202. The CMO First Premises is barely used, and not occupied by the CMO's staff. It has lifespan of at least another 15 years. As such, CG (and in particular the CMO) is adequately catered for at this early stage of the CG development. Other strategic developments often utilise space associated with other facilities that have been delivered early on; for example, at schools. In this instance, the Secondary School community use agreement provides a range of facilities over and above the MUGA and multi-use area proposed in the Community Hub.

203. A RM application was submitted in January 2025 for the Community Hub so there is limited value in requiring submission of a Design Brief, which should reflect discussions on planning application.

204. As noted above, the CMO has slowed down the process of engagement on Playspace 1 Design Brief and has not assisted in resolving issues to take it forward when budget and expectations have not aligned. As such, the CMO has

demonstrated no value in terms of community engagement. In light of this, it should be left to the Appellant to undertake consultation it sees fit.

205. Leases will be on terms acceptable to the user, this will include provision for renewal. It therefore serves the purpose equally well. This addresses the obligation to make the parts of the building available to KCC, which under the s.106 agreement is not within the power or control of the Appellant. The costs need to be reasonable and proportionate. The Community Hub can be provided within the £2m figure proposed.[84]

206. ABC and the CMO should be responsible for costs incurred. There is currently no requirement for the CMO to act reasonably or for ABC to efficiently secure the transfer. This has already caused difficulties in respect of the transfer of the CMO first premises whereby the developer had to make amendments to the building on matters already approved by ABC's Building Control and Planning teams in order to effect the transfer. This significantly increased the Appellant's own legal costs to bring forward the transfer.

[84] Brookbanks Cost Report here, on the Community Hub. CD2/25/Appendix 5.

Public Art

Schedule 24	Appellant evidence
Modifications 105 – 108 - Seek refund of £150,000 already provided (Contribution 1 and 2). - For the Appellant to deliver public art work rather than make contributions to ABC - Push back triggers to 999, 1999, 2999, 3999 and 4999 for delivery of art, rather than 99, 999, 1399, 2,599, 4,099. - Remove obligation for Appellant to maintain the art – this should be the CMO as part of their maintenance of spaces. - Remove obligation for ABC to commission and install the art. - No public art provided on site to date other than Snow Dogs by the Appellant. The Appellants want to undertake commissioning themselves to ensure high quality public art is provided and positive placemaking is undertaken.	JC Proof, 5.1.93 - 5.1.95

Purpose of modification

208. The modification is sought in order to ensure that the provision of public art is retained, but it will be for the Appellant to be responsible for its procurement. That will promote placemaking and the use of the money for art which will be of tangible benefit to Chilmington Green.

209. It is to be noted that i) no public art has been provided on site to date other than the Snow Dogs provided by the Appellant; and ii) some £600,000 remains to be paid which can genuinely contribute to placemaking if the Appellant can undertake commissioning so as to ensure high quality public art is provided and positive placemaking is undertaken.

Consideration of purpose and justification

210. The Appellant accepts that the provision of public art potentially serves a useful purpose in terms of placemaking and as a means of developing a sense of community pride in CG. It is clear, however, that a considerable amount of money has already been paid under these obligations, but with no public benefit.

211. As discussed during the roundtable, it is clear that the current 82 page strategy ('Creative Chilmington') is very much an ABC led view of what the Public Art

Strategy should be. Creative Chilmington was adopted in principle by the CMO in November 2019 and endorsed by ABC. The consultation set out in the committee report dated 19 December 2019 clearly illustrates that consultation was essentially limited to Council led organisations. At that time, there were few residents at CG and so a limited number that were able to input. No specific developer feedback was sought.

212. The current obligations are serving no useful purpose because unless a viable way forward is agreed for CG, the development could be stalled at 400 units. Moreover, the second payment of £100,000 was part of ABC removing of funds from the Escrow account. Despite this, ABC has already taken 2 years to spend this money and have provided no public art on site. This is a clear demonstration that money is being sought earlier than is necessary.

213. By pushing back triggers, it will enable CG to proceed with greater Appellant and resident input into proposals for Art Work and Strategy, which will not only facilitate a better-informed choice, but also improving scheme viability.

214. Given the severe viability constraints to the scheme, the focus for Public Art should be on place making, which in turn could enhance value. As such, the modifications would enable the Appellant to liaise with the community to commission local artists for local artwork. This will be more cost effective, ensuring maximum funding goes into public art.

KCC Services other than Education

Schedule 16	Appellant evidence
Modifications 85, 86, 87, 88, 117 and 118: - Discharge the Library Services contributions (4 x £225k). - Discharge youth services contributions (£239,000). - Discharge community learning contributions (£213,000). - Discharge Family Social Care Contributions (£272,000) and Telecare Contribution (£26,450).	JC Proof, paras 5.1.25; 5.1.31-38

Libraries (modification 85)

Purpose of modification

215. A Library Premises is included within the delivery of the Community Hub. There is, therefore, already substantial capital expenditure towards library service provision.

Consideration of purpose and justification

216. The obligation is surplus to requirements, duplicative and serves no useful purpose. The development is not viable and cannot sustain duplicative provision in respect of enhancing library provision to meet the needs of the development.

217. In any event, the Possingham Farm Inspector did not consider library contributions were necessary (at [2.2.4])[85]:

> *"there is no assessment of current resources, equipment and stock at either Ashford Gateway or Stanhope Libraries […]. Accordingly there is nothing before me to demonstrate that existing library infrastructure is incapable of accommodating new users from the proposed development or that the new users would have an unacceptable effect on current resources, equipment of stock."*

218. There is no new evidence that such contributions are necessary. Nor is there any evidence that existing library services are at capacity.

[85] CD7.1, at [2.2.4]

219. KCC's principal objection in respect of on-site provision is its size. KCC's plan is for a 12sqm access point to accommodate 2-3 shelves of books/music/film stock, RFID technology enabling self-services, 1 PC and access to wi-fi. The Appellant's proposals (69sqm) will meet this requirement with the potential for additional stock and more importantly, multi-use space. This could include an area to study, read, or other KCC services to utilise where there is clear synergy in requirements e.g. community learning facility. Again the on-site facility promotes placemaking.

220. The library sits within the community hub, which is a District Centre that will serve the whole of the South of Ashford Garden Community i.e. Kingsnorth and Court Lodge.

Youth Services (modification 86)

Purpose of modification

221. There is ample provision of facilities within the Community Hub, which will provide a 220sqm dedicated space for youth facilities, as well as that provided at the schools. The payments represent substantial over provision and therefore serve no useful purpose.

Consideration of purpose and justification

222. The development is not viable and cannot sustain the double counting of obligations towards the provision of youth services. The development is making ample provision towards youth services generated by the development through provision of facilities.

223. KCC alleges that the Appellant has provided no evidence of 'ample' provision[86], but there is an up to 220 sqm facility provided for youth services in the Community Hub Building[87]. In providing that space for youth facilities, CG will enable existing provision to be expanded and enhanced, delivering what KCC is stating that the contributions will also provide[88]. Taking into account floorspace

[86] KCC Topic paper, para 5.1.4(a).
[87] JC Proof, para 5.1.25; JC Appendix V (Brookbanks report, section 2).
[88] KCC Topic Paper, paras 6.1.8-10.

provision elsewhere within the CG development, it is clear that the payments are double counting of support to youth services.

