

Statement of Case

Appeals by Hodson Developments (Ashford) Limited and others

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**

October 2023

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A. INTRODUCTION

1. This Statement of Case has been prepared on behalf of Hodson Developments (Ashford) Limited; Chilmington Green Developments Limited; Hodson Developments (CG ONE) Limited; Hodson Developments (CG TWO) Limited; Hodson Developments (CG THREE) Limited; (together hereinafter referred to as the “**Appellant**” or “**Hodson**”).
2. This Statement of Case sets out the Appellant’s grounds of appeal relating to the failure of Ashford Borough Council (“**ABC**”) and Kent County Council (“**KCC**”) to determine an application (“**Application No 2**”) made 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 (the “**s.106 agreement**”), which accompanied the Chilmington Green outline planning permission (Ref 12/00400/AS, which, along with the associated non-material amendments and reserved matter approvals listed at Appendix 1, are together referred to as the “**Development**”)¹.

The s.106 agreement

3. The s.106 Agreement contains numerous and substantial obligations. It distinguishes between ‘Positive Planning Obligations To Pay’ / ‘Positive Planning Obligations To Provide And / Or Construct’ and Negative Planning Obligations. The Positive Planning Obligations require numerous financial contributions to be paid to ABC and Kent County Council (“**KCC**”).

The proposed changes

4. As further summarised below, a number of factors have adversely affected the delivery and viability of the Development in an acute and critical fashion, including significant planning delays, delays in getting utilities and electricity to the site, reconstitution of the development model and a reduced build rate, as well as the consequences of the

¹ Application No. 2 also included a re-submission of an earlier application for modification and/or discharge, which is referred to as Application No. 1 below.

uncertainties surrounding nutrient neutrality requirements and the Covid-19 pandemic. The combined effect has been to invalidate many of the build assumptions on which the s.106 agreement was based. Most, if not all, were outside the Appellant's control. None relate to the Appellant wanting to enhance (or even protect) its profit margin.

5. The net effect is that the build rate originally envisaged to be some 300 units per year is at most some 150 units and will be significantly lower in 2023 (current estimate, Jarvis 10 units; Hodson Developments 50 units; BDW 50 units). The Main Phase 1 (originally expected to complete within 5 years of an earlier start date) is not now expected to be completed until 2031.
6. In short, the s.106 agreement was drafted in relation to a fundamentally different development than that which has emerged. As a result, therefore: i) the Appellant seeks a range of modifications and/or discharge of various obligations under the s.106 agreement; ii) the modifications and/or discharge of obligations are necessary in order to address critical viability and deliverability challenges that have arisen as a result of a range of circumstances beyond the Appellant's control; and iii) the proposed changes enable delivery of the Development and wider scheme.
7. In a great many instances, the Appellant is seeking to defer (rather than avoid) obligations to deliver infrastructure to align with demand and/or making provision dependent upon meeting basic performance criteria or upon actual need. A summary of the current s.106 provisions and the key proposed changes is set out at Section C below.
8. The Appellant will demonstrate through evidence how and where changes are proposed because the obligations no longer serve a useful purpose or would do so just as well if modified. Separately, the Appellant's evidence will also address further proposed changes that are required to ensure the viability and deliverability of the Development so that it can come forward to meet ABC's housing needs. With regards to viability, the Appellant will demonstrate that provided peak debt levels can be reduced in accordance with the variations requested, the scheme can be delivered by the Appellant and will ultimately prosper in a way that will offer the opportunity in later Review Phases to increase the Affordable Housing provision, whilst ensuring the delivery of all essential infrastructure.

9. The appeals are accompanied by:

- a. Completed s.106B Forms²
- b. A copy of the application to the relevant authority and the certificate accompanying that application] (i.e. the “**Application No. 2 materials**”);
- c. The instrument by which the obligation was entered into – being the s.106 agreement dated 27 February 2017 (along with two deeds of variation, together the “**s.106 agreement**”);
- d. Relevant correspondence with the authorities relating to the application.

10. The Appellant requests that the appeals be heard together. They relate to the same site, the same s.106 agreement, and the same Application No. 2). Hearing both appeals together will give rise to considerable time and cost savings for all parties and the Inspectorate. As such, this Statement of Case contains reference to the full suite of proposed modifications and/or discharge and in order that the requests in respect of all obligations enforceable by both authorities can be seen in their full and proper context.

² <https://www.gov.uk/government/publications/modify-or-discharge-a-planning-obligation-s106b>

B. BACKGROUND AND CONTEXT

Chilmington Green planning permission

11. By application submitted in August 2012, outline planning permission was sought for the following description of development:

“Permission for a Comprehensive Mixed-Use Development comprising:

- *Up to 5,750 residential units, in mix of sizes, types and tenures.*
- *Up to 10,000m² (gross external floorspace) of Class B1 use.*
- *Up to 9,000m² (gross external floorspace) of Class A1 to A5 uses.*
- *Education (including a secondary school of up to 8ha and up to four primary schools of up to 2.1ha each).*
- *Community Uses (class D1) up to 7,000m² (gross external floorspace).*
- *Leisure Uses (class D2) up to 6,000m² (gross external floorspace).*
- *Provision of local recycling facilities.*
- *Provision of areas of formal and informal open spaces.*
- *Installation of areas of appropriate infrastructure as required to serve the development.*
- *Transport infrastructure, including provision of three accesses to the A28, an access to Coulter Road /Cuckoo Lane other connections on the local road network, and a network of internal road, footpaths and cycle routes.*
- *New planting and landscaping...*
- *Associated groundworks.”*

12. The application was designed to align with the original Vision for Chilmington Green (*‘a truly sustainable new community and one which delivers a healthy balance of homes, jobs, local services...’* (Paragraph 3.1.3 Area Action Plan)).

13. ABC resolved to grant outline planning permission at its planning committee meeting on 15 October 2014.

14. However, it was not until a decision dated 6 January 2017 that outline planning permission was actually granted by ABC (Ref: 12/00400/AS, the **“Outline Permission”**).

15. Notably, therefore, the Outline Permission was issued more than two years after the resolution to grant outline planning permission and more than four years after the application was submitted in August 2012.

Section 106 agreement

16. The s.106 agreement was entered into by Hodson with ABC and KCC on 27 February 2017 in respect of the Outline Permission. A plan showing the area which has the benefit of the Outline Permission and which is bound by the s.106 agreement was attached at Annex 1. The s.106 agreement was also entered into by other developers with an interest in part of the Site.
17. Deeds of variation of the s.106 Agreement have been entered into on 29 March 2019 and 13 July 2022.
18. As summarised further below, the delays that have been experienced in relation to the Development have had a material effect upon the practical operation of the s.106 agreement. Those effects have been experienced disproportionately by the Appellant because of the way in which the Positive Planning Obligations were imposed on Hodson as a master developer (the relevant Hodson companies being referred to in the agreement as the Paying Owners). The Negative Planning Obligations were imposed on both the Paying Owners and the other parties to the s.106 agreement (defined as the Owners). They generally limit the ability of the Owners to progress development until certain preconditions are met.

Initial attempts to modify and/or discharge

19. In order to address the difficulties resulting from the Development not progressing as envisaged by the s.106 agreement (and the associated adverse impact on the viability of the Development), Hodson submitted an application to ABC on 20 August 2020 under s.106A of the 1990 Act. By that application, Hodson requested 55 modifications to the s.106 agreement.
20. By letter dated 16 October 2020, ABC refused that application.
21. Hodson challenged that decision by judicial review (CO/4435/2020) on the basis that ABC had not had regard to certain evidence submitted in support of the application, including evidence on viability. Permission to proceed with a challenge was granted by the High Court, but the judicial review was settled by a consent order sealed on 23 April 2021.

22. On 27 April 2021, Hodson submitted its new application under s.106A to ABC and KCC (with some minor changes from its earlier application, including a request for two additional variations). The new application was refused by a letter dated 17 November 2021, with the following summary of the Decision:

"In summary, ABC and KCC agree to 6 of the Requests entirely and agree to 5 of the Requests in part. ABC and KCC do not agree to the other 46 Requests, but in some instances, ABC and KCC have proposed different modifications which Hodson is invited to agree."

23. Hodson again sought to challenge that decision by judicial review (CO/4125/2021), which was refused permission.

Application No. 1

24. In order to address continued delays and associated issues in progressing the Development, a further application was submitted to ABC and KCC under s.106A on 4 May 2022 ("**Application No. 1**").

25. The focus of Application No. 1 was the removal of the requirement to present Viability Review Submissions for viability review phases 2, 3 and 4 of the Development. By Application No. 1, the Appellant proposed the discharge of each of these viability review submissions on the basis that the viability could not support any additional Affordable Housing requirement and that this should be limited accordingly to minimum 10% provision.

26. By letter dated 30 June 2022, and despite having received Application No. 1 some 8 weeks earlier and having failed to raise any concerns as to validation during the determination period, ABC asserted that Application No. 1 was invalid.

27. By letter dated 20 October 2022 sent on its behalf, the Appellant set out its primary position that Application No. 1 was and remained valid, before then setting out the Appellant's position in respect of each alleged flaw. The Appellant requested that ABC proceed to validate Application No. 1 without further delay.

Application No. 2

28. Under cover of the same letter dated 20 October 2022, the Appellant submitted to ABC and KCC a further application to discharge and/or modify various of the obligations under the s.106 agreement, which not only repeated a number of the requests made under Application No. 1 but also requested further modification and/or discharge, as well as providing some of the further information that had been requested by ABC in respect of Application No. 1 ("**Application No. 2**").

29. Application No. 2 was essential to enable permitted development at this strategically important site to be brought forward. The variations proposed by Application No. 2 are designed to ensure that a deliverable scheme comes forward, creating a positive and lasting legacy for Ashford, consistent with the original Vision for Chilmington Green.

30. Application No. 2 comprised (and was supported by) (together the "**Application No. 2 materials**"):

- a. Application No. 2 and Annex A (and Appendices A1 and A2 thereto), which explained the need for the changes and detailed the variations sought (modification and/or discharge) and the reasons for each;
- b. Viability Report dated April 2022 and appendices (prepared by Turner Morum, the "**Turner Morum Viability Report**") in support of Application No. 1 (as previously submitted) (Annex B), which uses the template set out in a schedule to the s.106 agreement;
- c. Explanatory Statement and appendices dated 18 October 2022 (prepared by Quod, with contributions from Vectos in respect of traffic obligations), which provided further justification for the requests made as part of the application;
- d. Viability Report prepared by Quod and appendices dated October 2022 (the "**Quod Viability Report**"), which included new viability (baseline and sensitivity) analyses and which assesses the viability of the whole scheme.

31. The Explanatory Statement comprises expert planning and transport evidence, which assesses in planning terms whether specific obligations continue to serve a useful purpose, or can serve their purpose equally well if modified as proposed. As can be seen from the summary table at Section C of this Statement of Case, in a great many instances, the Appellant is seeking to defer (rather than avoid) obligations to deliver infrastructure to

align with demand and/or making provision dependent upon meeting basic performance criteria or upon actual need.

32. Together, the Turner Morum Viability Report and the Quod Viability Report provide a robust and transparent viability case that the obligations contained within the s.106 agreement are excessive and need to be varied to ensure the viability and deliverability of the Development. Crucially, as well as establishing that provided peak debt levels can be reduced in accordance with the variations requested, the scheme can be delivered by the Appellant and will ultimately prosper in a way that will offer the opportunity in later Review Phases to increase the Affordable Housing provision, whilst ensuring the delivery of all essential infrastructure.

The Settlement Agreement

33. The Appellant entered into a settlement agreement with ABC on 10 February 2023 in order to provide ABC with additional time to consider Application No. 2 and, it was hoped, to facilitate modification and/or discharge by agreement. However, no progress was made and the prohibition on lodging an appeal set out in that agreement has expired.
34. In effect, therefore, Application No. 2 was not determined by ABC within the statutory determination period (as extended) and so this appeal proceeds against ABC for non-determination.

Non-determination by KCC

35. Under cover of a letter dated 15 August 2023, the Appellant resubmitted Application No. 2 to KCC. However, KCC has failed to determine the application within the statutory time period and so, as noted above, an appeal is also brought against KCC for non-determination.

