

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

LPA Refs: AP-90718 & AP-90647

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

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

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

CLOSING SUBMISSIONS ON BEHALF OF KENT COUNTY COUNCIL

Overview

1. KCC repeats its Opening. On the key issues the appeal is misconceived for the short reason that the obligations *plainly* serve a useful purpose (“UP”)¹. On the headline issues:
 - a. provision of the A28 dualling scheme (“the A28DS”), the restriction on occupation until it is secured (sch 18 para 1) and payment by Hodson (“HDL”) to reimburse KCC for its forward funding with those payments secured by a bond serve a UP of ensuring the Chilmington Green development (“CG”) does not proceed further² until the highway infrastructure necessary to make it acceptable is delivered.
 - b. As to education, HDL’s attempts to avoid the obligations for primary school 4 (“PS4”) are based on the flimsiest of evidence - set against the weight and

¹ In answer to Inspector’s Q5 of 30/4/25, whilst the case law does not restrict the UP to a useful planning purpose or one linked to the development, KCC confirms that all the obligations in dispute sought to be discharged or modified (save where there is agreement) serve a useful planning purpose arising from the development (including recouping of expenditure incurred or to be incurred) on the development. Where a wider UP also applies this is made clear below - but that other UP is additional to and not in substitute for a planning UP related to the development.

² In answer to inspector’s Q2 of 30/4/25 the only mechanism for control of occupations to 400 is sch 18 para 1.

expertise of the ONS. All the other education obligations (as amended in accordance with KCC's modelling) serve a UP of ensuring that sufficient school sites and sufficient schools are delivered in a timeline which meets the needs of CG all paid for by HDL with forward funding secured by bonds. The case on bonds and indexation is misconceived - bonds are obviously necessary here and are available in the market. The case on indexation is wrong in fact and misconceived in law.

2. It turns out that the case really turns on HDL's viability case. On that, KCC gratefully adopts the compelling evidence and cross examination led by ABC and defers to and adopts ABC's Closing Speech on that matter. Even if there was any merit in HDL's viability case, the proposition that a developer can escape obligations (especially negative obligations) under s.106A to assist its finances and cashflow is misconceived in law, in principle and on the facts.

The S106B Test³

3. The correct legal test under s.106B has been set out by ABC/KCC repeatedly and is not repeated here.
4. The legal analysis of the correct test set out in ABC's opening and closing is gratefully adopted and not repeated. Save for viability, HDL has never put forward any substantively different legal analysis.
5. HDL purports to accept the above test but then fundamentally distorts it. By way of headline points only:
 - a. the test is not whether planning permission ought to be granted on the basis of the s.106 as sought to be modified. The S.38(6) test and the planning balance do not apply. The repeated focus by HDL (Mr Hodson - "TH" - and Mr Collins - "JC" - in particular) on the "choice" between the requirements of the S106 and delivery of the housing is not a choice for this inquiry. It would be a matter for a planning application considering the merits of CG with the s106 as modified and without much of the infrastructure required under the existing permission. Much of the evidence of witnesses for HDL and in particular JC was thus legally irrelevant. JC sought to rely on the "planning balance" as "a key element" of his case⁴. The misdirection cannot be clearer. His attempts in evidence in chief to undertake a planning balance (backed by no evidence) was misconceived in law. HDL is in reality seeking to get consent for a

³ ABC will be answering Inspector's questions 3 and 4 and KCC does not repeat that

⁴ Answer to Inspector's question

fundamentally different development than that approved - the correct route for that is a planning application. The inspector was correct to interject during evidence that this was not a planning application/appeal;

- b. the test is not whether the reg 122 tests are met. The regulation 122 test is essentially different from the s.106B useful purpose test because the legal question under s.106B is not whether any particular obligation is necessary to the grant of permission for CG. Despite this fundamental difference between the tests, JC considers it “important” to refer to the statutory tests for obligations and planning permissions⁵ and consistently uses this approach throughout his evidence. However, it is notable that even JC accepts (at least in writing) that if obligations are necessary then viability concerns cannot outweigh that necessity⁶;
 - c. the test is not to be applied to all the obligations in the round or cumulatively – which is JC’s approach⁷. Each obligation is a separate obligation⁸ and the useful purpose test is thus to be applied to each individually.
6. This is not just semantics. The distortion of the tests reveals a basic flaw in approach. It is clear throughout HDL’s evidence that the useful purpose test is not approached on a correct basis. The conclusions reached on it for each obligation are therefore reached on a false (and legally incorrect) premise; and, thus, cannot be relied on. The short point is that HDL has not justified its proposals by reference to the correct test and that there is no evidence from it applying the correct test uninfected by the flawed self-direction as to the test its team has given itself. Thus, by way of example, even if it has succeeded in showing a particular obligation is not necessary or that on a s.78 appeal the obligation might not be imposed, that does not start to demonstrate that the obligation should be modified or discharged when the correct test is applied. There is thus a fundamental evidential disconnect between HDL’s evidence and the correct legal test.
7. Even if para 5a above is wrong, the inspector does not have the material to carry out any such s.38(6) or planning balance exercise. By way of the most stark example, HDL deliberately provides no assessment of the impacts of non-provision of the A28DS and whether the development is acceptable without it. JC

⁵ JCP para 4.1.1

⁶ See JC para 1.216 – “if the obligation is unviable but the scheme would remain acceptable without the obligation then viability must be relevant”; para 3.2 – “still necessary” and para 4.1.5 – “if they are not [necessary to make the whole development acceptable] and they impact viability in a way such as to hold back development, my conclusion is that those obligations do not serve a useful purpose”

⁷ JCP 1.2.20 - “collective effect”

⁸ See the decision relating to validity in this very case and legal submissions on that point on behalf of HDL.