224. It is also clear that i) County Council tax payments include provision for youth services to facilitate on-going service provision, as with the existing population; and ii) contributions from Kingsnorth can also be used to support youth service provision within the South of Ashford Garden Community, rather than off-site.

Community learning contributions (modification 87)

Purpose of modification

225. There is ample provision within other facilities provision and therefore the payments represent double counting and substantial over provision and therefore serve no useful purpose.

Consideration of purpose and justification

226. These contributions no longer serve a useful purpose, in as much as there is already ample provision in this regard, including the Community Hub building and the school facilities.

227. KCC allege that the Appellant has provided no evidence of 'ample' provision[89]. However, the Community Hub Building and school facilities provide early opportunity for the delivery of community learning, whilst the Community Hub will provide further multi-use space (including proposed library space). This leads to a substantial over provision within the development[90].

228. Further to the above, it is clear that i) within County Council tax payments there must already be provision for use for Community Learning; ii) there is an overlap between KCC's stated objectives here and other contributions being sought at CG[91]. The development is not viable and cannot sustain the double counting of obligations towards the provision of community learning.

[89] KCC Topic paper, para 7.1.4(a).

[90] JC Proof, para 5.1.31.

[91] See, for examples, KCC Topic paper, para 7.3.3 (b) "*Personal Development: Programmes focus on personal growth, such as mindfulness, well-being and creative arts)*", which is very similar to the public arts contributions; KCC Topic paper, para 7.3.3(d) "*Community*

Family social care contribution (modification 88)

Purpose of modification

229. These contributions no longer serve a useful purpose, in as much as there is already ample provision in this regard. These payments accordingly amount to substantial over provision, are surplus to requirements and should be discharged accordingly.

Consideration of purpose and justification

230. KCC suggest that these contributions and infrastructure is required to cover the following: i) specialist housing provision, including supported living; ii) adaption of community facilities to enable access for all; iii) technology and equipment to promote independence in the home; iv) multi-sensory facilities; v) changing places within the Borough; vi) occupation health and delivery of sessions on-site[92].

231. In these regards, however, it is clear that floorspace provision is being made within the Community Hub. The Community Hub building will also be providing 340sqm of space for police, community and social services outreach including family and social care[93]. The Community Hub building also provides community facilities accessible for all, changing rooms in line with the requirement for changing places within the Borough. It will also provide a space to allow occupation health sessions on-site.

232. The County Council's revenue, including Council Tax from this development will be available for Social Care.[94]

233. It is also notable that KCC assert that "*the additional 531 adult social care clients projected to arise from this Development is only the tip of the iceberg in terms of the*

Engagement: Many programmes involve community projects and volunteering, strengthening local ties and addressing social issues", which is very similar to the Early Community Development contributions.

[92] KCC Topic paper, para 8.3.9a-f.

[93] JC Proof, para 5.1.36; JC Appendix V (Brookbanks Report).

[94] JC Proof, para 5.1.38.

number adults who will benefit from the Obligation"[95]. This is inappropriately justifying the payment for an existing shortfall at the cost of Chilmington Green's viability.

[95] Topic paper, para 8.3.8.

CMO

Schedule 4	Appellant evidence
Modifications 13 (agreed), 14 (obligation satisfied), 15 , 16, 17, 19, 20, 21, 22, 23 - Discharge provision of CMO Second operating premises (budget value of £250,000). - Discharge Payment of Deficit Grant Contributions totalling £3,350,000.00 - Discharge Provision of Commercial Estate Basic Provision to a value of £2,921,000 - Discharge Provision of Commercial Estate Second Tranche to a value of £2,190,750.00 - Discharge Provision of Commercial Estate Third Tranche to a value of £2,190,750.00 - Discharge Provision of Cash Endowment to be provided instead of Commercial Estate. - Discharge and Refund CMO Start Up contribution (2 instalments of £75,000).	JC Proof, paras 5.1.64 - 105

Purpose of modification

235. The Commercial Estate and operation of the CMO is over complex, over specified and not deliverable. Sums paid to date have not been spent sensibly[96]. The Rent Charge deed and properly managed accounts should be relied upon to meet core need. The Appellant's explanatory note[97] illustrates that the CMO does not need the Commercial Estate transfer or deficit grant funding, which are sums that the CG development cannot afford and which the CMO does not require to operate at a healthy surplus.

236. It is not realistic for the CMO to operate an independent commercial enterprise. The second operating premises is also surplus to requirements and therefore serves no useful purpose. The deficit grant serves no useful purpose.

237. The Cash Endowment does not have a useful purpose in replacing an asset endowment and is not appropriate for s106 to fund unspecified alternative investment.

238. Start-up contributions have not been spent sensibly nor delivered material benefits to residents and have not served any useful purpose.

[96] WS of TH, JC Appendix I, paras 71-84.
[97] CD14.15, to be read alongside the 2024 financials.

Consideration of purpose and justification

239. The Appellant is seeking to streamline the CMO to enable the CG development to come forward.

240. The CMO letter to PINS dated December 2024 states:

> *"We understand that the amendments were drafted a number of years ago and the picture on the ground is now very different to the one presented in the developer's application."*
>
> *"The CMO however, does accept that compromise is needed as the build out of the development has been impacted by the COVID pandemic and the Stodmarsh restrictions. The current viability of the development and the resultant stalled situation is that it is in, is having a hugely detrimental effect on the current residents."*

241. Unfortunately, ABC's evidence does not reflect this sentiment.

242. In total, Schedule 4 makes provision of £11,052,500 of funding and/or assets available to the CMO for the maintenance and management of facilities and/or facilitating community development. This is in addition to Rent Charge Payments which are levied. It is clearly over specified for the scale, nature and ability of the scheme to sustain or that it warrants.

243. As Mr Hodson describes, the CMO faces substantial operational, governance and financial challenges and is failing to provide to an appropriate standard the essential services that it is required to do under the Framework Agreement, including maintenance of open spaces and communal areas, despite residents making payments to the CMO pursuant to rent charge deeds and it having received £485,000 in s.106 payments from the Appellant.

244. The CMO First Premises were completed and ready for occupation by March 2020. It is c. 2,000 sq ft with office space, meeting rooms, kitchen, large community room and was delivered at a capital cost of around £270,000. The CMO delayed occupation of this due to Covid. Although the CMO finally signed

the lease in July 2023[98], the building remains empty and underused[99], due in large part to staff working from ABC's offices. It is therefore evident that the current premises is more than sufficient and has adequate life span for the operating requirements of the CMO on-site.

245. There is no sensible requirement for a second 'temporary' premises[100]. The CMO Business Plan 2018[101] (at para 3.2) confirms that the second premises is intended to be a permanent building that is temporarily fitted out to the CMO's specification, before reverting back to the developer. This was envisaged to provide 300sqm for the period between 1,000 dwellings and 1800 dwellings – broadly three years. In light of scheme viability and the considerable expense already incurred to provide the First Premises (a facility the CMO does not use and will perfectly address its needs until the Community Hub is delivered at either 1800 units or 3250 units if proposed modification accepted), it clearly can be seen that the obligation no longer serves a useful purpose.