C. SUMMARY OF PROPOSED CHANGES

36. In summary, and solely as a summary aid to the navigation of the Application No. 2 materials at this stage, Application No. 2 (and this appeal) seeks changes to the following sections of the s.106 agreement:

Definitions	Summary of key proposed changes: Modification to correct drafting or to strengthen obligation. . Provisions requiring modification and/or discharge: - Clause 1.1 Full detail and justification: - Annex A, Requests 1 – 3 - Explanatory Statement
Liability Provisions	Current s.106 provision Subject to exceptions (Cl. 2), liability is expressed to be binding on all of the parties and their respective successors in title unless otherwise stated) and references to Owner, Paying Owner and to individual parties should be construed accordingly. The s.106 agreement is enforceable by ABC and KCC (as appropriate depending to whom the obligation is given). The s.106 agreement contains wording which releases a person from liability once they no longer have interest in the Site or possession or control of it or of a particular part of it). The s.106 agreement contains numerous Positive Obligations to Pay supported by the Negative Planning Obligations. The Paying Owners covenant to comply with all of the Positive Obligations to Pay on a joint and several basis. They remain liable to make these payments irrespective of whether they retain an interest in the Site. Any person acquiring part of a Land Parcel from a Paying Owner will inherit the same liability as a Paying Owner. Any person acquiring the whole of a Land Parcel from a Paying Owner will however only be liable to pay a percentage of the Positive Obligations to Pay. The percentage for which that person will be liable will be calculated at the time the payment in question falls due. The formula to be used to calculate the liability involves multiplying the total amount of the contribution in question by the number of dwellings authorised to be constructed in the Land Parcel divided by the number of dwellings (other than affordable

	housing) that have still to be occupied on the whole of the land owned by Hodson at the date of the s.106 agreement. It is to be assumed for the purposes of this calculation that 30% of the dwellings in each Land Parcel will be provided as affordable housing although the actual amount to be provided will be determined through the viability appraisal process. The Owners covenant with ABC to comply with all of the Positive Planning Obligations to Provide And/Or Construct on a several basis so that each Owner (and their successors) is liable to provide and/or construct/or carry out all facilities and/or structures/buildings and/or works that are identified as being on their land under the s.106 agreement. The Paying Owners covenant with ABC and KCC to comply with the obligations in the s.106 agreement to deliver to KCC bonds guaranteeing the payment on demand of the education and highways contributions referred to in Schedules 15 and 18 of the s.106 agreement. The form of bonds required is attached to the s.106 agreement. Each of the Owners and their successors in title covenant with ABC to comply with the carbon off-setting obligations in Schedule 2 insofar as they relate to buildings constructed on their land. These obligations are made severally and only apply to the owners of commercial buildings. The Owners covenant jointly and severally to comply with all other covenants, restrictions and requirements for which specific provision is not made in the s.106 agreement. The s.106 agreement contains provisions which confirm that all of the Negative Planning Obligations will be binding on each and every Owner and their successors in title even if they or someone else on their behalf has satisfied the associated Positive Obligation for which they are responsible. This means that the Negative Planning Obligations will continue to apply until such time as the associated Positive Obligation has been discharged in full (i.e. all of the other parties have discharged their part of the obligation).
	Summary of key proposed changes: Clause 2.2 is acknowledged as serving a potentially useful purpose, but fails to account and provide for institutional investors that deliver long-term affordable housing solutions, retaining an interest in the Site after completion and occupation. This is presently acting as a brake on sale of parts of the site to this type of investor. Modification will serve any useful purpose better or at least equally well as it will accelerate delivery of homes.
	Provisions requiring modification and/or discharge: - Clause 2.2

	Full detail and justification: - Annex A, Request 4
Index linking	Current s.106 provision The sums of money payable under the Agreement are subject to index linking provisions with different indices being used for the indexation of different types of payments. Summary of key proposed changes: Modification to correct drafting, which will serve purpose equally well. Provisions requiring modification and/or discharge: - Clause 28 Full detail and justification: - Annex A, Request 5
Base date for indexation	Current s.106 provision: The sums of money payable under the Agreement are subject to index linking provisions with different indices being used for the indexation of different types of payments. Summary of key proposed changes: The purpose of index linking was to ensure that contributions matched actual costs over time. However, the indexation date of April 2014 and relevant indices no longer properly serve this purpose and are actually over inflating the relevant sums, generating payments and contributions in excess of what is required to mitigate the impact of development. Modification proposes to rebase all payments and contributions to August 2018, which was the actual commencement of house building on site. This will reduce cost distortions and allow for delays in reserved matters approvals, for which the Appellant was not responsible. The modifications will therefore better serve any useful purpose. Provisions requiring modification and/or discharge: - Clause 28 Full detail and justification: - Annex A, Request 6
Schedule 1	Current s.106 provision
Affordable Housing	<u>Viability Review Phases: Schedules 1 and 23</u> Although it is envisaged that the development will be constructed in four Main Phases, for the purposes of the affordable housing obligations the

development is divided into ten phases. The viability of providing affordable housing will be considered separately in respect of each of these ten phases (apart from the first phase where the affordable housing obligation is already fixed). Each of these ten phases is known as a viability review phase and (apart from viability review phase 1, the area of which is already fixed) the land to be covered by each viability review phase will be agreed with ABC as the development progresses.

The area of Viability Review Phase 1 is shown on a plan annexed to the agreement and is part of the first Main Phase. 1,000 Dwellings are intended to be built in this area which includes the District Centre (as to which see paragraphs 176 to 187 below). Viability Review Phase 2 will be the remaining part of Main Phase 1 on which a further 500 Dwellings are expected to be constructed.

Viability Review Phase 3 and 4 will form the second Main Phase. 600 Dwellings are expected to be constructed on Viability Review Phase 3 and a further 524 Dwellings are expected to be constructed on Viability Review Phase 4.

Viability Review Phases 5, 6 and 7 will form the third Main Phase. 500 Dwellings are expected to be constructed in each of Viability Review Phases 5 and 6 and 559 Dwellings in Viability Review Phase 7.

Viability Review Phases 8, 9 and 10 will form the final fourth Main Phase. 500 Dwellings are expected to be constructed in each of Viability Review Phases 8 and 9 and 567 Dwellings in Viability Review Phase 10.

Construction of Affordable Housing in Viability Review Phase 1:
Schedule 1, paras 1-7

Hodson Developments (Ashford) Limited (HDAL) and Chilmington Green Developments Limited (CGD) covenant on a joint and several basis to construct 70 Dwellings within the land that it owns within Viability Phase One as Extra-Care Housing Units (that is affordable housing units designed to accommodate the needs of persons over 55) prior to Occupation of the 850th Dwelling. HDAL, CGD and Hodson Developments (CG ONE) Limited (HDCG One) covenant on a joint and several basis to construct a further twenty four dwellings within the land that they own within Viability Phase One as affordable housing units prior to the date of Occupation of the 650th Dwelling. Another landowner (unconnected with the Appellants) Jarvis covenant on a joint and several basis to construct six Dwellings within the land that they own within Viability Phase One as affordable housing units prior to Occupation of the 650th Dwelling.

28 of the Extra-Care Housing Units to be provided by HDAL/CGD shall be provided as Shared Ownership Units and the remaining 42 shall be provided as Affordable Rent Units (or Intermediate Affordable Housing Units if requested and agreed by ABC in its absolute discretion). All of

the Extra-Care Housing Units shall be provided as one and/or two bedroom flats in one or more buildings in a single complex in the District Centre.

12 of the Affordable Housing Units to be provided within Viability Phase One by Hodson and Jarvis shall be provided as Shared Ownership Units and the remaining 18 shall be provided as Affordable Rent Units (or Intermediate Affordable Housing Units if agreed by ABC in its absolute discretion). All of the Affordable Housing Units (other than the Extra-Care Housing Units) shall be provided as two and/or three bed houses, one of which shall accommodate Habinteg fixtures and fittings

Affordable Housing Requirement for Viability Review Phases 2 – 10

The Owners covenant with ABC on a several basis to construct 10% of the Dwellings within each of Viability Review Phases Two to Ten (inclusive) as Affordable Housing prior to Occupation of more than 75% of the Dwellings in each Viability Review Phase. The first 50 of the Affordable Housing units in Viability Review Phase 2 (i.e. the minimum 10%) shall comprise only Shared Ownership Units. The Affordable Housing units in Viability Review Phases 3 to 10 shall comprise a combination of Affordable Rent Units (60%) and Shared Ownership Units (40%) or if ABC agrees in its absolute discretion, Intermediate Housing Units and 5% of the units shall accommodate Habinteg fixtures and fittings.

The Owners also covenant on a several basis with ABC to construct the additional Affordable Housing (if additional affordable housing is required under the terms of the Agreement) for each of the Viability Review Phases Two to Ten insofar as they own any land within that particular Viability Review Phase prior to the date at which 75% of the Dwellings in the relevant Viability Review Phase are occupied. These additional Affordable Housing units (if any) shall comprise a combination of Affordable Rent Units (60%) and Shared Ownership Units (40%) in each of Viability Review Phases 2 to 10 or if ABC agrees in its absolute discretion, Intermediate Housing Units and 5% of the units shall accommodate Habinteg fixtures and fittings.

The Deed contains associated prohibitions on Occupation of Dwellings until the positive obligations to construct all of the Affordable Housing Units (including the Extra-Care Housing Units) have been complied with and the units have been transferred to an Affordable Housing Provider or (if ABC in its absolute discretion agrees) an executed Transfer of the freehold title of the units has been delivered to an Affordable Housing provider. The Affordable Housing provider must be registered with the Regulator of Social Housing and either have signed a nominations agreement with ABC or otherwise be approved by ABC.

Affordable Housing Information Request: Schedules 23 and 45

	The Owners covenant with ABC to serve an Occupation Notice on ABC informing ABC each time that the number of occupied Dwellings reaches a number stipulated in a table annexed to the Agreement (Schedule 45). The notice is to be accompanied by a written request for ABC to advise the Owners of its requirements as regards the makeup of Affordable Housing provision for the next Viability Review Phase. ABC covenants with the Owners to send a prepopulated table in reply in response to each Occupation Notice setting out both the required composition of the minimum 10% Affordable Housing provision and also what proportion of the Additional Affordable Housing Provision (if any additional Affordable Housing has to be provided) shall be provided as each of the different types of Affordable Housing units listed in a table annexed to the Agreement (Schedule 47). ABC must specify the following in respect of the minimum 10% Affordable Housing provision: - whether each of the Affordable Rented Units (comprising 60% of the minimum 10% provision) shall be flats or houses and how many bedrooms each of those units shall have; - whether the remaining 40% shall be provided as Shared Ownership Unit or Intermediate Housing Units; and - whether those Shared Ownership Units/ Intermediate Housing Units shall be provided as flats or houses and how many bedrooms each of those units shall have. <u>Viability Review Submissions: Schedules 23, 42, 43, 48 and 49</u> The Viability Review Submission must include certain minimum information stipulated in the definition of Viability Review Submission. <u>Viability Review Submission for Viability Review Phase Two</u> The Owners covenant with ABC not to occupy more than 851 dwellings until it has submitted a Viability Review Submission for Viability Review Phase Two to ABC for approval and paid a fee of £10,000 towards ABC's costs of instructing advisors to consider the submission. <u>Subsequent Viability Review Submissions: Schedule 23, paras 2.1 and 3</u> <u>Restrictions on occupation, as follows:</u> No more than 1,351 dwellings until a Viability Review Submission for Viability Review Phase Three has been submitted and review fee paid. The submission timing is with reference to 1,200th dwelling that is occupied. No more than 1,951 dwellings until a Viability Review Submission for Viability Review Phase Four has been submitted and review fee paid. The submission timing is with reference to 1,800th dwelling that is occupied
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	No more than 2,475 dwellings until a Viability Review Submission for Viability Review Phase Five has been submitted and review fee paid. The submission timing is with reference to 2,324th dwelling that is occupied. No more than 2,975 dwellings until a Viability Review Submission for Viability Review Phase Six has been submitted and review fee paid. The submission timing is with reference to 2,824th dwelling that is occupied. No more than 3,475 dwellings until a Viability Review Submission for Viability Review Phase Seven has been submitted and the review fee paid. The submission timing is with reference to 3,324th dwelling that is occupied. No more than 4,034 dwellings until a Viability Review Submission for Viability Review Phase Eight has been submitted and the review fee paid. The submission timing is with reference to 3,883rd dwelling that is occupied. No more than 4,534 dwellings until a Viability Review Submission for Viability Review Phase Nine has been submitted and the review fee paid. The submission timing is with reference to 4,383rd dwelling that is occupied. No more than 5,034 dwellings until a Viability Review Submission for Viability Review Phase Ten has been submitted and the review fee paid. The submission timing is with reference to 4,883rd dwelling that is occupied. The requirements as to what must be included in Viability Review Submissions Three to Ten and the cap on the amount of Affordable Housing are the same as for Viability Review Phase Two. <u>Other provisions relating to the provision of Affordable Housing: Schedule 1</u> The Affordable Housing Units must be constructed in accordance with the reserved matter approval for the relevant Viability Phase as regards the type and size of the Dwelling and whether they shall comprise of Extra Care Housing Units and/or other accommodation for older persons and/or for vulnerable groups of people. Summary of key proposed changes: Discharge or modification to serve useful purpose equally well (or at all). <u>Provision of 70 Extra Care Housing Units in Phase One – Viability Review 1</u>
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	This (and associated) obligations serve no useful purpose because such units are both unnecessary and their cost is undermining viability of phase and jeopardising overall delivery. They should be discharged. Provision of 24 AHU in Phase One – Viability Review 1 Acknowledged as potentially serving a useful purpose, but the requirement to do so by the 650th Dwelling adversely affects cashflow and compromises viability of Phase 1 – Viability Review. <u>Obligation to include Affordable Rents is non-viable.</u> It does not serve any useful purpose and can be modified to provide further Shared Ownership units so as to serve any useful purpose equally well or better. 10% AH to be provided in each Viability Review (2 to 10) as minimum <u>provision</u> Acknowledged as potentially serving a useful purpose, but requirement to do so by 75% occupied dwellings adversely affects cashflow and compromises viability of each viability phase. Any useful purpose can be served equally well or better by modifying them to be completed by 95% occupied dwellings within the relevant review phase. <u>AHU tenure split 60% Affordable Rents and 40% Shared Ownership, with 5% of units to have Habinteg fixtures and fittings</u> Acknowledged as potentially serving a useful purpose, but current allocation to Affordable Rent Units and Shared Ownership Units is not sustainable or feasible, compromising cashflow and viability. Any useful purpose can be served equally well or better by modifying the Affordable Housing tenure split so as to provide 30% Affordable Rents and 70% Shared Ownership. <u>Overall</u> The financial benefits and contribution to viability and deliverability ensure that these obligations (as modified) will serve the useful purpose equally well.
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	Provisions requiring modification and/or discharge: - Paras 1.1, 2, 3 and 6 - Paras 1.2, 4, 5 and 7 - Paras 8 and 14 - Paras 9 and 12
	Full detail and justification: - Annex A, Requests 7 – 10 - Explanatory Statement, sections 6 and 13
Schedule 2 Carbon Off Setting	Current s.106 provision: Includes restriction on occupation and requirement to pay to ABC within 21 days of the date each Building (defined to exclude a Dwelling) is occupied for the first time the carbon off-setting contribution for that Building provided inter alia that: - the aggregate of all contributions will not exceed £2,300,000; - no contribution shall be payable in respect of any of the following buildings, namely, schools to be built under Schedule 15), the Community Hub building to be built under Schedule 12) , the local centre hubs to be built under Schedule 13), the Community Pavilion to be built under Schedule 7), the Sports Hub to be built under Schedule 10), the Combined Heat and Power Plant (CHP), District Heating Plant (DHP) buildings and machinery or any utility buildings, electricity substations, gas pressure stations or similar buildings, any building to be transferred or leased to the CMO to be built under Schedule 4) and any outbuildings or buildings of a temporary nature or which are not normally to be occupied residentially or commercially.
	Summary of key proposed changes: Discharge Schedule 2 as no longer serves useful purpose. It is understood that this request is agreed by ABC both as to residential and non-residential.
	Provisions requiring discharge: - Schedule 2 and 43
	Full detail and justification: - Annex A, Request 11
Schedule 3 Combined Heat and Power Plant	Current s.106 provision: Schedule 3 Includes restriction on occupation (at 200 and 400 Dwellings), until submission of Feasibility / Viability Studies with regards to Combined