(orally) referred to the lack of assessment of impact on alternative routes, alternative modes; changing travel times but there is no evidence on any of those matter from HDL to allow the planning balancing exercise he relies heavily on to be undertaken.

The A28DS

Overview

8. This is the single most consequential issue in this inquiry from KCC perspective.
9. Under the current s.106: (1) CG cannot proceed further until the delivery of the A28DS is secured (sch 18 para 1); and (2) the A28DS is to be provided at the cost of the developer and at no risk to KCC: sch 18A sch 1. Both elements plainly (and unarguably) serve a UP - and a useful planning purpose directly related to and arising from the development itself.
10. R91 and R93 seek to remove that structure entirely with no replacement (and even without any explanation as to how the obvious need would otherwise be met).
11. Bizarrely but inevitably, HDL provided no highway evidence which even suggested that the A28DS is not required or that restricting occupation until delivery of it is secured serves no UP. HDL provides no evidence that the A28DS can/will be funded by other routes. Extremely belatedly, ID made the inevitable concession that the A28DS was necessary in order to avoid a severe residual cumulative impact on the A28 of CG (HSOCG para 1.4) and in answer to the final question in cross examination accepted that the restriction on occupations served a useful highway capacity purpose. Those two inevitable concessions are fatal to HDL's case on R91 and R93 as a matter of law and on the facts.

The Existing Structure

12. In accordance with planning policy applicable to CG⁹ (none of which has been questioned or subject to any cross examination on behalf of HDL), the mechanism freely agreed to secure delivery is as follows:
 - a. under sch 18 para 1, occupations are limited to 400 unless and until the bond required to be delivered to KCC under the s.278 to secure the post-contract costs and, thus, unlock delivery of the A28DS is provided;

⁹ in policy terms, the provision of the A28DS has always been an essential requirement of development of CG for 5750 as explained by MH (see e.g. para 3.2; 3.4; 3.6). Pursuant to CS5 of the former Core Strategy, AAP13 [CD4.6] CG11 and para 9.17/9.21/9.24 required funding for the A28DS and provided for occupations at CG to be restricted until there was sufficient capacity on the A28. That position is repeated in the Local Plan – CD3.3.13 - TRA1; and the Local Transport Plan [CG10.3].

- b. under the s.278 agreement (sch 18A) the provision of the bond triggers the obligation on KCC to let a contract for construction (clause 5.1) – there are corresponding obligations in the s.278 to provide the bond (sch 1 para 7 and 4);
- c. KCC then delivers the A28DS with forward funding;
- d. HDL covenants in the s.278 agreement to pay the Pre- and Post-Contract costs: sch 1 para 1 and 2 as set out in Annex 1 and 2 respectively – these sums being secured by the bond - with HDL being under further obligations to pay upfront any shortfall in LEP funding (sch1 para 3 and 4) and at the end of the project any overrun in costs up to a defined excess: sch 1 para 8; and
- e. KCC's forward funding is thus secured, the A28DS is paid for by the developers of CG; and there is no risk to KCC¹⁰.

13. Under that framework delivery of the necessary A28DS would be secured and the 400 restriction on occupations at CG lifted whilst KCC would let the construction contracts knowing that it could do so at no cost or risk to it.

The Useful Purpose

14. Applying the correct legal test, the UP can be expressed in a wide variety of ways any one of which is sufficient in law. By way of example only:
- a. the delivery of a desirable highway improvement scheme (whether or not connected with the development)¹¹;
 - b. the delivery of the highway infrastructure necessary to avoid CG having a severe residual cumulative impact on this part of the highway network;
 - c. the prevention of highway harms arising by restricting occupations at CG beyond 400 without the A28DS being secured; and/or
 - d. ensuring that the costs and risks of provision of the A28DS are not passed to the public.

The Proposals

15. The effect of R91 is far wider than just removing the obligation to pay the bond. It has the effect of allowing CG5750 to proceed without the infrastructure necessary to make it acceptable. Further, the requirement for a bond serves the UP of ensuring the A28DS is delivered at no risk to KCC. KCC is forward funding the A28DS only on the basis that it does so at no risk. The bond is a fundamental requirement of the forward funding package. Without it, risk of HDL default re: full repayment is transferred from HDL to KCC and the public. The bond serves the UP

¹⁰ Except for cost overruns above the sch 1 para 8 cap which costs KCC is in a position to manage.

¹¹ KCC could rely just on this but does not do so. There are multiple other planning purposes relating to the development itself

of preventing that transfer of risk. Whilst not relevant to the correct legal test, the risk is obvious – see HDL’s evidence on its precarious financial position and the default on the only bond so far provided re: PS1.

16. Still limiting ourselves to R91, absent provision of the bond, there is no incentive and no requirement for HDL to enter into a s.278 given the payment obligations in it. It can plough on with CG5750 without signing a fresh s.278.

17. As to R93, the obligations re: payment serve the useful purpose of, to state the obvious, paying for the A28DS and allowing the delivery of the A28DS. It is the only means by which payment (and thus the ability of KCC to deliver) is secured.

The Need for those Obligations

18. It is no part of the UP test that KCC has to demonstrate a need for existing obligations.

19. Further, R91 and R93 are discharge applications (not modifications). This is therefore not an inquiry into *when* the A28DS should be provided or whether the costs are overstated¹².