246. The ABC Topic paper acknowledges that the secondary school may be used for some events[102]. There is additionally the 200sqm in the CMO first operating premises which is available during school time.

247. The viability of the proposed Commercial Estate is challenging and is best left to private sector management. The BNP Paribas report demonstrates limited market for office to generate an income for CMO[103].

248. As to the CMO's financial position, the 2018 Business Plan is now over 6 years old and cannot be relied upon as the basis of any financial case. The most recent 10-year modelling done by the CMO for 2025 to 2035 shows a healthy position based upon current and expected rent charges and known commitments. It does

[98] WS of TH, JC Appendix I, paras 71 – 74.
[99] No third party appears to have rented from the CMO, despite the First Premises having been marketed since Summer 2023. It appears to only have been used for CMO AGMs, periodic Parish Council meetingsand from time to time by the local authority as a polling station.
[100] JC Proof, paras 5.1.66 – 5.1.68.
[101] CD 13.7 June 2018.
[102] ABC Topic paper, at 6.7.
[103] JC Proof, Appendix IV – Marketing Evidence from BNP Paribas.

not support the position that without the deficit grant or commercial estate that the CMO would become insolvent. Indeed, it shows that the Rent Charge Deed Accounts show a healthy surplus of between £210,000 in 2025/26 and £3.2m in 2034/35. This confirms the CMO is expected to be in a solid position in respect of maintaining the grounds of the development.

249. The most recent 10-year modelling also shows that the CMO charities account is in a healthy position. This account is meant to pay for staff and legals towards the CMO. In 2025/26 expenditure from the charities account is expected to be £77,000 (of which £60,000 is towards ABC staff who are not based onsite). £45,000 of those staff costs are to be paid for by transfer from the Rent Charge Account. There is very little which could be outside the scope of the Rent Charges, given the wide scope of the deed (Schedule 31, page 289 'Schedule 1'). By 2034/35 expenditure is only expected to be up at £139,000. The Charities Account shows zero income from Commercial Estate, but still shows a healthy surplus. Thus, ABC's claims that the CMO needs the 13% Commercial Estate income is unfounded.

250. In terms of movement of monies, the Rent Charge deed income can go into the Charities account, as shown in the 2024 material[104] which shows transfers from the Rent Charge deed account to the Charities account, which is then counted towards the charity expenditure. This is governed by Schedule 31 of the s.106 agreement and Schedule 1 to the Rent Charge deed document, which includes maintenance, communities buildings costs, etc. Thus, the Rent Charge payment is covering potentially very wide matters and can be used to put into the charitable expenditure. There is no difficulty in taking money from Rent Charge deed for these charitable purposes. The combined totals of the Charities Account and the Rent Charge Deed Account would show a surplus without the Deficit Grant.

[104] CD14.15 at page 6 – expenditure, which shows an ABC contract at £45k for three years, but then that appears as an income on the Charities a/c on the next page.

251. The Appellant is seeking to take responsibilities off the CMO and reduce its costs.

252. In terms of the wider management of public spaces it should be noted that the financial modelling for the CMO in 2018 assumed that either roadside verges remain under KCC maintenance or that KCC enter into agreement for the Trust to maintain – consequently the modelling assumes maintenance expenditure matches payments for the duration of the commuted sums from KCC. This extent of CMO work is therefore not impacted by the deficit grant.

253. The CMO has ample resources not to need the deficit grant. However, it has not been managing its income in a prudent manner given the challenges the development has endured[105] (COVID, Stodmarsh, ABC not progressing applications, S106 triggers) and the clear implications this has in terms of housing delivery and the work the CMO is required to do.

254. Commercial Estate Provision (Basic, Second and Third). The CMO Business Plan states that this would eventually generate income equating to c. 13% of the CMO's costs, including being a primary source of funding for its community development work and funded activities. However, as set out above, the latest 10-year business plan makes no allowance for income from the commercial estate and there remains a healthy surplus.

255. Notwithstanding this, it is clear from the 2018 Business Plan[106] that the extent of Community Development work envisaged is non-essential, often overlapping with the provision that other agencies provide and that contributions have also been sought as part of the s106 agreement[107].

[105] WS of TH, JC Appendix I, para 81.
[106] CD13.7.
[107] See, for example, Section F, page 91-92 of CMO Business Plan "*Other Third Party Funding*", which states: "*KCC will be in receipt of developer contributions for youth work within Chilmington Green. The Trust will be in a good position to support and deliver services to children and young people through its Community Development Strategy and work. It is possible, therefore, for the Trust to receive some funding from KCC to undertake a supporting role, however, this is not currently budgeted for.*"

256. Cash Endowment. The provision of money for undefined investment does not have a useful purpose in replacing an asset endowment.

Early Community Development

Schedule 5	Appellant evidence
Modifications 24 - Discharge and repay all past and future Early Community Development obligations (totalling £250,000).	JC Proof, paras 5.1.108

Purpose of modification

257. The s.106 agreement states that the monies received are for the purpose of community development programme(s) for the residents and future residents of the Development, which may include the cost of dedicated staff and consultants and setting up and running a community website.

258. The Adopted Early Community Development Strategy[108] assumed over 200 dwellings (c. 480 people) by the end of 2019. It was also expected that Phase 1 would be completed within 5 years. As of January 2020, there were just 30 dwellings (c. 72 people), whilst Phase 1 is not now expected to be completed until 2031. The payments due under the existing terms are therefore not proportionate to need in the short term and no longer serve a useful purpose.

Consideration of purpose and justification

259. The Appellant has now paid all Early Community Development obligations, which included £150,000 of payments withdrawn from ESCROW Account on 6 March 2023.

260. The CMO 2018 Business Plan[109] assumes all contributions are transferred to it for expenditure in years 1 to 5 (when Phase 1 would be completed i.e. 1500 dwellings). It is notable that in years 1 and 2 the plan states £100,000 of income for community development but only £5,000 to be spent on community activities. In years 3 to 5 it states £150,000 of income for community development but only £45,000 to be spent on community activities. During the same period, actual housing delivery amounted to 215 dwellings, the CMO had not taken up occupation of the premises and had not taken on maintenance of any landscaped

[108] CD13.9.
[109] CD13.17 CMO Business Plan (2018), at page 100.

areas. It is unclear what, if anything, of the money has gone toward in relation to community activity during this period.

261. This is contrary to the suggestion that deletion of the Early Community Development Contribution would undermine the ability of ABC and the CMO to deliver the activities required to develop community cohesion[110], which was identified as being a principal objective of the CMO Business Plan.

262. Nor is there any evidence to support the assertion that if Early Community Development funding is deleted then central Government would reconsider the garden community status[111]. However, what is certain is that for the CG development to progress then it has to be viable, which lies at the heart of this appeal.

263. These additional payments no longer serve any useful purpose and should be discharged accordingly, with those payments already made duly refunded.