	Heat and Power Plant or District Heating Plant to serve the whole or a part of the Development.
	Summary of key proposed change: Discharge as no longer serves useful purpose. Feasibility / viability studies were formally submitted for fact-checking by ABC on 5 April 2019. No response was forthcoming within the requisite 28 days. CHP/DHP is not feasible in all Scenarios.
	Provisions requiring discharge: - Schedule 3
	Full detail and justification: - Annex A, Request 12
Schedule 4 CMO	Current s.106 provision: Schedule 4 Includes restriction on occupation of any Dwelling until CMO created and established according to Framework Agreement that records CMO established to hold, maintain and manage community land and buildings, support and co-ordinate delivery of a range of community services to meet the needs of local residents and to promote and support environmental and community sustainability. Includes restriction with regards to construction works above foundation level of any Dwelling until approval of First Operating Premises design brief and specification. No occupation of any Dwelling until First Operation Premises completed and provided. Includes restriction on occupation of more than 750 Dwellings unless a design brief and specification for the CMO Second Operating Premises has been approved by ABC. The Second Operating Premises shall be located in a permanent building extending to 300 square metres GIA (the First Operating Premises may be in a temporary portacabin) designed for uses consistent with Use Classes A1 and/or B1 of the 1987 Use Classes Order and community uses and located within the District Centre. Includes restriction on occupation of more than 1,000 Dwellings until Second Operating Premises have been completed and provided. Includes requirement for the payment of Grant to CMO (Sch 4, para 7), in the sum of £3,350,000 towards costs incurred by CMO in 10 equal instalments linked to date of Occupation of a specified number of Dwellings.

	Includes restriction on occupation of more than 750 Dwellings (and then no more than 1,500 Dwellings) until Commercial Estate of between 15,000 and 20,000 sq feet has been approved (and then provided) by ABC at a total capital cost of £2,921,000.
	Summary of key proposed changes: <u>Operating Premises</u> _____ The Appellant's position is that the First Operating Premises are sufficient and there is no sensible requirement for the Second Operating Premises (it is surplus to CMO requirements and the associated obligations no longer serve any useful purpose and should be discharged). <u>Deficit Grant Contributions</u> _____ Appellant seeks discharge including because: - DGC are in any event substantially undermining viability and deliverability of the Development (and therefore do not serve any useful purpose); - CMO is currently over specified and its scale and complexity is not deliverable for a development of this nature or the time horizons over which it will be built. <u>Provision of Commercial Estate: Basic Provision</u> Appellant seeks discharge of the Basic Provision at £2,921,000 because it no longer serves a useful purpose including because: - DGC are in any event substantially undermining viability and deliverability of the Development (and therefore do not serve any useful purpose); - There is little, if any, market demand for the Commercial Estate; - The total capital cost of the Basic Provision undermines viability. <u>Provision of Commercial Estate: Second and Third Tranche</u> Discharge, as above with regards to Basic Provision. <u>Payment of Cash Endowment</u>

	Discharge obligations to pay First Cash Endowment and Second Cash Endowment. Option B (requiring payment of endowments) is fundamentally flawed. The Commercial Estate was proposed to provide CMO with long term revenue stream, but no longer serves any useful purpose. One off endowment does not have any useful purpose in replacing an asset endowment. It is not appropriate for s.106 payments to be levied to fund an unspecified alternative investment by the CMO. In any event, total cost of endowments (2 x £2,190,750) undermines viability and cannot be sustained, thus meaning it no longer serves useful purpose because it jeopardises overall deliverability. <u>CMO Start up Contribution</u> Discharge, with sums already paid to be refunded. As above. In addition, funds paid to date have not been spent sensibly nor delivered any material benefits to residents. They have not achieved any useful purpose. Provisions requiring modification and/or discharge: - Para 2.1.2 - Para 4.1.3 - Para 4.1.4 - Para 5.1.1 – Para 5.1.5 and Sch 29D Item 6 - Para 7 and Sch 29A, Items 7, 10, 13, 16, 20, 22, 26, 29, 33, 37 and equivalent items in Sch 29B and 29C - Paras 9 and 10 and Sch 29D, Item 14 - Para 11 and Sch 29D, Item 24 - Para 12 and Sch 29D, Item 27 - Para 13 - Para 14 - Schedule 34 Full detail and justification: - Annex A, Requests 13 – 23 - Annex A, Request 120 - Appendix A1: No longer relied upon - Explanatory Statement, section 7
Schedule 5 Early Community Development	Current s.106 provision: Schedule 5 Payment of £50,000 within six months of commencement and a further £50,000 on each of the first, second, third and fourth anniversaries of the

	date of the first payment, which ABC covenants to use for community development programmes for residents. Summary of key proposed changes: <u>Annual Early Community Development Contributions of £50,000</u> Discharge as no longer serves useful purpose. Given actual (rather than planned) housing trajectory and associated levels of occupancy, the payments due are not proportionate to need in the short term. Payment of first, second and third ECD contributions was predicated upon a rate of occupation that has not materialised. At present occupancy levels, the payments are not proportionate to the population on site and therefore not in line with their originally intended purpose and cannot be justified. Moreover, ABC has now, instead of and in substitution for these payments, secured £755,000 in funding from the Department for Housing and Levelling Up Communities. In context, therefore additional payments no longer serve any useful purpose and should be discharged. Provisions requiring discharge: - Para 1.2 Full detail and justification: - Annex A, Request 24 - Explanatory Statement, section 8
Schedule 6 Natural Green Space	Current s.106 provision: Schedule 6 Includes restriction on occupation of more than 1,450 Dwellings in Main Phase 1, 1,100 Dwellings in Main Phase 2, 1,550 Dwellings in Main Phase 3 and 1,550 Dwellings in Main Phase 4 unless: - the informal/natural green space facilities within the relevant Main Phase have been provided in accordance with the Reserved Matters Approvals and are free from any defects identified by the CMO; - all necessary actions have been taken to ensure that the land on which the informal/natural green space facilities are located is free from contamination and pollution and protected species that would prevent or limit the intended use; - all conditions to a planning permission or approval of Reserved Matters that apply to the facilities but which are required to be discharged prior to occupation/use have been discharged;

	- the Owners have paid to ABC a sum equivalent to any SDLT or any other tax payable by the CMO as a result of registering the transfers at the Land Registry and the sum of £1,500 in respect of the legal fees incurred by the CMO in accepting the transfers; and the facilities have been transferred to the CMO (the s.106 agreement contains wording which treats this obligation requirement as being discharged alternatively if the CMO has all of the documentation necessary in order to complete the transfer in the form approved by ABC). Summary of key proposed changes: Discharge and/or modification to serve useful purpose equally well (or at all) The Appellant does not seek to reduce the amount of space, but seeks to modify some of the detail of the obligations, including discharge or modification of conditions attaching to occupation in each Main Phase; in particular, there is no useful purpose to be served in the CMO being able to halt the Occupation of Dwellings in each or any of the Main Phases merely because of defects. Moreover, the CMO is provided with excessive powers to demand repairs. However, the CMO is not equipped or competent to be the arbiter of such matters. Provisions requiring modification and/or discharge: - Para 1 et seq. - Paras 1.1.5 – 1.1.10 - Para 1.2 - Para 2 Full detail and justification: - Annex A, Requests 25 – 28
Schedule 7 Chilmington Hamlet	Current s.106 provision: Schedule 7 Includes restriction on occupation of more than 1,000 Dwellings until a design brief and specification for various facilities has been approved by ABC with a total capital cost of £1,266,000. The facilities comprise one cricket pitch, one community pavilion (297 square metres of floor space of which 250 square metres is to be designed to be usable as community space), one batting cage, one bowling green, two tennis courts, one car park and one equipment storage facility. The details to be included within the design brief and specification are set out in a schedule to the Agreement. Includes restriction on occupation of more than 1,400 Dwelling unless the facilities within the relevant Main Phase have been provided in accordance with the Reserved Matters Approvals and are free from any defects identified by the CMO.

	Summary of key proposed changes: Acknowledged as potentially serving a useful purpose, but should be delayed until the facilities are viable (i.e. there are enough people living on the development to make sufficient use of them). The current front-loading will not only have a significantly detrimental effect on cashflow, but will likely cause the loss of funding available to carry out the Development at all. The purpose of these provisions can be better or at least equally well served by modifying them to relate to the occupation of a greater number of dwellings for each stage of the process and other associated modifications as detailed in Application No. 2. Provisions requiring modification and/or discharge: - Para 1.3 and Sch 29D, Item 12 - Paras 1.1 and 1.2 - Para 1.2 and its sub-paras 1.2.1, 1.2.2 and 1.2.3 - Para 1.4 - Para 2 Supporting material: - Annex A, Requests 29 – 33 - Explanatory Statement, section 8
Schedule 8 Children and Young People's Play Space	Current s.106 provision: Schedule 8 Includes restrictions on occupation by phase until facilities are approved and provided. Summary of key proposed changes: The purpose of these provisions can be better or at least equally well served by modifying them to relate to the occupation of a greater number of dwellings for each stage of the process and other associated modifications as detailed in Application No. 2. For example, for the provision of a design brief and specification, to modify from the current 50, 50, 750, 650 and 1150 triggers to 350, 500, 850, 850, and 1350 respectively. Further, the level of capital cost (£2.585m) is another significant factor in terms of viability and deliverability, justifying deferment so as to support overall delivery. The Appellant also seeks discharge of associated CMO elements of these obligations, for the reasons set out above in relation to the CMO and as detailed in Application No. 2. Provisions requiring modification and/or discharge:

	- Para 1 - Para 1.1.2 - Paras 1.2 and 1.4 - Paras 1.2.1 to 1.2.6 - Para 1.3 - Para 2
	Full detail and justification: - Annex A, Requests 34 – 39 - Explanatory Statement, section 8
Schedule 9 Allotments	Current s.106 provision: Schedule 9 Includes restrictions on occupation by phase until inter alia allotment facilities within relevant phase have been provided in accordance with Reserved Matters approvals. Summary of key proposed changes: Acknowledged as potentially serving a useful purpose, but the requirement to do so by the 1000th Dwelling Occupations will adversely effect the Paying Owner’s cashflow in Main Phase 1 and compromise the viability. Purpose can be better or at least equally well served by modifying, so as to still secure delivery of facilities in the same phase as under existing provisions. The revised trigger is based on the point at which demand for the minimum viable size (20 plots / 0.66ha) of allotment is reached (1,375 homes). Similar changes to the occupation trigger are sought in relation to Main Phase 2. The Appellant seeks to discharge the obligation to provide Main Phase 3 Allotments by 1,400 Dwelling Occupations and Main Phase 4 Allotments by 1,400 Dwelling Occupations. The obligation to provide these allotments is unnecessary and represents over provision of such facilities. The Appellant also seeks discharge of associated CMO elements of these obligations, for the reasons set out above in relation to the CMO and as detailed in Application No. 2. Thus, the Appellant seeks to discharge and/or modification to serve useful purpose equally well (or at all). Provisions requiring modification and/or discharge: - Para 1 and Sch 29D, Item 10 - Para 1 and Sch 29D, Item 11 - Para 1 and Sch 29D, Item 18 - Para 1 and Sch 29D, Item 20 - Paras 1.1.1 to 1.1.6

	- Para 1.2 - Para 2
	Full detail and justification: - Annex A, Requests 40 – 46 - Explanatory Statement, section 8
Schedule 10 DP3, Discovery Park Sports Hub and Discovery Park Sports Pitches	Current s.106 provision: Schedule 10, which includes: - Requirements for payments prior to occupation; - Restriction on occupation (no more than 1,000 Dwellings) until approval of design briefs and specifications; - Restriction on occupation (no more than 3,200 Dwellings) until facilities within relevant Main Phase have been provided inter alia in accordance with Reserved Matters approvals; - Restriction on occupation (no more than 5,000 Dwellings) until second phase of Sports Facilities within relevant Main Phase have been provided inter alia in accordance with Reserved Matters approvals; - Restriction on occupation (no more than 1,000 Dwellings) until a design brief and specification for the land known as DP3 and PS6 (identified on plans) have been approved by ABC with a total capital cost not exceeding £2,056,813; - Restriction on occupation as follows no more than 1,500 Dwellings unless one hectare of DP3 has been provided, 2,500 Dwellings unless 0.6 hectares of DP3 has been provided, 4,000 Dwellings unless PS6 and 1.08 hectares of DP3 have been provided and 5,500 Dwellings unless 4.42 hectares of DP3 have been provided, and in each case the facilities within the relevant Main Phase have been provided in accordance with the Reserved Matters Approvals. Summary of key proposed changes: The Appellant seeks modification to re-gear the submission / approval of design briefs and specifications from 1,000 Dwelling Occupations to 2,650 Occupations in order to serve useful purpose equally well given present housing trajectory and rate of occupations. With regards to the obligations to provide the Sports Facilities (1st Phase) and (2nd Phase), the Appellant seeks to modify to relate to occupation of 3,650 (rather than 3,200) Dwellings and 5,500 (rather than 5,000) Dwellings respectively, subject to conditions. Given the availability of alternative sports facilities and assets that precede the delivery of the first phase, the retiming will serve purpose equally well if modified.