20. The central question is whether the restrictions on occupations at CG until the A28DS is secured serve a useful purpose. The sole route to demonstrate that they do not serve a UP would be by showing that the A28DS itself served no useful purpose.

21. The evidence on the need for the A28DS arising from the CG development is overwhelming (and now - inevitably - common ground):

- a. the requirement for the A28DS as necessary infrastructure to enable CG to come forward has been embodied in planning policy from the outset;
- b. by 2014, ID for HDL (not KCC) was demonstrating in detail how the A28DS would be effective to mitigate the impacts of CG on the A28: CD10.10;
- c. the resolution to grant was predicated on that delivery: see e.g. CD6.1 para 99;
- d. how to secure that was then the subject of discussion leading to the 2017 S106 with an *agreed* trigger of 400¹³;

¹² The attempt to get MH to state what trigger is necessary for the delivery of the A28DS was misconceived. Given the nature of H’s applications that matter is simply not relevant and MH was surely correct when he said that that would require detailed consideration of modelling as to the highway impacts at various points to address the necessary timing. But HDL, of course, has not provided any such modelling.

¹³ There is no evidence that this is an inappropriate trigger – ID expressly gave no evidence on timing (see para 2.2) and the attempt to raise an issue of timing through evidence in chief was correctly refused.

- e. at the Possingham inquiry, ID modelled the impact of the Possingham development and just 2426 units at CG (with no TEMPRO growth). That showed the impacts set out in CD10.5 which are accurately¹⁴ summarised in MHP p10-14. The impacts of CG progressing to even that half-way stage without the A28DS being in place are so obviously severe (and unacceptable in planning and highway terms) as to require no further comment - and there is no evidence or suggestion to the contrary. Even an A28DS delivered at this point would be far too late;
- f. given the nature of R91 and R93 (seeking to be able to deliver the whole of CG5750 with no A28DS), KCC commissioned modelling (in a timeline to meet the inquiry dates¹⁵). It looked at the implications of full delivery of CG in the long term. It was provided to ID months ago. MHP p14 – 19 accurately summarises the outputs of that modelling. There has been no evidence (in writing or orally) disputing any of it. The impacts of CG progressing to 5750 are so obviously severe (and unacceptable in planning and highway terms) as to require no further comment - and there has been no suggestion or cross-examination to the contrary.
- g. Given the stance adopted by ID, the inquiry has not had to go into the modelling in evidence and cross-examination because none of it is put in issue but the Inspector is invited to review those sections of MHP in some detail – see esp. MHP table 7 (p18) – queuing times increase by about 10 mins; average speed almost halves; and total travel time more than doubles in the am peak (with a similar picture on the pm peak). How one gets place making premiums when there is this extreme level of congestion is (inexplicably) entirely unexplained?

22. MH's Proof is the only evidence put before this inquiry. There has been no cross-examination on any of it re: highway impacts¹⁶. If this was a planning inquiry or the "planning balance" was relevant here (which it is not), the only evidence on those matters is from that proof. MH is clear (see his summary at HSOCG para 1.7 second bullet) that it is "impossible to conceive that permission could have been granted for [CG] without the [A28DS]" and there was no cross examination on that. MH is obviously correct. Even applying a much higher test than the UP test, CG without the A28DS is obviously unacceptable and a fundamentally different planning proposition from that approved in 2017.

¹⁴ Accepted by ID in XX

¹⁵ Explained by MH in XX.

¹⁶ Save for the small point that he has quoted the sensitivity test rather than ID's base model. He said that made a very minor difference and it was not suggested in XX of him that that was wrong

The Approach of HDL

23. This is the HDL's application and appeal – it needs to make a case for its proposals. The main change sought now is the discharge (not modification) of the A28DS obligations. It has to demonstrate that sch 18 para 1 and the payment obligations in the s.278 serve no UP.

At Application Stage:

24. At the outset (and in the same overall claimed viability context), the Explanatory Memorandum [CD1.12] para 10.23 contended that the transport schedules “need to be revisited and modified with the scheduled payments pushed back”.

25. As to the A28DS specifically:

- a. para 10.23 sought to amend the phasing to that previously promoted in 2013 (Appx 5 to the Exp Memo - para 5.2¹⁷). Based on an assertion (not now pursued in any evidence and which MHP provides unchallenged evidence to rebut at section 6) that traffic growth was lower than anticipated (CD1.12 para 10.24ff) HDL proposed that the A28DS be *completed* by 2500 dwellings¹⁸;
- b. paras 10.38 and 10.84 sought a lower contribution (again not pursued in any evidence and not subject to XX¹⁹) including based on contributions from others (not the subject of any evidence from HDL and addressed in unchallenged evidence of MH at section 11);
- c. with the exception of the bond, the Exp Memo was not suggesting that the A28 obligations should be discharged – just that the timing of the works be pushed back and the contributions reduced;
- d. that was in the context of the overall argument that the changes proposed were those necessary to secure viability.

26. That proposal was unacceptable and unevidenced for reasons canvassed in the footnotes to the previous paragraph but the key point is that they embody a recognition at the start of this application that the A28DS had to be provided and relatively early in the development.

¹⁷ an assessment which was then 9 years old and which in any event was superseded by: (1) the 2014 STIA [CD10.10] and (2) by the agreement on the s106 in 2017. No up to date modelling was provided.

¹⁸ No analysis of what that meant in terms of commencement was provided

¹⁹ The figures are obviously wrong not least because they assume LEP funding is still available which it is not and ignore finance costs which are not included in the £22m base build costs. Given the request to remove the bond, it was assumed that KCC would bear the delivery cost risk, the LEP risk and cost overrun risk and the risk of HDL defaulting.