[110] ABC Topic paper, para 6.15.
[111] ABC Topic paper, para 6.17.

Management and Maintenance

265. This next section covers matters in:

a. Schedule 4 (CMO)

b. Schedule 6 (Informal/Natural Green Space);

c. Schedule 7 (Chilmington Hamlet);

d. Schedule 8 (Children's and Young People's Play Space);

e. Schedule 9 (Allotments);

f. Schedule 10 (DP3 and Discovery Park Sports Hub and Sports Pitches);

g. Schedule 12 (Community Hub Building); and

h. Schedule 17 (Ecology).

Purpose of modification

266. Taken together, these modifications respond to a number of similar and recurring issues, including that i) the CMO has delayed the transfer of completed assets to a time suited to them, rather than when it was completed; ii) the CMO has struggled to undertake core, basic management of landscaped areas and the Appellant has needed to step in to ensure placemaking; and iii) funding available to the CMO has not been used efficiently or effectively in pursuing its primary purpose.

267. It is not viable for the Development to support the evolution of the CMO into a commercial organisation. Its focus should be on the management and maintenance of limited community facilities. Run efficiently, the Rent Charge deed supplemented by hire of limited facilities will enable the on-going management and maintenance.

268. Beyond those general themes, the Appellant has concerns regarding the CMO's ability to efficiently and effectively manage and maintain assets. It employs both ABC staff and Block Management UK Ltd, with the latter managing the work on site and collection of the rent charge.

Schedule 4 (CMO)	Appellant evidence
Modifications 15, 19, 20, 21 - Discharge the 12-month continued maintenance obligation in respect of the CMO First Premises - Discharge the requirement to provide the First, Second and Third Tranche Commercial Estate / Cash Endowments	JC Proof, paras 5.1.59 – 63, 5.1.83 - 95

Purpose of modification

269. The continued 12-month maintenance obligation no longer serves a useful purpose. Day to day wear and tear should be the responsibility of the CMO and those persons hiring the facilities. The provision of endowments to the CMO are well beyond what can be reasonably and sustainably managed by the CMO; are not viable; and not necessary for the core functioning of the body. They serve no useful purpose.

Consideration of purpose and justification

270. The Appellant's experience of the CMO First Premises and maintenance of initial landscaping has highlighted significant problems with the transfer, management and maintenance of facilities and landscaping, which need to be addressed.

271. The CMO First Premises was completed and ready for occupation from March 2020. However, the CMO deferred occupation due to Covid and did not sign the lease until September 2023. It has never been occupied and has only been used for a handful of events, including periodic Parish Council meetings. It is wholly unreasonable to require 12 month repairing liability from this date. The building will not have deteriorated during this time. Upon completion, facilities should be made available with the various warranties in place, but the CMO should be responsible for repair and maintenance as would be expected of any occupier of a building.

272. It is noted that the Commercial Estate provisions appear part of the objective to make the CMO an independently viable commercial enterprise supported by the Commercial Estate. However, it is neither realistic, necessary, nor within the CMO's abilities. The BNP evidence and the lack of demand to rent or use the

CMO first premises demonstrates that there is little demand. As such, these obligations are likely to become a liability rather than asset.

273. Crucially, it is not viable to provide all these assets / payments, which are not required for the CMO to run efficiently and effectively and to focus on a core role of managing and maintaining facilities through the rent charge deed. The delay in delivery of community facilities (covered by other requests), will also help sustain the ability of the CMO to manage and maintain those facilities as there will be a bigger resident population making Rent Charge payments.

Schedule 6 (informal / natural green space)	**Appellant evidence**
Modifications 26 and 27 - Discharge the obligation to transfer the facilities to the CMO - Discharge the obligation allowing the CMO to identify Defects - Discharge the obligation to pay transfer costs of CMO - Discharge the 12-month repairing liability obligation.	JC Proof, paras 5.1.118 - 126

Purpose of modification

274. The CMO is neither equipped nor competent to maintain communal greenspaces. Therefore, unnecessarily restricting occupations on the transfer of informal green space serves no useful purpose. No useful purpose is served by the CMO being able to hold up occupations merely by identifying a defect, which it is not qualified to assess.

Consideration of purpose and justification

275. The Informal / Natural Green Space addressed by these modifications relates to space that runs around and through development parcels. Therefore, the delivery of this space is heavily tied to the delivery of land parcels, with the provisions and transfer of land to the CMO over complicating and delaying delivery.

276. The Appellant requested that the CMO maintain communal areas from 2020. However, this has only occurred since July 2023[112]. Prior to this, the Appellant

[112] WS of TH, JC Appendix I, para 79 and 83.

had to maintain these areas. Due to the delay, the 12 month repairing liability from date of transfer no longer serves any useful purpose, as such areas may have been made available to the public long before such transfer. The modification therefore allows for the Appellant to retain ownership and to take on maintenance requirements. The Informal / Natural Green Space is to be delivered per phase and in accordance with the relevant RM approval.

Schedule 7 (Chilmington Hamlet)	**Appellant evidence**
Modifications 29 and 32 - Defer the provision of the facilities until 3,500 occupations. - Discharge the obligation allowing the CMO to identify Defects - Discharge the obligation to pay transfer costs of CMO - Discharge the 12-month repairing liability or 3 year liability in respect of grass surfaced facilities. - Modify the obligation to transfer of facilities to that of a 21-year lease at peppercorn rent.	JC Proof, paras 5.1.130 – 140; 5.1.151-153.

Purpose of modification

277. The proposed deferral is intended to ensure that the facilities are provided at a time where there are sufficient occupations to make the facilities viable in terms of level of use. This will serve any useful purpose equally well. Deferring the provision of the Chilmington Hamlet facilities will also ensure that there is a bigger pool of Rent Charge deed through which the facilities can be managed and maintained.

278. The proposed 21-year lease arrangements will: i) help to provide control to the developer in respect of the maintenance of the facilities during construction, in turn assisting with placemaking and value enhancement; ii) provide certainty in the provision of the facility in perpetuity through the requirement to ensure transfer provisions to be in a form acceptable to the CMO.

279. If the transfer of a facility is delayed after the point of practical completion (as has been experienced already), it is unreasonable to extend the repairing liability from the transfer date. Any repairs required would only relate to the use of the facility, whereas if the transfer of facilities occurs in a timely fashion, then the

CMO will have the benefit of warranties in respect of any problems and would only be responsible for repair of normal wear and tear matters, as is standard.

Schedule 8 (Children's and Young People's Play Space)	**Appellant evidence**
Modifications 37 and 38 - Discharge the obligation allowing the CMO to identify Defects. - Discharge the obligation to pay transfer costs of CMO - Discharge obligation to transfer facilities to that of a long-lease with a term of 125 years at a peppercorn ground rent.	JC Proof, paras 5.1.173 - 182

Purpose of modification

280. It is appropriate for the CMO to continue to manage and maintain these spaces under the Rent Charge deed arrangements. The proposed lease arrangements will provide the CMO with sufficient certainty in respect of these facilities to plan for their management and maintenance. However, as with the modifications above, in light of problems that have been experienced with the management of communal spaces by CMO it is considered necessary that leases are put in place such that the Appellant is able to retain an element of control in the event that the proper management and maintenance of these spaces is not secured. This safeguards potential harm to the placemaking aims that are critical to driving sales of houses and the delivery of CG.