	With regards to the obligations to provide DP3 and PS6 and applicable occupation limits, the Appellant seeks to modify to adjust those occupation limits so as to better reflect need and cashflow profiles. The Appellant also seeks discharge of associated CMO elements of these obligations, for the reasons set out above in relation to the CMO and as detailed in Application No. 2. Provisions requiring modification and/or discharge: - Para 1.1 - Para 2.1 - Para 2.1.2 - Para 2.2 and 2.8 and Sch 29D, Item 26 - Para 2.3 and 2.8 and Sch 29D, Item 30 - Paras 2.6.1, 2.6.2, 2.6.3, 2.6.4, the relevant sub-paras of 2.8 and Sch 29D, Items 22, 23, 28 and 31 - Para 2.5 - Paras 2.2.1, 2.3.1 and 2.6.5 - Paras 2.2.4, 2.3.4 and 2.6.8 - Paras 2.2.6, 2.3.6 and 2.6.10 - Paras 2.4 and 2.7 - Para 3.4 Full detail and justification: - Annex A, Requests 47 – 56 - Explanatory Statement, section 8
Schedule 11	Current s.106 provision
Cemeteries	Schedule 11, which includes restrictions on occupation until phased payments made towards the provision of new cemetery. Summary of key proposed changes: The obligations to make these payments are unnecessary and represents over provision given the available off-site facilities. The Appellant seeks all payments towards Cemeteries to be discharged Provisions requiring discharge: - Paras 1 and 2 Full detail and justification: - Annex A, Request 57 - Explanatory Statement, section 8
Schedule 12	Current s.106 provision:

Community Hub Building	Schedule 12, which includes restriction on occupation (no more than 1,400 Dwellings) unless a design brief and specification for Community Hub facilities be provided in the District Centre have been approved by ABC with a total capital cost not exceeding £5,152,127. The facilities are a multi-purpose community leisure building (0.1 hectares) with associated hub space (i.e. lobby, toilets including an 18 square metre changing place, wheelchair accessible kitchen, reception, café and CMO Trust office (0.034 hectares), family and social care facility (0.34 hectares), youth facility (0.016 hectares), library access point (0.0012 hectares), community learning facility (0.01 hectares), police face (0.005 hectares), outdoor multi-use games area (0.08 hectares), car parking (0.092 hectares) and a health centre comprising a GP surgery for eight doctors (0.1 hectares). Includes restriction on occupation (no more than 1,800 Dwellings) unless community hub facilities have been provided in accordance with the Reserved Matters Approvals and are free from any defects identified by the CMO. Summary of key proposed changes: Acknowledged to potentially serve a useful purpose, save for the community learning space which is surplus to requirements. However, the capital cost (up to £5,152,127) is excessive. The provision of the balance of this space should in any event be phased and where appropriate made subject to lease confirmation. The total space to be provided is also very large and not expected to be needed until much later than the current triggers provide for. The purpose can be better or at least equally well served by modification to regear the triggers to a greater number of occupations. The Appellant seeks that these facilities are transferred by long leasehold interest to the proposed users The Appellant also seeks discharge of associated CMO elements of these obligations, for the reasons set out above in relation to the CMO and as detailed in Application No. 2. Provisions requiring modification and/or discharge: - Para 1.2 and Sch 29D, Item 17 - Para 1.1 - Para 1.1.2 - Para 1.4 - Para 2 Full detail and justification: - Annex A, Requests 58 – 63 - Explanatory Statement
Schedule 13	Current s.106 provision

Local Centre Hubs	Schedule 13 Includes restriction on occupation (no more than 600 Dwellings) in Main Phase 3 unless a design brief and specification for the Orchard Village Facilities on a site of 0.06 hectares and the car parking of 0.0115 hectares in the approximate location marked on a plan attached to the s.106 agreement has been approved by ABC with a total capital cost not exceeding £733,971.35. Includes restriction on occupation (no more than 1,000 Dwellings) in Main Phase 3 unless the Orchard Village Facilities within the relevant Main Phase have been provided in accordance with the Reserved Matters Approvals and are free from any defects identified by the CMO. Includes restriction on occupation (no more than 600 Dwellings) in Main Phase 4 unless a design brief and specification for the Chilmington Brook Facilities on a site of 0.07 hectares and the car parking of 0.0115 hectares in the approximate location marked on a plan attached to the s.106 agreement has been approved by ABC with a total capital cost not exceeding £748,190.10. Includes restriction on occupation (no more than 1,000 Dwellings) in Main Phase 4 unless the Chilmington Brook Facilities within the relevant Main Phase have been provided in accordance with the Reserved Matters Approvals and are free from any defects identified by the CMO. Summary of key proposed changes: The Appellant reserves the right to make a further application to discharge or modify these obligations as the case may be. Provisions requiring modification and/or discharge: - Paras 1 – 3 and 4 – 6 Full detail and justification: - Annex A, Request 64
Schedule 14 District and Local Centres	Current s.106 provision: Schedule 14 Includes restriction on occupation (no more than 950 Dwellings) in Main Phase 1 unless a design brief and specification for the District Centre Facilities has been approved by ABC. The District Centre Facilities are a supermarket with 3,100 square metres floor space, other retail units with a total floor space of 4,595 square metres (specifying at least 5 units to be constructed in any event with none of these units being less than 150 square metres at ground floor level), an office building with 2,600 square metres floor space and connected by underground ducts to fibre broadband, a public house and a day nursery.

	Includes restriction on occupation (no more than 1,250 Dwellings) in Main Phase 1 unless serviced sites for the District Centre Facilities including corresponding roads and footpaths and the 5 small retail units have been provided in accordance with the Reserved Matters Approval and approved design brief and specification and a marketing plan for the facilities has been approved by ABC. Includes restriction on occupation (no more than 1,000 Dwellings) in Main Phase 3 unless a master plan (which has been the subject of prior consultation) showing that part of the Site including Orchard Village that provides for a retail unit with a floor space of 150 square metres and potential further retail units and showing all roads and footpaths has been approved by ABC. Includes restriction on occupation (no more than 1,400 Dwellings) in Main Phase 3 unless the 150 sq metre retail unit and serviced sites (including corresponding roads and footpaths) for the potential retail units specified in the approved masterplan have been provided in accordance with the Reserved Matters Approval and the marketing plan for the Site has been approved by ABC. Includes restriction on occupation (no more than 950 Dwellings) in Main Phase 1 unless a design brief and specification for the District Centre Facilities has been approved by ABC. The District Centre Facilities are a supermarket with 3,100 square metres floor space, other retail units with a total floor space of 4,595 square metres (specifying at least 5 units to be constructed in any event with none of these units being less than 150 square metres at ground floor level), an office building with 2,600 square metres floor space and connected by underground ducts to fibre broadband, a public house and a day nursery. Includes restriction on occupation (no more than 1,250 Dwellings) in Main Phase 1 unless serviced sites for the District Centre Facilities have been provided in accordance with the Reserved Matters Approval and approved design brief and specification and a marketing plan for the facilities has been approved by ABC. Includes restriction on occupation (no more than 1,000 Dwellings) in Main Phase 4 unless a master plan (which has been the subject of prior consultation) showing that part of the Site including Chilmington Brook that provides for a retail unit with a floor space of 150 square metres and showing all roads and footpaths has been approved by ABC. Includes restriction on occupation (no more than 1,500 Dwellings) in Main Phase 4 unless a serviced site (including corresponding roads and footpaths) for the retail unit has been provided in accordance with the Reserved Matters Approval and the marketing plan for the Site has been approved by ABC. Summary of key proposed changes:
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	The obligations to provide a District Centre with the facilities indicated no longer serve any useful purpose. The current retail market is such that there is no demand for such facilities and they are unsustainable. The Appellant seeks to modify or discharge the Main Phase 1 District obligations to permit a revised scheme, to be the subject of a separate application for planning permission. In any event, the Appellant seeks to modify the timing of the submission of details (by 1,500 (rather than 950) occupations), with provision of these facilities (no earlier than 2,700 (rather than 1,250) occupations). Such modifications will at least equally well serve the useful purpose. Provisions requiring modification and/or discharge: - Paras 1.1 to 1.5 - Para 1.1 Full detail and justification: - Annex A, Requests 65 and 66 - Explanatory Statement, section 9
Schedule 15 Education	Current s.106 provision: Schedule 15 Primary School 1 Includes restrictions on commencement and subsequent residential use with reference to inter alia staged payments, provision of access, and bonds. Primary School 2 Includes restrictions on occupation and subsequent residential use with reference to inter alia staged payments, provision of access and bonds. Primary School 3 Includes restrictions on occupation and subsequent residential use with reference to inter alia staged payments, provision of access and bonds. Primary School 4 Includes restrictions on occupation and subsequent residential use with reference to inter alia staged payments, provision of access and bonds. Secondary School Includes restrictions on occupation and subsequent residential use with reference to inter alia staged payments, provision of access and bonds. Summary of key proposed changes: <u>Provisions of Bonds (PS1, PS2, PS3 and PS4)</u>

The obligation to provide bonds does not serve any useful purpose and should be discharged. See sections 3 and 11 of the Explanatory Statement. There is no proper justification for the 'triple lock' imposed under the s.106 obligations. In any event, it is not possible to secure such bonds in the financial markets.

Primary School 1 contributions 1 to 4

The Appellant seeks discharge of the obligation to pay PS1 Contribution 4 and the Indexation payments on previous Contributions. The current obligations (and very significant indexation payments) are undermining the viability of the Development and its deliverability and cannot therefore be regarded as serving a useful purpose.

Primary School 2 contributions 1 to 4

Acknowledged that further primary school provision may potentially serve a useful purpose, current modelling shows that the current occupation and time-based triggers may lead to premature delivery. As such, the Appellant seeks to modify the current triggers so as they will be based on need, rather than merely occupations.

The proposed modifications will continue to serve their intended purpose.

Primary School 3 contributions 1 to 4 As above.

Primary School 4 contributions 1 to 4

The requirement for a fourth Primary School was based on the original proposal for the development of 7,000 dwellings. Therefore, this provision is surplus and does not serve any useful purpose. It should be discharged.

Secondary School contributions

The delivery of the school is being accelerated to benefit the wider community, rather than simply mitigating the effects of this Development. The contributions should be modified to reflect those wider benefits. It is also necessary to introduce a provision to take account of contributions from other developments.

As modified, the obligations will serve their purpose better or at least equally well, given the wider pool of funding to be drawn upon.