At appeal stage

27. Since then, the only further modelling by ID at Possingham and KCC for this inquiry has not provided any basis for any change of stance – indeed it has confirmed the need for the A28DS (as shown above). However, on appeal, HDL’s Statement of Case sought the current discharges - and the above modification proposals have been dropped. But absent new modelling, that change of stance has no basis in highway facts.
28. HDL stated that it would “adduce evidence that explores the provision of that infrastructure with reference to need...” [para 119d]. This was for the obvious reason that HDL properly understood that it had to demonstrate that the A28DS was not required if it was to have any chance of demonstrating that sch 18 para 1 and the bond and contributions did not serve a UP. KCC’s SoC made clear that it would demonstrate that there was a need. The stage was set for a show down on the need for the A28DS. KCC commissioned further modelling to support its case.
29. At the CMC, HDL indicated (for the first time) that it would not be undertaking further modelling. It did not, however, withdraw para 119d above or take “need” out of contention. KCC naturally expected a showdown on need and prepared accordingly – as demonstrated by the structure of MHP.
30. Evidence was thus exchanged. Bizarrely, on this central issue of the need for the A28DS, HDL’s only highway related expert²⁰ who was suitably qualified to assist the inspector on the key issue of need (and timing) stated, only this:
- “I do not present any evidence on the need for an A28 Improvement Scheme in relation to the [CG] development or on the timing of provision of the improvement scheme”***: para 2.2.
31. How this is consistent with his duty to the inquiry is not explained – compare his recognition of that duty in IDP para 1.9.
32. He and HDL thus consciously decided not to provide any evidence on the central issue of whether the obligations served a UP in terms of highway capacity and need. That stance means that HDL and ID have produced no evidence on:
- a. the impact of CG on the A28 absent the A28DS;
 - b. the need for the A28DS to avoid CG having a severe impact on the A28;

²⁰ Who had been involved since 2013 – in 2013 demonstrating what he thought was the appropriate phasing of A28DS; in 2014 demonstrating that the impact of CG could be mitigated; in the framing of the s.106, in the evidence for HDL at Possingham

- c. the necessary timing of the A28DS works;
- d. the cost or detailed design of those works;
- e. the implications of not carrying out those works on the matters raised by JC orally for the first time – use of alternative routes, mode share, changing journey times or trip distribution; and
- f. (if relevant – which is denied) the overall harm caused by the proposed discharge or the planning balance for CG as a whole without the A28DS (whether through ID or JC).

33. ID provided no evidence to dispute the relevance and application of his own modelling at Possingham or of the Council's VISSIM modelling. ID accepted that the Inspector has nothing from him to cast any doubt on the conclusions MH draws from those documents and there was literally no material for KCC to cross examine him on.

34. The fundamental point is this. The reason for this bizarre omission of any evidence on the key issue is for the short and overwhelming reason that ID could make no positive case at all that the A28DS obligations did not serve a useful purpose.

35. Despite that and contrary to his denial in cross examination, ID repeatedly refused to engage in the issue of the severity of the impact: see MHP Appx B. He only finally agreed in writing to HSOCG para 1.4 late in the afternoon of Thursday 17th.

36. The reticence in accepting the obvious is because it is clear that the concession when finally provided is fatal to H's case on R91 and R93.

37. It is now common ground that without the A28DS²¹, CG will have severe residual cumulative impact on the A28. The only evidence as to that severe impact is from MHP. ID accepted that the negative obligation in sch 18 para 1 served a UP in highway capacity terms.

38. R91/R93 necessarily fail on HDL's highway inevitable recent concessions.

The Powergen Point

39. H appears to contend that a decision in its favour on R91 and R93 would somehow compel KCC to agree a revised S278 Agreement without the bond and without the payment obligations relying on the principle in *Warwickshire v Powergen*: see e.g. SoC page 36 Sch 18 and JCP/5.1.53 such that it can avoid contributing to the A28DS but KCC would nonetheless be forced to deliver it.

²¹ ID did not agree that the A28DS he agreed to in HSOCG1.5 is that already secured – but he provides no other plans.

40. That argument, if pursued, would be hopeless. *Powergen* is authority for the proposition that where a LHA objects to a scheme on highway grounds and loses on appeal, it cannot then try to prevent the scheme by refusing to enter a s.278 Agreement. It is not authority for the proposition that an LHA can be forced to enter into a (fundamentally) different S278 from that previously agreed under which all risks and costs are passed to it. Shorn of the bond and the payment obligations, the s.278 agreement would be a fundamentally different proposition to that previously agreed and for the avoidance of doubt, KCC would not enter into it²². The A28DS would not happen.

Alternative Solutions

41. It was implicitly suggested in XX of MH that the need for the A28DS could be delayed by some amount. There is no application to modify the obligations to push back the triggers; and no evidence or modelling to support it. MH was correct to decline to speculate absent that work.

42. There is unchallenged and unchallengeable evidence that absent the bond or other security KCC would not and could not contract for the provision of the A28DS. The highest it was put by HDL was the unevidenced assertion in oral evidence (for the first time) that something might crop up in the future if/when the accepted severe impact transpired²³. There was no XX of MH clear evidence that KCC could not fund it and that there were no other available public sources of funding. Yet HDL's case (revealed for the first time in XX of JC) is that someone else should have to pay for the A28DS necessitated by it.

43. The reference by HDL to without prejudice discussions in its email earlier in the week was inappropriate and KCC makes no further comment.

Consequences of failure of R91/R93.