281. Again, due to the delay by which CMO has accepted maintenance of current landscaped areas, the 12-month repairing liability from date of transfer serves no useful purpose, as such areas may have been made available to the public long before such transfer.

Schedule 9 (allotments)[113]	**Appellant evidence**
Modifications 44, 45 and 46 - Modify obligation to confirm allotments to be delivered in accordance with the planned cost. - Discharge the obligation to transfer the facilities to the CMO to that of a bi-annual licence. - Discharge the obligation to pay transfer costs of CMO - Discharge the 12-month repairing liability	JC Proof, paras 5.1.199 - 208

[113] These do not cover the Discharge of Phase 3 or Phase 4 allotments. However, their removal does reduce the management and maintenance of facilities.

Purpose of modification

282. The provision of allotments does not require the transfer of the asset to the CMO. The CMO can take responsibility for the allotments through the grant of a biannual licence – transfer is not required. This will serve any useful purpose equally well.

Schedule 10 (DP3, Sports Hub and Pitches)	**Appellant evidence**
Modifications 54 and 55 - Discharge the obligation to transfer the facilities to the CMO to that of a 21-year lease with peppercorn ground rent. - Discharge the obligation to pay transfer costs of CMO - Discharge the 12-month repairing liability or 3-year liability in respect of grass surfaced facilities.	JC Proof, paras 5.1.244 – 251.

Purpose of modification

283. The Discovery Park Sports Facilities and DP3 will be delivered in a series of phases. As and when a new phase is delivered, it will leave the general ongoing management of land by the Appellant under agreement with Chilmington Farm. It is beneficial to offer each phase on a 21-year lease, which is the length of time envisaged to complete the CG development. This ensures that the Appellant is able to keep an element of control over the quality and coordination of this space, as well as ensuring that during the build out of CG the site is not split into multiple different ownerships.

284. The modification requires the transfer provisions to be in a form acceptable to the CMO. It is therefore envisaged that upon the completion of the CG development, the respective leases could be brought together as a single long-term lease to the CMO or Parish Council.

285. The Sports Facilities offer the potential for income generation to help supplement the management and maintenance of these facilities meaning that the CMO should be able to manage these facilities through both the Rent Charge deed and income generated by the facilities.

Schedule 12 (Community Hub Building)	Appellant evidence
Modifications 58 and 61 - Modify obligation to deliver Hub in 2 phases, first phase at 3250 dwellings and second phase at 4250 dwellings, at an overall cost of £2m. - Modify obligation to transfer to the CMO to that of granting proposed users, as far as is required leases or tenancies on terms suitable for their use. - Discharge the 12-month repairing liability.	JC Proof, paras 5.1.263 – 279;

Purpose of modification

286. The proposed modification is to discharge the obligation to transfer the Community Hub by way of freehold or long leasehold such that Hodson Developments retains the freehold and enters into leasehold arrangements with the respective users of the hub.

287. The capital cost of up to £5,152,127 is excessive and is undermining the viable delivery of the development. The current timetable for delivering these assets means that they are having a considerable impact on cashflow. In any event, the Brookbanks cost report confirms that the facility can be built for £2m.

288. Early provision of the secondary school supports deferral of the need for community and sports facilities.

289. The Appellant would be required to commence the development of the hub for those parts where the required leases are confirmed. It is not possible to fit out parts of the building until the respective leases are confirmed, but the Appellant would progress the building for those parts where demand has been confirmed and the necessary arrangements are in place. In bringing forward the delivery of the Community Hub in two phases it will allow the Appellant to only fit out those elements of the building required

Schedule 17 (Ecology)	Appellant evidence
Modifications 90 - Discharge the obligation to transfer any ecological mitigation land.	JC Proof, paras 5.1.41 – 5.1.43

Purpose of modification

290. Paragraph 1 of Schedule 7 principally seeks to enforce matters covered by conditions, save for requiring ecological mitigation land to be transferred to the CMO. However, this is not necessary in order for the mitigation to be provided; since February 2017, the Appellant has entered into an agreement with Chilmington Farm allowing it to continue to farm the land at CG for the duration of the development on the proviso that, as an when land is needed for the next stage of the development, Chilmington Farm will cease farming such land. This is secured by way of a Farm Business Tenancy, which has been entered into on two-year terms since 18 September 2018.

291. Given that the vast majority of ecological mitigation land is Ecologically Managed Farmland, there is little practical benefit to transferring this to the CMO because the CMO would simply have to enter into a similar arrangement with a farmer.

292. In any event, the delivery of ecological mitigation is a requirement under planning condition and such ecological management could potentially be extensive. As was explained, already as part of the Possingham Farm development the Appellant is required to bring forward additional ecological mitigation on the Chilmington Green ecological areas in respect of Skylarks. As the Appellant is responsible for bringing forward the ecological mitigation plans and securing licences, it is plain that it is in the best position to then oversee its management. As currently drafted, this would be something that the CMO would have to take on without any additional funding or incentive.

RIF

Schedule	Appellant evidence
Modification 99 - Discharge the RIF payment obligations.	JC Proof, paras 5.1.74 – 76 ID Proof, section 6

Purpose of modification

293. The burden of this payment is undermining the viability and in turn the deliverability of the scheme. As such, it cannot be seen to serve a useful purpose. It would be better and more beneficial for CG to be able to proceed, rather than requesting £5m that does not take priority to enabling a viable scheme.

Consideration of purpose and justification

294. RIF is to contribute to works carried out at Drovers Roundabout, Junction 9 of the M20 and Eureka Skyway Footbridge. The improvement works commenced in June 2010 and were completed in summer 2011. The cost of these improvements was forward funded by government funds from the then Regional Infrastructure Fund, which were subject to funding agreements entered into in May 2010 between ABC, KCC and SEEDA (Now Homes England). The total forward funding is £15.1m. Contributions secured to date total £11,728,104.75, including £5,622,589 from Chilmington Green, which is a shortfall of £3,371,895.25[114].

295. The RIF contribution was agreed at Possingham Farm[115], because it was viable. In respect of CG, however, the RIF payments are undermining the viability of the development, thus serving no useful purpose.

[114] Since the ABC Topic paper was produced, ABC has prepared a committee report in respect of Court Lodge, which confirms that Court Lodge would be expected to make the following contributions towards: M20 Junction 9: £715,227.04 and Drovers Roundabout: £562,997.84

[115] ABC Topic paper, para 3.5.

Index Linking

Clause 28	Appellant evidence
Modifications 5 and 6 - Modification 5 seeks to replace all references to "index linking" to "Index Linking" to correct drafting. - Modification 6 seeks to modify the base date for indexation from April 2014 or Q2 of 2014 to August 2018 or Q3 of 2018. - Modification 6 also seeks to include wording such that if indexation results in payments exceeding the cost of the item for which it is to be paid, then the payable amount should be reduced accordingly.	JC Proof, paras 3.1.55 – 60; 5.1.11 – 5.1.25.