The schools are also significant community assets. As such, it is requested that the school assets, and their community use, be reflected in

	the triggers for additional community buildings and sports pitches with reference to the Community Hub and Chilmington Hamlet.
	Provisions requiring modification and/or discharge: - Para 6 and 7(e) - Para 7 (as amended by deed dated 29 March 2019) - Paras 8, 10, 11, 12 and 14 - Para 13 and 14(e) - Paras 15, 17, 18, 19 and 21 - Para 20 and 21(e) - Paras 33 and 35 - Sch 15, Part 6, Para 42 - Sch 15, Part 5 - Paras 48 and 49
	Full detail and justification: - Annex A, Requests 67 – 78 - Explanatory Statement, section 11
Schedule 15A KCC General Site Transfer Requirements	Summary of key proposed changes: In most instances, modification is to correct drafting and/or serve useful purpose equally well. In two instances (provision of temporary electricity and water supplies; payment of legal fees), discharge is sought as it is either not possible or justified and therefore longer serving any useful purpose.
	Provisions requiring modification and/or discharge: - Para 4 - Para 5 - Para 7 - Para 8 - Para 10 - Para 14
	Full detail and justification: - Annex A, Requests 79 – 84 - Explanatory Statement
Schedule 16	Current s.106 provision: Library Services Contribution: Schedule 16 Part 1 Includes restrictions on occupation and residential use with reference to staged payments (based on occupation or time since commencement). Youth Services Contribution: Schedule 16 Part 2 Includes restrictions on occupation and residential use with reference to staged payments (based on occupation or time since commencement).
Other KCC Services	

	Community Learning Contribution: Schedule 16 Part 3 Includes restrictions on occupation and residential use with reference to staged payments (based on occupation or time since commencement). Family Social Care Contribution: Schedule 16 Part 4 Includes restrictions on occupation and residential use with reference to staged payments (based on occupation or time since commencement).
	Summary of key proposed changes: Library Services Contribution: Already included in the Community Hub (Sch 12, as amended), therefore obligation is surplus to requirements, duplicative and serves no useful purpose. It should be discharged. Youth Services Contribution: Discharge as no longer serve a useful purpose, in as much as there is already ample provision in this regard. Community Learning Contribution: Discharge as no longer serve a useful purpose, in as much as there is already ample provision in this regard. Family Social Care Contribution: Discharge as no longer serve a useful purpose, in as much as there is already ample provision in this regard.
	Provisions requiring discharge: - Para 1 and 2 and Sch 30B - Paras 3, 4, 9 and Sch 30A-C - Para 5 and 6, and Sch 30A-C - Para 7 and 8 and Sch 30A-C - Para 10
	Full detail and justification: - Annex A, Requests 85 – 89 - Explanatory Statement
Schedule 17	Current s.106 provision

Ecology	Schedule 17 Includes restriction on occupation of the number of Dwellings specified (if any) in any ecological enhancement and mitigation strategy to be approved pursuant to conditions attached to the Outline Permission unless the corresponding property has been transferred to the CMO in a state that is laid out in accordance with the details and plans approved by ABC as part of the Reserved Matters Approvals at nil consideration and with payment to the CMO of a sum equivalent to any SDLT or other tax payable as a result of registering the transfer at the Land Registry together with any other documentation that may be necessary for the registration and the health and safety file, any operating and maintenance manuals and maintenance schedules and all guarantees, warranties (including any collateral warranties which the CMO may reasonably require) and as built drawings. Summary of key proposed changes: The provisions of this Schedule are unnecessary because the matters to which it refers are fully covered in the CMO framework agreement . The paragraph and its sub-paragraphs do not therefore serve any useful purpose and should be discharged accordingly. Provisions requiring discharge: - Para 1 Full detail and justification: - Annex A, Request 90
Schedules 18 and 18A A28 Improvement Works	Current s.106 provision: Schedule 18 Includes requirement for entry into s.278 Agreement, requiring inter alia the payment of sums and provision of bond. Summary of key proposed changes: Primary application to discharge Schedules 18 and 18A in accordance with Annex A to Application No. 2. The Appellant relies on the <u>Warwickshire v Powergen</u> principle, including that KCC be compelled to accept the discharge of the s278 agreement which has already been entered into if the Inspector finds that the s.106 obligation to enter into the s.278 agreement should be discharged

	Provision of a bond: Discharge as bond in total sum of £28,988,800 no longer serves any useful purpose. It has ceased to be 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. Payment Covenants and Post-Contract 278 Contributions. Discharge because the cost and burden of payment is undermining viability and in turn deliverability.
	Provisions requiring discharge - Sch 18, Para 1 and Sch 18A - Sch 18 and Sch 18A - Sch 18A and Annex 2 of the s.278 Agreement therein and Sch 18, para 2
	Full detail and justification: - Annex A, Requests 91 – 93 - Explanatory Statement, section 10
Schedule 19 Off-Site Pedestrian and Cycle links	Current s.106 provision: Schedule 19 Includes restriction on occupation and residential use with reference to staged payments.
	Summary of key proposed changes: Off-site pedestrian provision and cycle links. Discharge
	Provisions requiring discharge: - Sch 19, paras 1 and 2, and Sch 30A-C
	Full detail and justification: - Annex A, Request 94 - Explanatory Statement, section 10

Schedule 20	Current s.106 provision:
Provision of Bus Services	Schedule 20 Includes restrictions on occupation with reference to provision of bus services and infrastructure.
	Summary of key proposed changes: Provision of bus services: Modification to regear occupation triggers and adjust nature of provision to better reflect need and therefore to serve useful purpose equally well (or at all). Provision of bus vouchers. Discharge provision of £450 worth of bus vouchers to each owner, at total cost of £2,587,500 for reasons of viability and deliverability. Given the impact of these sums on deliverability, they cannot be said to serve any useful purpose.
	Provisions requiring modification and/or discharge: - Sch 20, and Sch 29D, Items 1, 13, 25 and 29 - Sch 20, para 1.17
	Full detail and justification: - Annex A, Requests 95 and 96 - Explanatory Statement, section 10
Schedule 21	Current s.106 provision:
Off-Site Traffic Calming	Schedule 21 Includes restrictions on occupation with reference to provision of survey and monitoring data and payment of sums.
	Summary of key proposed changes: Modification either to simplify the obligations or to defer payments to recognise the impacts on traffic flows arising from Covid-19 in particular, as well as to better reflect need. As modified, the obligations will continue to serve useful purpose equally well, if not better.
	Provisions requiring modification and/or discharge: - Paras 1.2, 1.3, 2.1, 2.2 and Sch 30A
	Full detail and justification: - Annex A, Requests 97 and 98 - Explanatory Statement, section 10
Schedule 22	Current s.106 provisions:
RIF	Schedule 22

	Relates to infrastructure and road improvement works at Drovers Roundabout and Junction 9 of the M20 on the Eureka Skyway footbridge. Includes restriction on occupation with reference to payment of sums: - no more than 3,999 dwellings until £1,405,647 paid to ABC; - no more than 4,599 dwellings until £1,405,647 paid to ABC; - no more than 5,199 dwellings until £1,405,647 paid to ABC; - no more than 5,599 dwellings until £1,405,648 paid to ABC.
	Summary of key proposed changes: Application is to discharge the RIF payments, which are undermining viability and deliverability and therefore cannot be said to serve any useful purpose.
	Provisions requiring discharge: - Sch 22
	Full detail and justification: - Annex A, Request 99 - Explanatory Statement, section 10
Schedule 23 Viability	Current s.106 provision: See above
	Summary of key proposed changes: Existing provisions for Viability Review Submissions no longer serve a useful purpose as they are artificially restricting bringing forward different areas of the Development, inhibiting the Appellant from entering partnerships / agreements to increase delivery, working against ensuring value growth and undermining overall deliverability. Modifications would allow Viability Review Phase Submissions to be made when the cumulative number of dwellings within Reserved Matters Applications to date reach adjusted dwelling numbers.
	Provisions requiring modification and/or discharge: - Column 3 of Appendix to Annex A - Definition of Premature Viability Review Submission (PVRs) d) to i) and para 3.19
	Full detail and justification: - Annex A, Requests 100 - 104 - Appendix A2 to Annex A

	- Explanatory Statement - Appendix 3: Viability Report
Schedule 24	Current s.106 provision:
Public Art	Schedule 24 Includes restrictions on commencement and occupation, with reference to staged payment of sums and installation of public art.
	Summary of key proposed changes: Payment of Public Art Contribution 1: Discharge and refund as it is not apparent how this money has been spent towards the provision of public art. As such, this obligation cannot be regarded as serving any useful purpose. Payment of Public Art Contributions 2 to 6: In principle, payments potentially serve a useful purpose, but the existing timetable is out of step with actual building trajectory and is undermining viability of Main Phase One and potentially the Development. Their purpose will be better served if they are modified to align with progress, completions and also empower the Appellant to deliver the art. Obligations relating to commissioning, installation and maintenance of public art: It is proposed that the Appellant takes on responsibility for the commissioning and installation and therefore the associated obligation can be discharged. It is unfair and disproportionate to require the Appellant to have a continuing obligation to repair. As such, this element serves no useful purpose and should be discharged.
	Provisions requiring modification and/or discharge: - Para 1 and Sch 29A, Item 2 - Paras 1 and 6, Sch 29A, Items 2, 6, 17, 21 etc - Paras 1.7 and 1.8 - Paras 3 and 4
	Full detail and justification: - Annex A, Requests 105 – 108
Schedule 25	Current s.106 provision:
Heritage Interpretation	Schedule 25 Includes restrictions on commencement with reference to staged payment of sums.
	Summary of key proposed changes: With regards to payment of Archaeological Archiving, Heritage and Archaeologist Contributions, discharge as no longer serving any useful

	purpose. There is no archiving, other than that carried out by the Appellant's consultant. The other contributions are duplicative or otiose and should be discharged as not serving any useful purpose. With regards to payment of Archaeological Contributions, the Development is well beyond the initial three-year period envisaged for such funding. There is no longer any utility in further payments.
	Provisions requiring discharge: - Paras 1 and 4.1 - Paras 4.2 and 4.3, and Sch 30A, 30B and 30C
	Full detail and justification: - Annex A, Requests 109 and 110
Schedule 26 Quality Agreement	Current s.106 provision: Schedule 26 Includes restrictions on occupation with reference to staged payment of sums.
	Summary of key proposed changes: These payments are surplus to requirements, grossly excessive and more than is necessary to mitigate the impact of the Development. Discharge as no longer serving any useful purpose, not least given the parallel payments for monitoring etc.
	Provisions requiring discharge: - Paras 1, 2.1, 2.2 and 2.3 – 2.21, and Sch 29A, Items 9, 12, 15, 19, 24 etc, and likewise in Sch 29B and 29C, Items 5, 11, 14 etc
	Full detail and justification: - Annex A, Request 111 - Explanatory Statement, section 12
Schedule 28 Monitoring Fees	Current s.106 provision: Schedule includes requirement for staged payment of sums and restrictions on occupation with reference to staged payments of sums.
	Summary of key proposed changes:

	Payment of some monitoring fees potentially serve a useful purpose, but the contributions are disproportionate in scale. As such, some should be discharged and reimbursed, with prospective payments adjusted to serve the useful purpose equally well.
	Provisions requiring modification and/or discharge: - Sch 28, paras 1, 2.1, 2.2 and 2.3 – 2.21 and Sch 29A, Items 8, 11, 14, 18, 23, etc and likewise in Sch 29B and 29C, Items 4, 10, 13, 16 etc
	Full detail and justification: - Annex A, Request 112 - Explanatory Statement, section 12
Schedules 29 and 30 Bank Accounts	Current s.106 provision: <u>Developer's Contingency Bank Account (ABC): Schedule 29</u> Includes restriction on commencement with reference to payment of sums into contingency bank account. <u>ABC's contributions bank account: Schedule 29</u> Includes restriction on commencement or occupation with reference to staged payments. <u>Developer's Capital Bank Account (ABC): Schedule 29</u> Includes restriction on commencement and occupation with reference to payments of sums into bank account. <u>KCC's Contingency Bank Account: Schedule 30</u> Includes restriction on commencement with reference to payment of minimum balance. <u>KCC's Contributions Bank Account: Schedule 30</u> Includes restriction on commencement, construction and occupation with reference to payments of sums into bank account.
	Summary of key proposed changes: Discharge and/or modification to serve useful purpose equally well (or at all), including by adjusting payment triggers and withdrawal triggers to better serve any useful purpose.
	Provisions requiring modification and/or discharge: - Sch 29, paras 1 and 2 and clause 1.1 definition of Council Minimum Balance - Sch 30A, Sch 30B and Sch 30C - Para 8

	Full detail and justification: - Annex A, Requests 113 – 116 - Annex A, Requests 117 – 119 - Explanatory Statement
Schedules 34, 39 and 40 Comments in respect of Schedules 39 and 40 Superseded	Current s.106 provision: See above Summary of key proposed changes: Modifications to the Heads of Terms for Lease of the CMO's First Operating Premises (Schedule 34) are sought . As modified, the obligation will continue to serve any useful purpose equally well. Provisions requiring modification and/or discharge: - Heads of Terms (Sch 34) - Full detail and justification: - Annex A, Request 120 - Explanatory Statement
Schedule 49 Viability Review Templates	Current s.106 provision: See above Summary of key proposed changes: Rights reserved to make further application should the need arise Provisions requiring modification and/or discharge: - Entire schedule Supporting material: - Annex A, Request 122 - Explanatory Statement - Appendix 3: Viability Report

D. LEGAL AND POLICY CONTEXT

Section 106

37. By s.106 of the 1990 Act, any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into a planning obligation which is enforceable by the local planning authority. A planning obligation may *inter alia* require sums to be paid to the authority on specified dates or periodically: s.106(1)(d).

Section 106A

38. A planning obligation may not be modified or discharged except pursuant to s.106A of the 1990 Act, which materially provides as follows:

- “(1) A planning obligation may not be modified except –
(a) by agreement between the appropriate authority (see subsection (11)) and the person or persons against whom the obligation is enforceable; or
(b) In accordance with –
(i) this section and section 106B...

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

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

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

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

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

- (6) Where an application is made to an authority under subsection (3), the authority may determine –

- (a) that the planning obligation shall continue to have effect without modification;
(b) if the obligation no longer serves a useful purpose, that it shall be discharged;
or
(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

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

- ...
(9) Regulations may make provision with respect to –

- (a) the form and content of applications under subsection (3);
(b) the publication of notices of such applications;

- (c) *the procedures for considering any representations made with respect to such applications; and*
- (d) *the notices to be given to applicants of determinations under subsection (6)."*

39. Thus, a person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the local planning authority by whom the obligation is enforceable for the obligation to be discharged.

40. The 'relevant period' if no period is prescribed (as in this case), is the period of five years beginning with the date on which the obligation is entered into. The obligation was entered into on 27 February 2017 and so the relevant period has now expired.

41. In addressing an application pursuant to s.106A(3), there are four essential questions to be considered: (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? See R (Garden and Leisure Group Ltd) v North Somerset Council [2003] EWHC 1605 (Admin) per Richards J (as he then was), at [28].