44. The immediate problem with delivery at CG is the failure to comply with sch 18 para 1: see e.g. JC Appx 10. It is this failure that is preventing parcel sales and occupations beyond 400.

²² This is said on direct instructions from senior officers at the Council as is reflected in the evidence of MH.

²³ It was suggested that other viable development could fund the A28. No such other development were identified. Kingsnorth Green and Possingham have been consented the latter with minor contributions to the A28DS as an option. Court Lodge is a small fraction of the scale of CG and KCC is seeking a proportionate contribution from it but the idea that it could substantially fund the A28DS is backed by no evidence and is fanciful. There are no other identified or even hinted allocations in this area.

45. KCC/ABC naturally intend to enforce that obligation – because of the severe highway impacts that would arise if it did not do so²⁴. KCC/ABC made clear its intention to enforce in August last year. There is nothing remotely surprising in KCC/ABC warning those bound by the S106 that they would be held to its terms. KCC has suggested a route through to allow up to 763 units to be occupied but that has been rejected and no alternative proposed in the PAPL correspondence. The 400 unit occupation is imminent. KCC/ABC will enforce.
46. HDL has claimed that *it* cannot meet sch 18 para 1 and that *it* needs the savings from not delivering the A28DS. *It* says it cannot deliver the fundamental requirement to allow this development to proceed. Hence this impasse.
47. The decision in this appeal should be a reality check for HDL and its funders – that the development has to deliver the A28DS for development to proceed and has to be provided (predominantly) at HDL's cost. How the bond or other security or up front funding of the A28DS is to be secured is a matter for HDL, its investors and funders and not for this inquiry. But once they realise that they cannot expect to be bailed out by the public or avoid the need for this key piece of infrastructure necessitated by the CG:5750, then they will have to find a solution themselves. HDL's expectations at this inquiry (discharge of the A28DS) are wholly unreal and a reset is required.

Schedule 19 and 21

48. Agreement has been reached on all these issues and the necessary amendments will be pursued outside of this Inquiry decision making process (in accordance with the Inspector's indication).
49. HDL place a caveat on sch 19 in HSOCG para 1.28. It is assumed that HDL is thus still seeking for these obligations to be deleted on viability grounds even though they have otherwise agreed to them and even though they obviously serve a UP for the reasons given by MH and on which he was not cross examined.

Education – Sch 15 and Sch 15A

7000 vs 5750

50. The s106 requirements for 4 PS was based on 5750. The contrary is unarguable – all the documents since at least 2012 referred only to 5750. The AAP requires 4 PS for 5750; the contemporaneous education needs assessment was based on

²⁴ it has been prepared to show some leeway but on terms – terms which have been rejected for the sole reason that HDL does not want to be bound to deliver the A28DS.

5750²⁵; the report to committee is on that basis; the s106 is for a development of 5750 with 4 PS. The same position is clear across the highway case too.

51. TH's claim to the contrary is simply factually wrong. But he doubled down on it by inventing a conversation that never happened and is impossible to conceive did happen – it is simply impossible to envisage that DA would have said that the 4PS was based on 7000 when he knew it was not and what he is alleged to have said would have been untrue. He was entirely clear that the conversation did not happen. TH's claim to the contrary is "untrue". TH's self-serving invention of this story reflects poorly on the rest of his evidence.

KCC not co-operating

52. This is an appropriate point to respond to the allegation that KCC has been unco-operative and inflexible. If that means giving in to HDL's demands then KCC pleads guilty but if it means failing to try to find solutions to HDL's financial predicament by showing appropriate flexibility it is patently wrong. TH's attempts to portray HDL as a "victim" of KCC behaviour is simply wrong.

53. TH and JC's allegations are not relevant to the statutory test but the allegations having been made it is necessary to rebut them.

54. As DA demonstrates, throughout KCC has sought to assist HDL whilst not compromising the basic requirements. The list of such assistance is long. TH's response to all of that is "yes but...." KCC should have gone further, or the overall position is still not as HDL would want or holding HDL to the deal embodied in the repeatedly amended (in their favour) s106 is not fair.

55. The correct position is that it is HDL who has consistently defaulted on its obligations: see PS1 bond having to be called in; debt action for PS1 unpaid contributions, the recent episode when KCC had to go to the High Court to get access to land to enable it to deliver the highway and service infrastructure necessary to allow the Secondary School to open in September which HDL (despite generous loan funding from KCC) had failed to do.

56. With those preliminary HDL "red herrings" out of the way – as to the education substance.....

"Useful Purpose"

²⁵ DA EiC

57. There does not appear to be any dispute that the UP served by the education package is to ensure that sufficient school sites for sufficient schools to be provided by the developer at its costs and with no risk to KCC are provided at the right time to ensure that there are sufficient places to meet the needs of CG as part of the South Ashford Primary Planning Area.

The Emergence of the Proposals

58. The proposals were made without any input from Mr Hunter (“BH”). Despite being raised by Mr Adams (“DA”) in his proof, there is still no evidence before this inquiry of any modelling being undertaken to justify those proposals at the time they were made, and in particular as to the need for PS4. This was thus a client led demand rather than a proposal based on any evidence.

The Modelling:

59. BH produced an Education Report in December 2023 but that was overtaken by the ESOCG1 in which he agreed with almost all of the original analysis of DA and thereby dropped the bulk of his earlier argument. He produces no competing modelling to that of DA.

60. There were just two areas of disagreement: (1) the housing mix; and (2) pupil projections post – 2031 - what shall be termed the “fertility” issue²⁶.