Purpose of modification

296. To amend the base date to that date at which construction started and address the unjustified over inflation of costs that results from the extended period by which inflation is currently calculated. This also undermines the viability of the development. Where infrastructure (such as a school or sports hub) can be provided for a figure that is less than currently required to be contributed under the s.106 agreement, then rebasing to the 2018 index would serve any useful purpose equally well, if not better, given that it avoids drawing down money that is not required and so enables CG to be delivered. The CG scheme is not in a position to construct expensive infrastructure such as a school at excessive cost when that can be provided for less.

Consideration of purpose and justification

297. The purpose of index linking was to ensure that payments and capital contributions tracked actual costs over time. However, the indexation date (April 2014) and the Relevant Indices[116] no longer properly serve this purpose.

298. Rather, as a result of the historical base date and extended period over which payments and values in the s.106 agreement in respect of Phase 1 are now being indexed, the indexation payments are over inflating the relevant sums. Thus, the indexation is generating payments and contributions in excess of those required to mitigate the impact of the Development[117].

[116] RPI, BCIS Indices or the Output Prices Index for Non Public Housing works as the case may be.
[117] JC Proof, para 5.1.18.

299. The Appellant seeks the modification of the indexation to a new base date of August 2018 (the point at which construction on site commenced) This brings payments more in line with actual, present-day costs.

300. Mrs Justice Lieven did not deal with the merits of indexation, merely saying they could not be challenged in a planning judicial review.[118] Mr Collins' evidence appends[119] a report from Brookbanks, which looks at the specific costs of certain elements of the scheme and how these are impacted by indexation and which demonstrates not only how inappropriate indexation is causing viability issues, but also tests examples[120] that show how amending the base date for indexation to 2018 still provides more than enough capital to deliver the facilities as set out[121]. It is entirely inappropriate to use indexation from 2014 as it artificially inflates the costs of delivering the facilities when they are costed at today's date and when using 2018 (the start of construction) as the date for indexation more fairly reflects the costs of provision of facilities.

301. The Appellant has repeatedly asked for the accounts of expenditure on the school, which KCC has refused. It is also notable that the school opened in November 2021 and yet KCC anticipated the total spend on the school to increase by £162,770.97 after January 2024 (i.e. over two years after the school opened). According to the figures provided by KCC, £991,593.89 of costs being charged to Hodson Developments relate to costs incurred post the opening of the Primary School. KCC have refused to provide any explanation. As per the email dated 7 December 2023[122], it appears that KCC is utilising s106 monies to resolve defects. This is not the purpose of indexation or what the contribution

[118] CD 12.11, para 18.
[119] JC Proof, Appendix V.
[120] JC Proof, paras 3.1.55-3.1.60, summarising the calculations in respect of primary school 2, the Discovery Park Sports Hub and Sports Pitches.
[121] JC Proof, Para 5.1.12. At today's costs, Primary School 2 could be built for £5,280,745.47. This remains within the budget for the school with indexation moved to Q3 2018 which means the £6m budget would equate to £7,920,000 today. The Discovery Park Sports Hub will cost between £4,137,000 and £5,352,000 at today's prices, whilst the Sport Pitches would cost £2,454,000. The budget for these facilities indexed back to 2018 are £5,971,388 and £3,338,400.
[122] Ref 2c in KCC additional bundle.

should be used for. Post completion works such as defects, should be addressed at the contractor's cost.

302. The position as set out in Mr Howson's note entitled BCIS Indexation Note submitted on 30 April can be summarised as follows:
    a. The build costs put forward by the Appellant come within the 2018 indexation range.
    b. The Brookbanks Primary School build costs come within the 2018 indexation range.
    c. With regards to the BCIS costs, Mr Howson accepts Mr Cato's argument that there are four items missing from the BCIS figures for Primary Schools, and therefore a total adjustment of + £770,689 is required to the BCIS average costs[123]. Although Mr Cato does not accept the cost of £770,689, it is taken from the costs in Appendix A of the Brookbanks Cost Report (March 2025), so the figures are correct.

303. It is therefore clear that indexation back to 2014 is not required to ensure the facilities can continue to be delivered based upon today's costs. Rather the indexation is leading to over inflated costs.

[123] For professional fees; furniture, fixtures and equipment (loose); contingencies; and external works.

Delivery, monitoring and Councils' costs reimbursement

Schedule 26	Appellant evidence
Modification 111 - To discharge all Quality Monitoring Payments and the repayment of monies already paid. Currently payments are £40,000 per annum (or £20,000 if less than 50 dwellings constructed).	JC Proof, paras 5.1.109 - 117

Purpose of modification

304. To remove payments that are surplus to requirements, excessive and more than is necessary to mitigate the impact of the Development, as well as to reduce costs of delivery to improve the viability of the scheme.

Consideration of purpose and justification

305. These sums are intended for staff and related costs to monitor the quality of the development, including the Chilmington Green Quality Agreement, Design Code and any other submitted or agreed materials specifications, design briefs, specifications, construction management plans, waste management plan and liaison with the CMO and residents. However, ensuring that a development comes forward in accordance with the approved plans and details, is part of the day-to-day functions of a planning department[124].

306. To date, £200,000 has been paid to ABC, against 370 occupations. ABC state this covers time to review, agree and monitor each Design Brief for which an additional fee is not available[125]. However, the Play Space 1 Design Brief have been with the Council for 2 years and there is still no agreed way forward, despite being in receipt of very considerable Quality Monitoring Payments. It is therefore self-evident that they do not serve a useful purpose and rather the payments should be deleted and the Council simplify the process, which duplicates the planning application process.

[124] See Possingham Farm Decision Letter (at [102]): "*Ensuring that the development comes forward in accordance with the approved plans and details, is part of the day-to-day functions of a planning department. Accordingly, the Quality Monitoring Fee is not considered to meet the statutory tests.*" See also Kingsnorth Decision Letter (at [40]): "*The Council accepted during the inquiry that this [quality monitoring costs] could not be justified as being necessary to make the development acceptable. As such it is not CIL compliant*."
[125] ABC Topic paper, para 6.4.

307. The extent of Monitoring and Design Brief requirements has a cumulative, negative, impact given the clearly evidenced lack of ability or willingness of the Council to progress matters. Each delay increases the financing costs, which compounds the already unnecessary high financing costs the s.106 agreement imposes on the Appellant.

308. To date, three letters have been issued to the Appellant[126], which all raise straightforward matters related to the day-to-day functioning of a planning department. Further, and in any event, they indicate a number of issues of particular concern, including that: i) in some cases, they relate to housing that was completed c. 5 years prior to the letter being issued; ii) they all use old Google Earth photos, rather than photos taken at the time ABC suggest that a site visit was undertaken; and iii) any matters relate to temporary situations (for example, wearing course to road is not down as still being used for construction).

309. Of even greater concern, is the fact that the first payment was taken some four and a half years prior to a quality monitoring officer even being appointed two years ago. ABC has been getting money for nothing.