42. The Appellant acknowledges that it is sometimes suggested that Garden and Leisure Group is authority for the view that the decision-maker must either approve all or none of the proposed modifications. However, such a narrow view does not fully take into account the fact that it is possible to have several obligations within one s.106 agreement. To take a practical example, where there is a s106 agreement with variety of obligations, an application could be made trying to change a number of those obligations, but where the local authority agrees with some but not others. The legislation provides that an application to modify an application can be approved or refused. In such circumstances, including on appeal, it would be lawful to approve the changes to one (or more) obligation within a s.106 agreement but refuse modifications to others within the same agreement.

43. 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 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 (para 30); and ii) the question for the authority is whether the obligation served any useful purpose, not just any useful planning purpose (paras 37-38).

44. The Appellant will make further submissions on the above, if and as necessary.

Section 106B

45. Section 106B of the 1990 Act provides for appeals in relation to applications under s.106A, as follows:

- “(1) Where an authority...
 - (a) fail to give notice as mentioned in section 106A(7); or*
 - (b) determine under section 106A that a planning obligation shall continue to have effect without modification, the applicant may appeal to the Secretary of State.**
- (2) For the purposes of an appeal under subsection (1)(a), it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification.*
- (3) An appeal under this section shall be made by notice served within such period and in such manner as may be prescribed.*
- (4) Subsections (6) to (9) of section 106A apply in relation to the Secretary of State under this section as they apply in relation to applications to authorities under that section.*
- (5) Before determining the appeal the Secretary of State shall, if either the applicant or the authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.*
- (6) The determination of an appeal by the Secretary of State under this section shall be final.*
- (7) Schedule 6 (determination of certain appeals by persons appointed by the Secretary of State applies to appeals under this section...”*

46. Thus, the jurisdiction of the Secretary of State on appeal under s.106B is the same as that of the local planning authority under s.106A. It is also properly open to the Secretary of State on appeal to determine disputes as to validity of applications under s.106A.

E. APPELLANT'S CASE

47. Appendix J of the Procedural Guide sets out that where an appeal is against non-determination, the appellant must address the areas that the appellant considers most likely to comprise the local planning authority's objections to the development proposed.
48. In this case, given the lack of determination, it is assumed that ABC and KCC have either determined that i) Application No. 2 is invalid (despite never having confirmed as such); and/or ii) the obligation shall continue to have effect without modification.

Preliminary issue: validity

49. As noted above, by letter dated 30 June 2022, ABC asserted that Application No. 1 was invalid, with reference to four alleged flaws:
- a. Alleged failure to specify the modifications sought (i.e. alleged non-compliance with s.106A(3)(a) of the 1990 Act);
 - b. Alleged failure to specify the land to which the application related and the applicant's interest in that land (i.e. alleged non-compliance with Regulation 3(1)(b) of the 1992 Regulations;
 - c. Alleged failure to serve notice on any person against whom the obligation is enforceable (i.e. alleged non-compliance with Regulation 4 of the 1992 Regulations);
 - d. Alleged failure to provide information which ABC considered necessary to enable it to determine the application (i.e. alleged non-compliance with Regulation 3(1)(e) of the 1992 Regulations.
50. By response dated 20 October 2022 (under cover of which Application No. 2 was submitted), the Appellant set out its position in respect of each alleged failure, as well as adopting a pragmatic approach to the provision of further information in order to resolve any outstanding issues. The Appellant position was, and remains, that Application No. 1 was valid and ought to have been determined.
51. By that same letter, the Appellant expressly i) noted that the specifics of the modification and/or discharge sought by Application No. 2 are sufficiently addressed in the

Application No. 2 materials; ii) requested that should ABC intend to take any point with regards to the validity of Application No. 2 that it be *“taken forthwith so as to limit any delay in consideration of the application”*. To date, however, both ABC and KCC have failed to either validate Application No. 2 or provide any reasons for challenging the validity of the same.

52. In this regard, and for the avoidance of doubt, the Appellant submits that:

- a. By s.106A(3), if a modification of an obligation is applied for then it must be *“specified”* in the application. Provided it is clear what the proposed modification is (and its effect) then it is not necessary for an applicant to provide precise wording for the proposed modification in each instance.
- b. For the purposes of both Application No. 1 and Application No. 2, the proposed modifications are set out clearly in column 3 of the Annex 1 / Annex A table³ respectively and then, for each time, the overall purpose is stated, along with specific reference to the relevant paragraphs that would require modification or deletion.
- c. On the basis of the proper interpretation of s.106A(3) (on the plain words used, read in their legislative context and having regard to their purpose), it is clear that the Appellant has adequately specified the modifications that it wants.
- d. Nor does the use of ‘catch all’ wording such as ‘all necessary and consequential amendments’ and ‘all other appropriate consequential amendments’ change the position in this regard. The use of such wording is obviously intended to highlight the fact that other minor amendments or adjustments to the drafting of other clauses may be required and ought to fall within the Councils’ consideration of Application No. 2. It is clearly not intended to suggest modifications of broader scope or for a different purpose. To seek to suggest otherwise is plainly unreasonable.

³ Annex 1 is reproduced as Appendix A2 to Annex A in Application No. 2.

53. The Appellant will make further submissions with regards to validity if, and to the extent, necessary.

54. In due course, the Appellant will invite the Inspector both to conclude that Application No. 2 was valid and also then proceed to determine the appeal.

Substantive case: justification for modification and/or discharge

55. It is the Appellant's case that it is essential to make changes to the s.106 agreement by way of modification and/or discharge for the following six principal reasons. Additional and further reasons are set out in the Application No. 2 materials and will be amplified in evidence.

56. As can be seen from the summary table at Section C above, in a great many instances, it is the scale and timing of triggers in the s.106 agreement that requires adjustment in order to reflect the reality of need and delivery at this stage, informed by the insight gained in the period since the s.106 agreement was signed.

Principal Reason 1: Delay in issuing Outline Permission

57. The delay in issuing the Outline Permission has had a material effect on the substance (and operation) of the obligations contained in the s.106 agreement. In short, the s.106 agreement was designed for a fundamentally different development model, envisaged to be building out in a completely different manner over a different timeframe.

58. In brief summary:

- a. The Environmental Statement that accompanied the application (and upon which a number of assumptions were based, with associated mitigation secured through the s.106 agreement) assumed that the Development would be undertaken over a period of approximately 20 years, commencing in 2013/2014. In fact, the s.106 agreement itself took until 2017 to be finalised.

- b. The Planning Statement accompanying the application predicted an annual build out of 250-300 homes per year. In fact, on account of a number of factors that will be addressed in evidence, build out rates have been considerably slower, with later delivery.

Principal Reason 2: Delivery Rate

59. As noted above, the phasing assumptions underpinning the s.106 agreement operated on the basis that building would commence at the earliest opportunity, with approximately 300 homes delivered each year and completion around 2036. However, a number of delay factors have meant that those assumptions are no longer remotely valid, meaning that many of the trigger points for payments and delivery of infrastructure are no longer in step with the reality of the Development.

Planning-related delays

60. There were 21 pre-commencement conditions, which had to be discharged before works could start on site. These were submitted by the Appellant between December 2016 and March 2017.

61. As to the delay caused by that process of discharge, an important example can be found with reference to Condition 17, which requires a detailed masterplan for each main AAP phase and which – in terms of timeframes – is possibly the most important condition to discharge promptly because no reserved matters applications could be submitted or registered by ABC until Condition 17 had been discharged. Given the importance of that condition, the Appellant submitted the information required in August 2016, but the application was not registered until March 2017. Condition 17 was finally discharged on 26 September 2017 (i.e. 6 months after registration). The Appellant made its first reserved matters application on the same day, but that application was not granted consent until 20 April 2018 (i.e. 7 months later).

62. The last pre-commencement conditions were discharged in June 2017, which enabled the commencement of infrastructure works on site. However, the only works that could be constructed were the detailed access points (A, B and D), which were approved as part of

the Outline Permission. The internal reserved matters applications for the strategic infrastructure were also subject to delays associated with the discharge of Condition 17 described above, which caused further issues as the contractors had been appointed to construct all of the Phase 1 infrastructure (access A, B and D; internal highways; SuDS; foul water drainage), and the contractor wanted to proceed with the on-site works once the access points had been completed. However, ABC informed Hodson that the only way to gain approval of the internal roads, surface water and foul water infrastructure in advance of the discharge of Condition 17 was to submit full planning applications, which had to then be submitted and were subsequently granted consent.

63. The first reserved matters application was approved in April 2018, with the first occupations not occurring until late September 2019 (i.e. 2 years' delay).

Utilities

64. Considerable delays arose in relation to bringing utilities to site; for example, it took two years (and considerable expense) to resolve issues surrounding foul drainage with Southern Water.

Electricity

65. Due to the 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. The final design and works for securing electricity for Phase 1 of the Development was not budgeted for and entailed taking electricity cables from over 2km from Brookfield Road Primary.

Covid-19

66. A number of Covid-related delays and impacts have occurred, including impacts on construction, borrowing and sales. As to borrowing, for example, the Appellant's revolving facility was placed on hold as a consequence of Covid, meaning that only houses that had already been started could be built out. Total borrowing then fell because of no new starts. New starts only commenced again in July 2020, before a second wave of

Covid-19 occurred that again caused borrowing issues. As to sales, the Appellant's selling agent virtually shut down during the first wave, with their representatives in the sales suite being withdrawn and furloughed. Marketing effectively stalled during the first lockdown.

67. Supplies and deliveries also faced difficulties during the first period of the pandemic. Such difficulties gave rise to an up to 10% increase in build costs for that period.

Nutrient neutrality

68. In July 2020, Natural England ("NE") issued advice to Councils including ABC advising that applications for certain types of development (including housing development) within the Stour river catchment or which discharge to specified wastewater treatment works within the catchment should be the subject of a Habitats Regulations Assessment ("HRA") prior to any decision to grant planning permission. NE issued this advice because of concerns that discharges within the Stour catchment might have an adverse impact on Stodmarsh (a European designated nature conservation site) through nutrient enrichment.

69. Although most of the Chilmingdon site lies outside the Stour catchment, foul water from the site is currently discharged to Bybrook which is one of the wastewater treatment works listed in NE's advice.

70. A HRA was not carried out when the Outline Permission was issued because it had been agreed by ABC that it was not required on the basis that the Development would not have a significant effect on any European designated nature conservation sites. However, Hodson has since submitted a planning application for an on-site wastewater treatment works, which would treat the wastewater prior to discharging it a tributary of the River Beault (which lies outside the Stour catchment). The application has not yet been determined by ABC.

Present position

71. Thus, although the Outline Permission has been lawfully implemented, with development having commenced (and been completed) on road access A, B and D within the prescribed timescales, the delays summarised above mean that many build assumptions are out of date.
72. At the date of the submission of Application No. 2:
- a. Reserved matters had been granted for 766 of the 1,501 homes anticipated in Phase 1 of the Development;
 - b. The first 117 units had been completed by Hodson, with a further 98 units completed by others;
 - c. Revised, realistic, forecasts suggested that housing delivery was expected to accelerate from around 100-125 homes per year in 2020-2024 to around 300 homes after 2028 with final completion by 2048.
73. At the date of this Statement of Case, Reserved Matters have still only been approved for 766 homes (no further Reserved Matters approvals are possible until the issue of nutrient neutrality has been resolved).
74. Notwithstanding the Appellant's considerable efforts, therefore, housing delivery to date has been much slower than anticipated, at the end of 2022, a total of c.220 dwellings were occupied; at the end of 2023, it is anticipated that an additional c.50 dwellings will be occupied, taking the total to between 250 and 270.
75. Therefore, 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 on site and to ensure that the mitigation proposed in 2012 is adjusted so as to be fit for purpose, necessary in planning terms, directly related to the development, fair and reasonable in scale and kind, and still serves a useful purpose. The Appellant's evidence will demonstrate that a revised phasing schedule is required in order to underpin the s.106 triggers that will apply going forward.

Principal Reason 3: Developer reconstitution and access to finance

76. The site was originally promoted by four members of a developer consortium. Initially, it was proposed that the drafting of the s.106 agreement was based on a partitioned agreement where each landowner was only responsible for obligations relating to the land they controlled. Equalisation and roof tariffs were explored, but eventually a form of Escrow was agreed. The complexity of the s.106 agreement meant that it took nearly three years to conclude.
77. Moreover, when the s.106 agreement was being negotiated, the development was 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.
78. However, on or around September 2016, some 12 weeks from the agreed date for the s.106 agreement to be signed, Hodson took over the land purchases of two of the other three consortium members (with the third member owning only 99 units) and became the sole paying owner under the s.106 agreement. Had Hodson not done so, then the Development would not have come forward at all and would have failed.
79. In effect, Hodson took 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 for a single land owner⁴. The delays summarised above have also added considerable funding costs.
80. Further, and in any event, the 'triple locks' in the s.106 agreement are not fit for purpose, as they inappropriately require the Appellant to:

⁴ For example, significant borrowing costs have been incurred (over and above those that were assumed for the purposes of the s.106 agreement) due to consolidation of the site under Hodson. In 2005, Hodson bought 36 acres. The rest of the land was optioned by Pentland, Hodson, Barratts and/or owned by Jarvis. Shortly before the s.106 agreement was signed, Pentland and Barratts chose not to proceed with purchasing their options. In order to avoid the scheme collapsing, Hodson held talks with Pentland and Barratt in order to put together a funding package with financiers to enable Hodson to take over the three positions. Part of the transaction provided that Barratts would buy back 500 plots in three tranches (over three parcels of land). Although the first parcel has been completed, Barratts did not complete on the other two because the s.106 agreement operates so as to restrict reserved matters planning before viability provisions have been dealt with.