Housing Mix

61. As to housing mix:

- e. consistency is required across the case – the viability case is based (essentially) on the Melton Mix (“MM”) and it is inconsistent to assume something different in the education case;
- f. KCC adopts (and does not repeat) the position of ABC - it is clear that there is significant scope for flexibility in terms of options for site delivery and how to deliver 5750 on the land available. There has been no demonstration through design that 5750 cannot be achieved with e.g. the current parking standards;
- g. in any event, DA has modelled the alternative mix (76/24%) and shows that there is a need over and above PS3 on that mix assumption such that the provisions for PS4 serve a UP in that scenario.

The Fertility Issue

62. The fundamental issue is thus fertility and the impact on pupil numbers long term.
– going to the question as to whether the provisions for PS4 serve a UP.

²⁶ It is accepted, of course, that they are not the same thing but the issue BH focusses on is the fertility issue driving down pupil numbers.

63. As BH accepted in XX:

- h. this is a long-term development to 2048;
- i. neither KCC nor HDL want to have too many schools generally or at CG specifically for obvious reasons;
- j. however, standing here today KCC needs to be sure that there are sufficient sites, sufficient schools and sufficient funding available to meet the needs of CG as it comes forward with pupil yield (directly impacted by fertility) as it turns out to be in the long term; and
- k. that can be secured through a monitor and manage approach (“M&M”).

64. However, BH claims that that is not sufficient. In the Education Statement [CD2.15] para 4.30 he states:

*“if the evidence demonstrates **clearly** that the amount of provision in the s.106 agreement exceeds the child yield of the site then it is only right that this is rectified and the total quantum of school infrastructure is brought into line with the **best evidence** available at the time of the review.”* [bold added]

and raises the question as to whether it serves a UP to provide for a PS which is “**demonstrably unnecessary**” – 4.31.

65. BH therefore sets himself the (correct) test for discharge of obligations - namely the best evidence has to show now (standing here today) that provision of PS4 in the mid to late 2040s is demonstrably unnecessary. Conversely, he accepted (correctly) that if one cannot yet be sure as to whether PS4 is required on current evidence then having provision for it now serves the UP of allowing it to be provided if it is required for CG in the future. This is for the short and obvious reason that removing the PS4 requirement now would mean that it could not be provided even if it turns out to be needed.

Certainty Now

66. By definition it is not possible now to know what fertility levels will be in the future and therefore there is no way of knowing what PS pupil numbers will be post – 2032. As BH correctly accepted it is therefore necessary to rely on projections.

67. It is in the very nature of projections that there will be considerable uncertainty in them. A judgement has to be made as to what the evidence shows.

ONS Data

68. The ONS is the national statistical body charged with making population projections including for the purpose of long-term planning for education: see CD14/9A para 88 –“widely used in planning - for example... health and education”.
69. The 2018 ONS data (correctly extracted in DA’s table 5 at para 67) is the only ONS data for ABC’s area specifically and it shows a rising birth rate in ABC’s area to 2043. DA conservatively does not adopt that graph.
70. In January 2025 the ONS provided national population projections through to the 2040s. They are not yet disaggregated by local authority area.
71. Fertility is a key issue for the ONS in making long term population projections- alongside mortality and immigration. It considered the long-term trends for fertility in its paper at ESOCG2/22ff [CD 14.25]. A panel of UK fertility experts had considered the appropriate projections as explained in section 7. Questionnaires were sent, a meeting held, initial scenarios were developed “based on expert opinion” and trends were maintained based on expert opinion. The expert views on key drivers of fertility including the cost of living crisis are set out.
72. Those experts and the ONS were well aware of recent trends (see section 3) and how fertility in the recent past had been significantly over-estimated (as shown in the graph at CD14.25 p27). The green line “broadly reflects the advice on trends for each age group provided by the fertility expert panel”.
73. This is thus the latest projection of relevant population trends by the national body and its expert panel charged with making such projections. It is clearly the best evidence available. It shows the fertility rate in 2048 being above that in 2023.

The Lobbying Article

74. BH does not analyse or do a critique of that ONS document. Instead, he relies on the SMF/Boom document.
75. Just three days after the ONS publication (hardly time to do any detailed analysis of it), the SMF and “Boom” (“the campaign to make it easier to choose to have children for everyone”) [CD14.25 p44] published a commentary on it. It was not an academic paper, or peer reviewed, or with any statistical underpinning set out in it. It was written by a person who was self-evidently lobbying for more family friendly policies to increase the birth rate (see last para on p44) on behalf of an organization with the same aim. It is hardly an objective assessment of long-term

trends in fertility – quite the opposite. It has a clear incentive to show that unless policies change fertility will decrease.

76. BH relies on this document but he inexplicably and misleadingly fails to quote the key relevant part of it – namely that looking forward the ONS is understating rather than overstating fertility and that 2024 data showed a notable rise. (p42).

77. When the author comes to the longer term – it is just “my view” – following his thesis that unless there are stronger family friendly policies there is only one direction for fertility in the long run - “down”.

78. The paper does not support the continuation of the trend on which BH relies in the short-term and as to the long term provides no statistical analysis of why the expert panel’s approach is wrong. It can hardly be the basis for saying that the ONS is wrong, that DA’s static line is too high or that the expert consensus is that the downward trend will continue.

79. BH cannot therefore meet his own test. There is no reliable evidence to show that PS4 is “demonstrably unnecessary”. BH is in effect asking the inspector to conclude now that the ONS is clearly wrong and that, based on that most flimsy evidence, he is clearly right - 20 years out.