310. If KCC seek to stop development at 400 occupations, the current requirement is for further annual payments of £20,000 even though no further development will be forthcoming. This clearly serves no useful purpose.

Schedule 28	**Appellant evidence**
Modification 112 - To discharge annual payments of £25,000 for monitoring purposes and instead make payments of £5,000. - Payments already made to ABC to be repaid – total payments to date £125,000.	JC Proof, paras 5.1.119 – 5.1.24.

Purpose of modification

[126] 1) Letter relating to A, E, F, C2 and NG1 dated 14 May 2024 (but sent on 03 June 2024); 2) Letter relating to A, E and F dated 30 September 2024 (but sent on 04 October 2024); 3) Letter relating to B1, C1, C2 and J dated 10 January 2025 (but sent on 03 February 2025).

311. The Appellant accepts that monitoring contributions potentially serve a useful purpose, but the level of contribution currently sought is disproportionate in scale. The proposed sum would be more than sufficient and will serve the useful purpose equally well, as beyond that amount ought properly to be surplus in any event. It is proposed that payments are to only relate to occupations and not anniversaries.

Consideration of purpose and justification

312. Monitoring costs should not be recouped out of step with the delivery of development. It is incumbent upon ABC to demonstrate the appropriate use of funds in accordance with the purposes for which they have been sought. To date, £125,000 of monitoring costs have been collected despite only 370 houses having been delivered. This is completely disproportionate. Mr Collins' comparison is highly relevant – CG is 10.45 times bigger than Kingsnorth, yet the monitoring fee is 50 times higher (£25,000 compared to £500 per annum). The modification to £5,000 per annum brings it in line with Kingsnorth (i.e. ten times larger in line with the proportionate scale of the developments).

313. Monitoring costs also include an allowance for attendance at CMO meetings and reviewing viability under Schedule 23. However, the CMO is also paying for ABC staff time and there is a separate cost for viability review under Schedule 23. Therefore, this represents double counting.

314. ABC assert that there would be insufficient funds to enable the Council to monitor obligations and conditions "*to the detriment to the delivery of the Development*"[127]. However, the requests will simplify and reduce the extent of monitoring work required, which it has not been carrying out anyway. In any event, funding shortage is not the cause of delivery problems. ABC have not issued a planning consent to the Appellant on site since October 2021 (for a road) and December 2018 (for housing). This is despite ABC having a clear surplus of finance relative to the development.

[127] ABC Topic paper, para 6.7.

315. Furthermore, if housing stops at 400 occupations, as per KCC position, then annual monitoring costs of £12,500 would still fall due, even though there would be no further requirement to monitor. Again, this serves no useful purpose.

Bank accounts

Schedules 29 and 30	**Appellant evidence**
Modifications 113 – 116 - To discharge the requirement to set up the Developers' Contingency Bank Account and to maintain a Council Minimum Balance. - To modify the payment triggers to be made into Council Contributions Bank Account - To modify the wording on the restriction of withdrawals such that "interest" is included within the terms by which ABC can make and use withdrawals from Council's Contributions Bank Account. - To discharge requirement to set up Developers Capital Bank Account.	JC Proof, paras 5.1.125 - 133

Purpose of modification

316. The proposed modifications will remove a Bank Account that is not required and serves no useful purpose now that there is a single Master Developer, as well as removing the early payment of obligations which is otiose and serves no purpose. It is also proposed to remove the Developers Capital Bank Account as it serves no useful purpose for the developer to have to deposit the full amount of money that is to be spent on the provision of facilities by the developer.

317. The arguments in favour of the modifications are the same for the ABC and KCC accounts.

Consideration of purpose and justification

318. The Contingency Bank Account is in place for ABC to withdraw from in the event of default of payment. However, this could only have been intended for a delivery vehicle where several developers / landowners were delivering CG (meaning that if one or more developers defaulted then ABC had a single point of recourse), rather than a single Master Developer that can be enforced against.

319. So far as ABC assert that the Contingency Bank Account is required as demonstrated by withdrawal of money from this account due to non-payment[128], this is not correct. The money that ABC withdrew from the account related to items that the Appellant is seeking to amend under this appeal. It is ABC's delay and failure to consider the application that resulted in this appeal taking over two years to get to this stage. The Appellant considers that it was unlawful for ABC to seek to enforce against obligations that were validly part of the application that forms the basis of this appeal.

320. The purpose of the bank account was not to allow the Council to circumvent the consideration of applications or engage with the Appellant on the overall viability of the development. In particular, £182,500 of money withdrawn from the account related to monitoring costs, which on any credible assessment is not commensurate with the level of monitoring required (or performed by ABC) to date.

321. Although ABC state that the amount to be put in Contingency Bank Account is equal to or less than that which the Developer ultimately needs to pay to ABC, plus the developer receives interest[129], this ignores the fact that this approach unnecessarily ties up considerable capital when developer cash flow is critical to delivery of the CG development. Similarly, the cost of borrowing the money to put in the account is significantly higher than interest accrued on savings.

322. The Contributions Bank Account is an ABC account that the developer deposits financial contributions into ahead of ABC then withdrawing sums. Schedule 29A currently sets out the triggers for payments, ahead of the date by which the obligation is required to be made. Schedule 29B sets out triggers for Indexation Payments into the Contributions Bank account, which are made at the trigger date that the obligation falls due. By way of an example, the second payment of CMO deficit grant of £335,000 is to be deposited at 425 occupations, but the trigger for the obligation requirement is not until 500 occupations (with the indexation payment also due at 500 occupations). Schedule 29C sets out trigger by which ABC will withdraw the amount (also 500 occupations).

[128] ABC Topic paper, para 6.8.
[129] ABC Topic paper, 6.11.

323. The practical effect of the early deposit of money is to add further to the already substantial financing costs.

324. The proposed modification is to require payment to ABC on the trigger date that the payment is due, rather than in advance. ABC can withdraw the sums shortly after the deposit has been made with no adverse consequences. Indeed, the evidence to date, is that money withdrawn by ABC has not been utilised for months, if not years, after. By way of an example, having withdrawn sums in respect of public art in March 2023, ABC are currently only preparing a brief to utilise this money some two years later.

325. The Capital Bank Account bank account relates to the funding required for facilities that the developer itself has to provide or deliver, with the full financial cost to deliver a facility to be deposited into this bank account ahead of the actual trigger point to deliver the facility. By way of an example, £1,266,000 for the Chilmington Hamlet Facilities is to be deposited by 1,000 occupations, despite the Hamlet Facilities not requiring completion until 1,400 occupations. The effect is to introduce an unworkable funding regime for the CG development that is in contrast to the usual terms on which finance is available which would allow funds to be drawn down against agreed construction milestones in respect of a given asset; it is not feasible to achieve 100% of funds in advance.

326. Reimbursement of Costs Paid by Developer. ABC asserts that the Appellant is seeking reimbursement of costs paid for by Homes England and that therefore repayment should be to Homes England[130]. However, the Appellant had a loan facility with Homes England, with some payments being paid directly from Homes England to ABC, to facilitate the quick and efficient payment of monies to ABC (e.g. Public Art Payment). This loan has now been completed and the money drawn down for CG repaid, with interest. As such, any unspent money or repayments fall due to the Appellant as financer of these payments.