- a. Secure bonds to guarantee funds well in advance of financial triggers;
- b. Deposit funds into a capital account well in advance of financial triggers; and
- c. Limit occupations according to Grampian conditions secured in the s.106 agreement (and which Application No. 2 modifies but does not remove).

81. The Appellant will demonstrate in evidence that these 'triple locks' 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. It is not possible for the Appellant to secure bonds and forward funding at the required level, primarily as a result of the ongoing viability and delivery challenges. Now that Chilmington Green is being delivered with Hodson as master developer, such a triple lock mechanism becomes redundant and requires modification to facilitate continued delivery.

Principal Reason 4: Viability and affordable housing delivery

82. Delivery of Chilmington Green 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.

83. In October 2014, the Planning Committee report confirmed that officers, supported by specialist advice, were in agreement that the scheme could provide no more than 10% affordable homes in total. Even at that early stage, it was acknowledged the front-loaded cost profile of the required infrastructure and that viability would only have the potential to improve when the place had become established and sales values grew.

84. By viability review dated May 2022, Turner Morum found that a substantial shortfall against reasonable return targets continued to exist for Review Phases 2, 3 and 4.

85. The inherent viability challenges (some of which are common to all schemes of a similar scale), have been compounded by the challenges to delivery summarised above.

86. The Appellant's evidence will demonstrate that a number of particular issues have arisen in light of these viability challenges.

87. First, the limited delivery to date means that sufficient critical mass has not been achieved to secure the targeted 'placemaking' value growth, which in turn means that the originally anticipated appraisal improvements have not yet occurred.
88. Second, the structure of the review mechanism, limiting the timings of submissions, has prevented engagement of a sufficient number and range of developer partners that might otherwise have accelerated housing delivery.
89. Third, the continuation of large-scale infrastructure delivery has increased peak debt and finance costs.
90. Fourth, the overall scale of infrastructure and s.106 costs are such that the scheme cannot currently deliver a reasonable market return, sufficient to engage housebuilder partners.
91. Finally, the current structure of the viability review mechanism has, and will continue to, slow delivery throughout the life of the Development.

92. The Quod Viability Report, Executive Summary confirms as follows:

- "1.1 The Chilmington Green development has the potential to be a major contributor to local housing and affordable housing supply. It also has the ability to offer a sustainable new place, supported by extensive new social infrastructure for the use of the new and existing communities. Hodson has delivered c.£35m of infrastructure works and Section 106 contributions to date and completed the first homes at the site. However, the structure of requirements within the section 106 agreement has been a barrier to the large-scale delivery originally envisaged. Change is now required to enable the original masterplan aspirations to be realized.
- 1.2 The specific challenges for the development include:
- Opportunity to engage housebuilder partners – at present the viability review mechanism prevents engagement of the wide range of partners needed to diversify and accelerate housing delivery. This in turn has prevented the critical mass / placemaking needed to drive sales values.
 - Peak funding required – the timings and scale of infrastructure and Section 106 contributions are not proportionate to the receipts from housing delivery. This creates a level of peak funding which is in excess of that achievable on market terms.
 - Viability – the level of infrastructure and Section 106 costs is such that, even where the land cost paid by Hodson is excluded from the appraisal, the scheme cannot currently deliver a reasonable market return sufficient to engage housebuilder partners.
- 1.3 This report sets out the viability and cashflow position for the scheme, demonstrating that change must occur to enable it to be delivered. The report is informed by wider analysis by Quod and Vectos, identifying changes to transport and social infrastructure requirements which can support scheme viability whilst still delivering residents appropriate facilities. Overall changes proposed include:

- *Transport and social infrastructure – adjustments to infrastructure requirements and timings in line with analysis by Quod / Vectos appended to the Application 2 Explanatory Statement. These changes support overall viability and reduce the peak funding that is required.*
- *Affordable housing – changes to the tenure of affordable homes, reflecting difficulties in securing interest in Extra Care and also a revised tenure mix to support scheme viability.*
- *Review mechanism – amendment to the review mechanism such that this is triggered during the stage of preparation of RMAs. These changes enable more housebuilders to be engaged earlier, accelerating delivery and creating funds to pay for infrastructure delivery.”*

93. In short, the infrastructure requirements of the s.106 agreement are not appropriately aligned to actual housing delivery and occupations. This causes a level of peak funding in advance of sales receipts that cannot be secured in the market. Moreover, the structure of the viability review mechanism is also a barrier to diversified, accelerated delivery, preventing engagement of plot housebuilder partners and achievement of the critical mass needed to achieve placemaking growth. It artificially restricts the bringing forward of different areas of the Development, inhibits the Appellant from entering partnerships/agreements to increase delivery, working against ensuring value growth and undermining the overall deliverability of the Scheme.

94. The viability position has deteriorated even further since Application No. 2 was submitted; in particular, as a result of higher interest rates (not only in terms of sales, but also finance costs), a substantial fall in residential values and continuing inflation.

95. In light of the above, the Appellant’s evidence will demonstrate that a solution is required that will unlock large scale delivery in order to return the scheme to the originally envisaged model of development (i.e. high up-front costs funded by accelerated housing delivery and real value creation in excess of inflation). Such a solution can be achieved through urgent modifications to the s.106 agreement that will support i) accelerated delivery via multiple diversified products / partners; and ii) land sales and partnerships to pay down early infrastructure costs and reinvest in future infrastructure.

96. One of the key proposed modifications relates to the trigger for issue of Viability Review Submission, which is proposed to be revised to be submitted each time the cumulative number of dwellings within Reserved Matter approvals to date exceeds the AAP phase sizes (i.e. in practical terms a review occurs every time Reserved Matter approvals for c.500

homes are submitted). The submission may be made no earlier than 12 months in advance of the relevant Reserved Matter approvals this is to allow early agreement of viability / affordable housing and Reserved Matter approvals to design in the relevant tenure mix.

97. Other key elements of the proposed amendments to Schedule 23 and associated definitions are proposed to apply post review phase 4 (with amendments to review phases 2-4 having been proposed as part of Application No. 1, which is subsumed within Application No. 2). The Appellant's evidence will demonstrate that the proposed modifications are consistent with other large-scale developments, balancing deliverability with appropriate controls:

- a. Affordable housing tenure mix - amendment of the base mix and review mechanism target to 30/70 affordable rent / shared ownership.
- b. Extra care homes - amendment of extra care homes to conventional affordable homes.
- c. Amendment to consider potential for non-registered providers (with prior approval from ABC) to operate shared ownership tenure homes.
- d. 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.
- e. 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).

98. These proposed modifications offer numerous benefits to ABC and the Appellant, 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 Matter applications and the time limits for implementing these, the Appellant is naturally incentivised to make Reserved

Matter 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.

99. Section 13 of the Explanatory Statement includes an overview of the scheme viability incorporating all proposed changes, together with an indication of the potential additional affordable housing delivery. The separate Viability Report details each change to the s.106 obligations and the financial implications.

Principal Reason 5: Early (and in some instances over) provision of infrastructure

100. 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. In short, 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”).

101. The Appellant will provide a number of relevant examples in evidence of where such requirements have placed a disproportionate burden upon it and therefore further delayed delivery as a result of creating cashflow issues, including:

- a. Although the demand for school places has been significantly lower than expected, the Appellant has nevertheless funded and provided primary and secondary school provision in line with previous forecasts of demand and triggers for

payment. Indeed, the primary school was fully open and operational despite there only being 100 homes occupied at that stage.

- b. A28 improvement works and associated bond. The existing timetable is vastly out of step with actual building trajectory. The Appellant's proposed modification adjusts the occupation triggers to better reflect progress and need. Schedule 18 requires a bond payment towards works on the A28 once no more than 400 Dwellings have been occupied. However, a bond is not appropriate given the funding structure for those works. In any event, such a bond has ceased to be possible in the financial markets to obtain a bond in the form or kind required by the s.106 agreement⁵. In any event, it would be prohibitively expensive and self-defeating.
- c. The operation of the CMO, which faces substantial operational, governance and financial challenges and is failing to provide the essential services that it is required to do under the Framework Agreement.

102. The Appellant's evidence will demonstrate that the ongoing burden of this inappropriate front loading is causing further delay, risk and uncertainty around funding. As such, it is critically important to modify the s.106 agreement.

Principal Reason 6: Deliverability

103. 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. As noted above, 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.

104. It is crucial that the Inspector gains a full and proper understanding of the fundamental substance that lies beneath the requests made as part of Application No. 2. For example, the 'utility of purpose' of the individual terms of the s.106 Agreement is rendered meaningless if the operation of the s.106 agreement as a whole prevents the development from being delivered. In that circumstance, there must surely be a 'cross check', which asks whether the s.106 agreement and its terms can truly be said to 'continue

⁵ See letter from SPF (brokers) dated 1 December 2021.

to serve a useful purpose' if their combined practical effect is to stall, delay or prevent the development rather than rendering it acceptable in planning terms through mitigation.

105. Further or alternatively, where the effect of the s.106 agreement is to stall, delay or prevent the development, then that is palpably a material consideration so "*obviously material*", that it is essential to take it fully into account.

106. Thus, the Appellant will demonstrate in evidence 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 Chilmington Green Area Action Plan; 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.

Summary of Proposed Changes

107. As illustrated by the summary table at Section C above, by Application No. 2 (and this appeal), although the Appellant seeks the removal of some obligations, the vast majority of requests look to adjust the scale of contributions or delay the trigger points. In essence, it is an attempt to 'rebalance' the s.106 agreement so as to align it more closely to the manner in which the Development has actually proceeded.

108. Annex A to the Application No. 2 document sets out the full text for every change, including its justification, which is on the basis of one (or more) of the following:

- a. Lack of useful purpose: the obligations no longer serve a useful purpose in planning terms as the context or need has changed (or for which the purpose is not clear and therefore requires additional definition or explanation to meet the terms of Regulation 122 of the CIL Regulations 2010 (as amended)).
- b. Inconsistencies or errors in drafting, which mean that the obligations no longer (or never did) serve a useful purpose.
- c. Changes to obligations which, in theory or principle, could serve a useful purpose but need to be amended to ensure that the development is deliverable and viable, given the financial challenges summarised above.

109. The Explanatory Statement contains a table (at page 16), which lists all clauses that are required to change under each of these three justifications. Those highlighted in grey in that table are explained further in the Explanatory Statement with reference to further, important, contextual, policy, legal and other justifications, which confirms that the obligations no longer serve a useful purpose (in whole or in part).
110. The Appellant will adduce further evidence in support of the proposed changes.

F. PROCEDURE STATEMENT

Criteria

111. Section 106B(5) provides that either party may request to be heard before an Inspector, with the Inspectorate having discretion in such circumstances as to whether to proceed by way of a hearing / inquiry. The appeal cannot proceed on the basis of written representations without the consent of both parties.
112. The exercise of the Inspectorate's discretion is guided by reference to specified criteria, as set out in Annexe K of the Procedural Guide: Planning appeals (the "**Procedural Guide**").
113. In accordance with the Procedural Guide, an inquiry will be appropriate if:
- a. There is a clearly explained need for the evidence to be tested by formal questioning by an advocate; or
 - b. The issues are complex; or
 - c. The appeal has generated substantial local interest to warrant an inquiry as opposed to dealing with the case by a hearing.
114. The use of the word 'or' indicates that only one of these criteria is required in order to justify the use of the inquiry procedure.

Application of criteria

115. The appeal is against the non-determination of a s.106A application. The Appellant's position is that the first two criteria are relevant to this appeal.

Complexity

116. The factual background to Application No. 2 is not straightforward, but nevertheless represents an important element of the relevant context. It will need to be addressed in detailed evidence, including with reference to the s.106 agreement itself, associated variations, as well as the planning and development history of the site.

117. Application No. 2 proposed a suite of inter-related modifications and discharges of various obligations under the s.106 agreement. Each proposed modification and/or discharge will need to be considered with reference to the applicable legal test under s.106A.

118. The Appellant requests that both appeals be heard together (they both relate to the same site, the same s.106 agreement and the same Application No. 2). This will add a further layer of complexity to proceedings.

Testing of evidence

119. Having regard to the correspondence between the parties, the Appellant considers that the following areas are likely to be in contention and will require detailed evidence to be produced by each party in relation to their respective positions and tested under cross examination:

- a. Factual background. As noted above, the factual background of the planning and development history of the site, as well as the negotiation of the s.106 agreement form an important element of the relevant context. Although some aspects will be capable of being evidenced by documents and written evidence, other elements are likely to require amplification and further exploration in oral evidence given its likely contentious nature.

- b. Planning. The planning history and policy context of the site and development forms a crucial part of the Appellant's case for modification and/or discharge. It is anticipated that the Inspector will be assisted considerably by the formal testing of planning evidence in respect of that history and context, as well as how the proposed modification and/or discharge would sit within the existing (and emerging) policy matrix.
- c. Viability. The Application No. 2 materials contain two formal viability reports (Turner Morum (dated April 2022); Quod (dated October 2022)). The Appellant will adduce further viability evidence in order to provide the Inspector with the most up to date position. It is likely that ABC will also submit viability evidence in response (even if limited to sensitivity testing). The underlying assumptions, baselines and calculations will need to be explored in detail through formal examination.
- d. Highways and transport. A considerable amount of the front-loaded s.106 costs has been associated with the delivery of highways infrastructure. The Appellant will adduce evidence that explores the provision of that infrastructure with reference to need, as well as the manner in which it has materially impacted the overall cost profile of the Development.

120. The Appellant intends to call up to four (4) witnesses to advance its case in respect of planning (including s.106B); viability; traffic and highways.