The Latest Data

80. The latest data (ESOCG2 para 3.2) is all inconsistent with the trend on which BH’s approach depends. South Ashford in particular has seen a significant rise in births in 2024.

The long-term trend

81. BH contends that assuming a static position post – 2032 is a fundamental reversal of the current trend²⁷:

- a. there is no such current downward trend for ABC or South Ashford for the reasons convincingly articulated by DA in XX – with his answers effectively closing down that line of questioning. The trend in births in Ashford has been level to moderately increasing since 2019 with the slight dip in 2023 being an outlier, as shown by the 2024 birth data (Para 4.12 - Graph 1 BH Education Statement and ESOCG2). This five-year trend cannot simply be ignored. DA also showed, from the evidence in BH Education Statement (Para 4.13, Table 5) that KCC were forecasting a stabilising of Year R roll numbers in the period 2026-33, meaning primary school rolls would stabilise. These forecasts have been

²⁷ BHP3.26 – “a complete turnaround from the projections for the ten years that proceed them”

accepted by BH as “highly accurate”. It is illogical for him then to attempt to argue primary school rolls will decline significantly after this period, when the trendline has already clearly changed; stabilised and does not reflect the downward trend BH then extrapolates;

- b. BH ignores the current upward movement – which even the SMF article graph shows;
- c. DA has been conservative as against the expert ONS projections in 2018 and 2025; and
- d. BH’s extrapolation of what he views as the current trend assumes a 52% reduction in PS pupil numbers by 2048. That is an incredible proposition based on no evidence and contrary to all expert views.

Conclusion on Fertility

82. What can be said with certainty is that the long-term fertility rate is uncertain but that the ONS projects it to rise and DA assumes it remains steady whilst, to make his client’s preconceived case, BH has to rely on it falling. What cannot be said with any confidence now is that fertility will drop to the point where PS3 is sufficient or that DA’s projections are other than conservative.

PS4

83. That then goes to the central question of whether the PS4 obligations serve a UP. KCC’s short case is that the evidence shows that there is a real prospect of PS4 being required and that it cannot be conclusively demonstrated now that it will not be (for the reasons given above and not repeated) - the provisions for it thus serve a UP.

84. It appears to be contended that even on DA’s approach there is no need for PS4 with reliance being placed on the 16 children point.

85. First, that figure is only on the alternative mix scenario - which is not accepted. In any event, the outcome on the 5750 and the mix may be somewhere in a spectrum from the MM to the Alternative Mix.

86. Second, this is 16 children per academic year – so 112 in total.

87. Third it is not based on the ONS’s projections, or latest data, but on a precautionary/conservative assumption of static pupil numbers after 2032 contrary to ONS projections.

88. Fourth, how things materialize will dictate the appropriate response. It may be that the birth rate is higher and thus more children may need to be accommodated. It

may be lower - in which case fewer children may need to be accommodated. The M&M approach provides the necessary flexibility to account for such uncertainty. *If the only* requirement is for 112 children PS4 may not be required and the funds may be used instead to extend another CG school (as allowed under the s.106) and the land released.

89. However fundamentally, the PS4 obligation serves the UP of allowing for PS4 to be provided if (as may well be the case) it is judged to be necessary in the light of the facts in the future. Applying BH's own (correct) test it cannot be now conclusively demonstrated that it is not needed.

Other Education Requests

90. KCC's modelling shows that the initial trigger point for provision of PS2 and PS3 can be adjusted to 1500 and 3150 respectively (but only as part of a package of other measures)
91. A M&M approach is supported in principle. HDL's current drafting is unacceptable because it does not guarantee delivery of the serviced school site at a fixed point in time to allow delivery of the school in the timeframe for which the initial trigger is set. This is the subject of ongoing discussions.
92. KCC agrees that the date of payments can be moved to reflect the changes in initial trigger points above but not to extend the gap between the initial trigger and the payment. This is because the current agreed payment obligations serve the UP of reimbursing KCC whilst the school is filling up *and* before it has to incur further forward funded expenditure on other schools. KCC is thus prepared to agree modifications which secure the same gap between the initial trigger and the payments as currently - but not to increase those gaps so as to require it to increase its capital committed with the forward funding of a further school starting before the costs of the previous school have been paid off. That serves a UP.
93. KCC does not agree to the changes in respect of PS1. The full costs have been incurred and the liability has arisen. The obligations serve the UP of reimbursing KCC for its expenditure and delaying or discharging the obligations does not serve that purpose equally well because it puts KCC out of pocket for longer. The bond was secured and had to be drawn down. Whilst not legally relevant under s.106B, CG will generate more than enough children to fill PS1 which was the reason it was provided in the first place. The fact the housing delivery has slowed at CG does not change that.

94. KCC does not agree to the removal of the bonds for PS2 – PS4. They are an essential *quid pro quo* for the forward funding (as adopted elsewhere – see e.g. Bond TP and New Dover Road example). They can be obtained in the market – see e.g. the bond for PS1. The need for the bonds has been amply demonstrated by the fact that the bond provided to date has had to be called on in default by HDL of its obligations.

95. KCC does not agree to any of the changes to its standard site transfer requirements – sch 15A. Provision of a level, fenced and fully serviced site with access at the outset serves the UP of: (1) ensuring that that which is necessary for the PS construction to commence is in place²⁸ in the agreed timeline and before construction is required to commence; (2) that the costs of provision of such a site are borne by HDL as assumed in the PS costing exercises (including by Brookbank) – so that the £6m indexed is available for the delivery of the school and not preparation of the site or provision of services to it; (3) to provide KCC with certainty that it can contract for and deliver the school unimpeded and that all that is necessary to allow the school to open on time is available to it without risk. The experience with the access and services to the secondary school shows how important it is that problems with securing services/accesses are at HDL's risk and not KCCs.