[130] ABC Topic paper, para 8.1.

Bus Services

Schedule 20	Appellant evidence
Modifications 95 and 96 - Modify the obligations at para 1.1 and 1.2 to provide the temporary bus stop by 500 occupations and the commencement of the bus service prior to the occupation of 500 occupations. - Modify the obligations at para 1.4, 1.5,1.6 and 1.7 to provide the initial bus related infrastructure for Phase 1 and the subsequent bus priority measures for phase 1 prior to the occupation of 1,222 dwellings (rather than 200 occupations for initial bus related infrastructure and keeping 1,222 occupations for subsequent bus priority measures and bus related infrastructure). - Modify the stipulations requiring the increase in frequency of bus service (1 every 30 mins, then 1 every 20 mins prior to 1,222 occupations, then 1 every 13-14 mins prior to 2772 occupations, then 1 every 10 minutes at 4,107 occupations) to be informed by the monitoring of the use of the service (in line with Possingham Farm decision) - To discharge the obligation to provide bus vouchers.	JC Proof, paras 5.1.60 - 69 ID Proof, section 4

Purpose of modification

327. The current level of subsidy is not serving any useful purpose because it is not viable and is potentially wasting provision of subsidy to provide empty buses. Or put another way, 'transporting air' to the detriment of the environment.

328. It is not presently sustainable to provide any bus service at the current time. Furthermore, KCC have made it clear that if a Bond for the A28DS is not provided at 400 units then they will to stop the CG development. Of those 400 units, 165 are located at Briseley Farm, which is served by a Bus Service on Coulter Road. Thus, the proposed temporary service would cater for, at most, 235 dwellings at CG.

329. The proposed modification replicates the approach considered acceptable at Possingham Farm[131] in order to strike the balance between providing the bus service early, but not with too high frequency so as to require an unnecessary

[131] CD7.1 Possingham Farm Decision Notice.

and wasteful subsidy[132]. In this regard, see Possingham Farm Decision, at [54-55]:

"[…] The only disagreement between the parties relates to the frequency of the service. The Appellant preference is for a service every 30 minutes during the weekday peak hour and once an hour thereafter.

I consider the proposed frequency to be acceptable particularly bearing in mind the bus service would commence on occupation of the 100th dwelling when levels of patronage are likely to be low, particularly outside of peak hours. As the quantum of dwellings on the appeal site increases, there may be sufficient demand to justify a more frequent service throughout the day. However, levels of bus patronage would be monitored and reviewed through the Bus Service Monitoring Report, so it would be possible to amend the timetable to respond to increases or decreases in demand. I am therefore satisfied that future residents would be able to access Ashford town centre and the international train station by public transport."

330. The cost of provision of bus vouchers is also undermining the viability and deliverability of the scheme. They introduce a further form of subsidy, therefore the current s.106 agreement effectively requires two forms of subsidy: £3,000,000 of direct subsidy and £2,587,500 of subsidy via bus vouchers, which equates to a subsidy of £971.74 per household (as compare to Court Lodge of £800.00 and Kingsnorth of £727.27 per household).

Consideration of purpose and justification

331. It is necessary to balance the desire to provide a bus service early enough to facilitate a modal shift before travel patterns are established with the risk of over providing a service, which will waste resources and money. The proposed modifications reflect the consented bus service at Possingham Farm and are a practical solution to try to deliver an economically feasible bus service when it is required and at a level of provision that is both sustainable and a positive benefit to the new and existing residents in the area[133]. The request for bus vouchers for new residents while seeking subsidies to provide bus services is

[132] ID Proof, para 4.7.
[133] ID Proof, Para 4.5-4.9.

double counting and does not perform a useful purpose[134]. Notably, there was no equivalent or similar requirement for Bus Vouchers at Kingsnorth[135] or Possingham Farm.

332. Under the Settlement Agreement, the Appellant commenced discussions with Bus Operators in respect of viable service options, with planning permission for a temporary bus stop granted on 9 August 2023 in anticipation of successful discussions. However, the discussions did not conclude as a result of the operator reverting to only seeking discussions in line with the existing s.106 agreement, despite the Appellant explaining that this was not viable.

[134] ID Proof, Para 4.13-4.16.
[135] CD7.3 Kingsnorth Decision Notice.

Offsite Pedestrian and Cycle Links

Schedule 19	Appellant evidence
Modification 94 - To discharge payments	JC Proof, paras 5.1.56-59 ID Proof, section 3

333. Where there are a range of existing routes that are safe to use, there is no need for further enhancements and/or routes will not connect Chilmington Green to facilities and services in the wider area, such enhancements no longer serve a useful purpose and can be discharged. The appellant has considered each of the routes on which the contributions would be spent in detail and set out why none of the contributions to those offsite pedestrian and cycle links would serve a useful purpose.[136]

334. If a deed of variation is entered into or a separate s 106A application approved then the modification will be withdrawn.

Offsite traffic calming

Schedule 21	Appellant evidence
Modification 97, 98 - To revise triggers for monitoring, with reduction in number of subsequent monitoring events. - To delay the payment of financial contributions. - To reduce contributions if level of traffic on identified roads is less than predicted.	JC Proof, paras 5.1.70 - 73 ID Proof, section 5

335. As a general principle, traffic calming should only be implemented if there is either an identified road safety accident issue where the causal factor is traffic speeds or there is rat running on a road where traffic should be using a road at a higher level within the road hierarchy. If this is not the case, then there is a question of why amendments would be made to the road network which would require the use of materials that could be used elsewhere and why traffic speeds would be reduced increasing journey times[137]. Where there is little or no traffic

[136] CD 2.26, Ian Dix proof, section 3.
[137] ID Proof, Para 5.16-5.17.

associated with the Development predicted to use a particular road[138] then there should not be any request for mitigation measures and funding towards that route would not serve a useful purpose. Where there is no need for traffic calming[139] or there is an agreed access from the Development to the road[140], then such measures serve no useful purpose.

336. If a deed of variation is entered into or a separate s 106A application approved then the modification will be withdrawn.

CONCLUSIONS

337. Chilmington Green is a vital development for Ashford. Hodson Developments have stepped up, but the scheme is stalled by a combination of viability, blockers in the planning agreement and the unwillingness of ABC to approve anything in Ashford South Garden Community.

338. ABC and KCC do not offer a Plan B. To bring the scheme forward, the planning obligation costs need to be reduced, by removal or deferral of various items, bonds which the scheme cannot achieve have to be removed, bureaucratic obstructions need to be deleted and the project made attractive to investors and developers.

339. Hodson Developments are not asking for the earth. They are not even asking for a profit.

RICHARD HARWOOD KC
JONATHAN DARBY
39 Essex Chambers, London

1st May 2025

[138] Such as is the case with Great Chart Road, Magpie Hall Road, Long Length, Tally Ho Road, Woodchurch Road, Hornash Lane, Criol Lane, Pound Lane.
[139] Such as is the case with Mock Lane.
[140] Such as is the case with Coulter Road.