121. Legal submissions need to be made in relation to this appeal including, but not limited to, case law on s.106A, s.106B, validity, viability and material considerations. The issues covered by these submissions are complex and will need to be heard orally at the inquiry.

122. The Appellant considers that evidence and cross-examination will last approximately four (4) days, with an additional day also required for submissions (thus requiring up to five (5) days in total). This exceeds the single day (or two days in exceptional circumstances) reserved for hearings.

123. For the above reasons, the Appellant requests that the appeal is determined by way of the inquiry procedure.

124. The Appellant considers that the written representations and the hearing procedure would be inappropriate for this appeal, having regard to the applicable guidance. There is a real risk that the relevant issues will not be properly scrutinised without the opportunity for the evidence to be tested through formal questioning by an advocate.

G. CONCLUSIONS

125. The Appellant has made repeated attempts to secure critical modifications and/or discharge of obligations contained within the s.106 agreement. Despite the Appellant having provided detailed and thorough justification for the latest round of proposed changes in the Application No. 2 materials, it has not been possible to secure ABC's agreement to those proposed changes. Indeed, ABC has not engaged with the underlying substance of the critical challenges that the Development has faced. The stark reality is that, without the required changes to the s.106 agreement, delivery of the Development is in serious jeopardy.

126. For the reasons summarised above, it cannot credibly be suggested either that those challenges are attributable to the Appellant's actions or that the proposed changes are in any way unreasonable. The vast majority of the proposed changes look to defer, rather than avoid, the substance of obligations. At its heart, Application No. 2 is an attempt to 'rebalance' the s.106 agreement so as to align it more closely to the manner in which the Development has actually proceeded. To that end, the majority of requests seek to adjust the scale of contributions and proof of demand obligations or delay the trigger points.

127. Annex A to the Application No. 2 document sets out the full text for every change, including its justification, which is on the basis of one (or more) of the following:

- a. Lack of useful purpose;
- b. Inconsistencies or errors in drafting; and/or
- c. Changes to obligations which, in theory or principle, could serve a useful purpose but need to be amended to ensure that the development is deliverable and viable, given the financial challenges summarised above.

128. It is anticipated that ABC may assert that Application No. 2 is invalid (as it did previously with reference to Application No. 1). The Appellant submits that not only is that wrong as a matter of substance and law, but it is also a sideline, perhaps designed or intended to enable ABC to avoid the necessary rigour and complexity that the challenges faced by the Development have prompted by way of a comprehensive suite of proposed changes to the s.106 agreement. The Inspector is urged not to be sidelined in the same way. The proposed changes are difficult and complex, but they are necessary and

essential. As such, the Inspector will, in due course, be invited to find that not only was Application No. 2 valid, but also that this appeal can (and should) be determined, with the full range of proposed changes confirmed.

16 October 2023

Appendix 1: Planning History

NB: For ease of reference, this content is an updated version of the material contained in Appendix 1 of the Explanatory Report

Outline Permission

06.01.2017	12/0400/AS	Outline application for a Comprehensive Mixed Use Development comprising: up to 5,750 residential units, in a mix of sizes, types and tenures; up to 10,000m ² (gross external floor space) of Class B1 use; up to 9,000m ² (gross external floorspace) of Class A1 to A5 uses; Education (including a secondary school of up to 8ha and up to four primary schools of up to 2.1ha each); Community Uses (Class D1) up to 7,000m ² (gross external floorspace); Leisure Uses (Class D2) up to 6,000m ² (gross external floorspace); Provision of local recycling facilities; Provision of areas of formal and informal open space; Installation of appropriate utilities infrastructure as required to serve the development, including flood attenuation works, SUDS, water supply and wastewater infrastructure, gas supply, electricity supply (including substations), telecommunications infrastructure and renewable energy infrastructure (including CHP in the District Centre); Transport infrastructure, including provision of three accesses on to the A28, an access on to Coulter Road / Cuckoo Lane, other connections on to the local road network, and a network of internal roads, footpaths and cycle routes; New planting and landscaping, both within the Proposed Development and on its boundaries, and ecological enhancement works; and Associated groundworks where appearance, landscaping, layout and scale are reserved for future approval and where access is reserved for future approval with the exception of the three accesses on to the A28 and the access on to Coulter Road / Cuckoo Lane
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Non-Material Amendments to Outline Permission

05.10.2021	12/00400/AM10/AS	Non-material amendment to planning conditions 17, 60, 80, 81, 82, 83, 84, 85 and 86 of planning permission 12/00400/AS relating to the Secondary School within Phase 2
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20.09.2021	12/00400/AM09/AS	Revision to Condition 17 (Main Area Action Plan Phase 1) on planning permission reference 12/00400/CONA/AS Non-material amendment to the Detailed Masterplan Phase 1 (Plan 1 of 4)
14.04.2020	12/00400/AM08/AS	Non-material amendment to plans approved under Condition 17 relating to the electricity sub station on planning permission 12/00400/AS
07.08.2019	12/00400/AM07/AS	Replacement of two plans listed under condition 14 in so far as they relate to parcels Q and R only as a non-material minor amendment to planning permission 12/00400/AS
w/d	12/00400/AM06/AS	Amendment to Outline Planning Condition 89 "Main AAP CEMP version 2 document dated 25 th April 2017" approved under case reference 12/00400/COND/AS
28.03.2019	12/00400/AM05/AS	Non-material amendment to condition 17 of planning permission 12/00400/AS to revise condition 17 (xii) SuDS Strategy – Revised SUDS Strategy Masterplan
07.12.2017	12/0400/AM04/AS	Non-material amendment to condition 17 of planning permission 12/00400/AS to revise condition 17 (ii) dwelling numbers per land parcel within Phase 1. Land Parcels A, E and F (In Part) changed from 137 units to 153 units and adjustments made to achieve the 1501 dwelling within Phase 1
06.04.2018	12/0400/AM02/AS	Non-material amendment to Planning Condition 18 (Advanced Planting)
11.04.2018	12/0400/AM03/AS	Non-material amendment to Planning Conditions 41 and 50 – variation of condition wording as follows: Condition 41 – new subsection (xix) a plan showing the development phasing (if applicable). Condition 50 – All applications for the approval of Reserved matters shall include the following details...
07.07.2017	17/00665/AS	Infrastructure routes which include carriageway, footpaths, cycleways, associated visitor parking bays and soft verges to the Avenue and access B street
25.08.2017	12/0400/AMND/AS	Application for a non-material amendment to condition 14 of planning permission 12/00400/AS to replace the approved residential density parameter plan 00122 - OPA03R1 with a new residential parameter plan 00122 - OPA03R3 in the list of main approved documents, and the addition of an addendum (dated 20 July 2017) to the approved development specification dated 13 September 2017 to the list of main approved documents
10.10.2017	12/00400/AM01/AS	Replacement of residential density parameter plan OPA03R1 with OPA3A04 in list of main approved documents and consequential addendum to development specification.

Reserved Matters approvals

16.01.2018	17/01732/ AS	RM application for the construction of access maintenance layby, gas governor housing and new hedgerow planting, located adjacent to the lane near Couleter Road, and an access maintenance...
23.04.2018	17/01170/ AS	Layout, access, scale, landscaping and appearance of development at Chilmington Green for the 346 residential dwellings, which comprises of a mix of two bedroom apartments, two, three, four and five bedroom houses within Land Parcels BCJK within mina AAP Phase 1 (Subsequent NMA approval: (29.06.2018, 17/01170/ AMND, Revision to location of sub-station within the parking court to plot 31)
13.12.2018	18/01310/ AS	RM for the development of 22 residential dwellings within Parcel Q, Main Phase AAP 1 including associated roads, parking, landscaping, open space and infrastructure (NMA approved subsequently (15.08.2019, 18/01310/ AMND/ AS Revision to design of plot 17)
10.07.2018	18/00395/ AS	RM application relating to strategic foul drainage works, which include, foul drainage and manholes, a pumping station (including access and service area) and associated works
19.07.2019	18/00207/ AS	RM approval for the development of Parcel P for 99 dwellings, together with associated access roads, footpaths, drainage, car/cycle parking, groundworks, landscaping and infrastructure (NMAs approved subsequently (11.11.2020, 18/00207/ AM01/ AS to vary brick colour) (17.02.2021, 18/00207/ AM01/ AS minor revisions to design), (12.04.2021, 18/00207/ AM04/ AS insertion of doors to 50% of car barns on plots 1 and 2), (12.04.2021, 18/00207/ AM05/ AS amended soft landscaping plans), (12.04.2021 18/00207/ AM06/ AS change to french doors on plot 91), (16.10.2020 18/00207/ AMND/ AS change to layout, landscaping and substitute house types).
14.12.2019	18/00911/ AS	RM application for the Construction of 153 dwellings on Parcels A, E and F (In part), Main AAP Phase 1, together with associated roads, parking, landscaping public open space and infrastructure
w/d	19/00417/ AS	RM application (pursuant to planning permission 12/00400/ AS) for the Community Management Organisation (CMO) First Temporary Premises at Chilmington Green
18.07.2019	19/00475/ AS	RM (pursuant to outline planning application 12/00400/ AS) for the development of 64 residential

		dwellings within Parcel Q, Main Phase AAP 1 including associated roads, parking, landscaping
20.12.2019	19/00753/AS	Electricity sub-station south east of Meadow View, Chilmington Green Road, Great Chart (Subsequent NMA approval: (04.09.202, 19/00475/AMND/AS reposition of 3 car ports for plots 37, 49 and 58 on parcel Q2)
04.05.2020	19/1032/AS	RM for the development of 82 residential dwellings within Parcel R, Main Phase AAP 1 including associated roads, parking, landscaping, open space and infrastructure
20.09.2019	19/00733/AS	Construction of an electricity sub-station within Main AAP Phase 1, Land Parcel H at Chilmington Green – Application for Reserved Matters pursuant to condition 10 of outline permission
Not determined	21/002248/AS	RM application pursuant to planning permission 12/00400/AS to consider the layout, scale, landscaping and appearance of development for 47 residential dwellings, within land parcel K within Main AAP Phase 1
Not determined	21/02165/AS	RM application for the amended Landscaping Works to the Phase 1 Northern Gateway (Access A) at Chilmington Green pursuant to planning permission 12/00400/AS

Full permissions

22.12.2017	17/01334/AS	Phase 1 SUDS
30.01.2018	17/01349/AS	Phase 1 SUDS at Brisley Farm (Subsequent NMA approvals: (18.05.2018, 17/01349/AMND/AS, Revision to foul water pipes for Phase 1 Brisley Farm extension at Chilmington Green), (19.07.2019, 17/01349/AM01/AS, alteration to position of swale 1 and pond 1).
06.03.2019	18/00677/AS	Variation to conditions 1,3,4&5 of 17/01334/AS to delay landscaping to pond 3, 4a and 4b.
26.07.2019	18/00382/AS	Mock Lane Highway Improvements which comprise the Access to Land Parcel G and the eastern section of Mock Lane, which include carriageway, footpath/cycleway, soft verges, foul and surface water
07.03.2019	18/01345/AS	Full application for a temporary haul road required to facilitate the development of parcels Q and R, Phase 1, in association with the outline permission for the wider Chilmington Green development
20.09.2019	19/0179/AS	Full application for the Community Management Organisation (CMO) First Temporary Premises at

		Chilmington Green (Application submitted to remove conditions 8, 9, 10, 11, 12 and 13 and vary condition 5 (validated on 23/01/2023 ref: PA/2023/0119). The purpose of this was to separate out the delivery of play space 1 from the CMO building, with Play Space 1 coming forward as a stand alone RMA).
20.02.2020	19/01170/AS	Construction of an electricity sub-station within Land Parcel CH4 of Main AAP Phase 2.
02.12.2021	21/01611/AS	Variations to conditions 1, 3, 5 and 7 of 18/00677/AS
01.10.2021	21/00839/AS	Active Travel Route to provide pedestrian access between Chilmington Avenue and the Secondary School Site Entrance.
01.10.2021	21/00840/AS	Infrastructure route which includes carriageway, footpath/cycleway, indicative locations of visitor parking bays and soft verges to the Phase 2 Avenue providing access to the Chilmington Green Secondary school (Subsequent NMA approval: (27.05.2022, 21/00840/AMND/AS alter the junction configuration at crossroads at Chilmington Avenue and Chilmington Green Road)
09.08.2023	PA/2023/0986	Erection of a bus stop (pole and flag) together with associated road marking

Live Reserved Matters Applications

	22/00024/AS	Land Parcels D and H (173 units)
	OTH/2022/3142	Land Parcels F and H (96 units)
	OTH/2022/3169	Land Parcel I (145 units)
	OTH/2023/0018	Land Parcels L, M and O (217 units)
	OTH/2023/0030	Land Parcels CH1 and CH2 (114 units and District Centre)
	OTH/2023/0033	Land Parcels A1 and A2 (allotments)
	OTH/2023/0034	Land Parcel A5 (allotments)
	OTH/2023/0019	Land Parcel G10 (green space)
	OTH/2023/0032	Land Parcel S1 (Chilmington Hamlet, cricket pitch)
	OTH/2023/0035	Land Parcel DP3 (Discovery Park)
	OTH/2023/0031	Land Parcels EC6, EC7, EC8, EC17, F8 (Landscaping and Pond)
	OTH/2023/0036	Land Parcel EC9 (landscaping)
	OTH/2023/0020	Land Parcel PS1 (Play Space 1)

Live Full Planning Applications

	22/00814/AS	Green Spine Infrastructure Route Extension (Phase 2)
	PA/2023/0715	Wastewater Treatment Plant