Other KCC Services

96. HDL continues to seek to fully discharge obligations in relation to contributions to library services (Sch 16 part 1), youth services (sch 16 part 2) community learning (sch 16 part 3), family social care (sch 16 part 4) and heritage interpretation (sch 25).

97. As set out in our opening, all these serve a UP of making the relevant provision.

98. The main arguments advanced at the inquiry (beyond the overarching point about viability) were that the contributions are duplicative either of provision which the CG development is already making (or will make if the request to modify Schedule 12 is granted) or of funding which should be provided via the chargeable Council Tax from the development.

99. KCC's topic papers explain why both arguments are misconceived. KCC's witnesses provided further clarification and explanation through their evidence.

²⁸ In re-examination JC confirmed that all the services were required for the construction and not just for the operation of the schools.

1. The obligations secure payments which are required to enable an increase in KCC services in terms which go well beyond a simple increase in floorspace.
2. For libraries,
 - a. The contributions are not only required to enable improvements to existing facilities and the intensification of their use, but also to provide the additional resources and equipment (such digital and physical media) which will be needed to meet the needs of the growing population resulting from the CG development. They were sought and agreed alongside a requirement to provide physical space in the form of a on site access point²⁹. They are not duplicative of it.
 - b. HDL seeks to circumvent this by reformulating the on-site physical space to offer a larger library facility on-site³⁰. However, a larger on site facility does not dispose of the need for off-site resources and equipment and is not in any event an acceptable offer given KCC's operational model. is additional to the provision of a library access point on site which sch 12 already requires. HDL's attempt is not an acceptable substitute and would be contrary to KCC's operational model.
3. The same point can be made for youth services, community learning and family social care. The contributions are secured in addition to any requirement to provide space and are not duplicative of it. Mr Collins' points about the capacity of the community hub building or availability of other spaces which could be used for community learning are nothing to the point.
4. In relation to council tax, the simple point is that any available portion of council tax revenue will not be available or sufficient to cover the additional investment which the CG development will require. That is why KCC's developer contributions guide seeks contributions for each of libraries,³¹ youth services³², community learning³³ and adult social care³⁴. There is no duplication at all.

²⁹ See both the terms of the s.106 as set out in the Topic Paper but also the minutes of the committee meeting at CD6.2 – ep 66.

³⁰ Via request 58

³¹ CD4.3.16

³² CD4.3.5

³³ CD4.3.2

³⁴ CD4.3.1

5. The suggestion that the heritage interpretation funding duplicates the scheme secured under condition 97³⁵ is also misplaced. As Mr Cuming explained, the archaeology scheme funded under Sch 25 is a community project aimed at increasing engagement and community understanding in relation to the heritage of the wider Chilmington Green area as a whole. It is distinct from the phase specific interpretation measures secured under condition 97 which relates to a much narrower set of professional work. As Appendix 13 of the Development Contribution guide explains, this is part of building a sense of place and helping to integrate new communities into Kent's existing social landscape³⁶. It is not divorced from the requirements of the NPPF but flows from what is now paragraph 218. It is already being spent on valuable projects, the removal of the obligation will not serve that purpose.
6. As on other topics, the arguments from HDL's witnesses tended to shade into questioning whether the contributions were necessary, which is not the test. Otherwise, they offered very little to advance their case. The Inspector asked for clarification on some matters which have now been provided.
7. As set out in opening, all of the obligations under Schedules 16 and 25 continue to serve a useful purpose and would not serve that purpose equally well if discharged.

Bonds

The Forward Funding Delivery Mechanism

8. There are a host of possible delivery models for infrastructure required under s.106 obligations including:
 - a. developer to fund and deliver the infrastructure with negative obligations re: occupation to secure delivery and/or provision of security in the event that the developer defaults;
 - b. developer forward funds KCC to deliver the infrastructure with payments tied to negative obligations re: occupations; or
 - c. KCC forward funds developments with the developer being obliged to make payments by instalments with those payments with some security for those payments.
9. Here, the delivery mechanism freely agreed and entered into for the sch 15 PSs and sch 18 A28DS is within sub-para c. above as follows:
 - a. The infrastructure is forward funded and built out by KCC;

³⁵ CD6.3 ep45

³⁶ CD4.3.13 at 1.2

- b. there are obligations on HDL to make payments by instalments; and
- c. those repayment obligations are secured by bond to ensure the risk falls on HDL not KCC.

10. The UP of the bonds is to provide security to KCC that its forward funding will be repaid and that the risk of default by the developer does not fall on KCC and the public purse. It is part of the *quid pro quo* for the forward funding and KCC would not enter into forward funding arrangements without them.

11. This is for the short and obvious reason that in the absence of the bonds, KCC would be exposed to the very risk of HDL default which HDL tells us the bond market refuses to cover (without full pre-payment) and the cost of that risk would be being transferred from HDL to the public. Thus, HDL's own evidence on the inability to secure the bonds given the default risk of HDL proves the need for there to be security for KCC before it forward funds.

PS

12. KCC is to build the schools. HDL is obliged to pay £6m index linked for each PS³⁷ in instalments. The bonds are required prior to a given number of occupations to secure those payments (see e.g. sch 15 para 6). No other security for payment of those sums is included in the agreement and no alternative is now offered.

13. Absent the bond there is no restriction on occupation until the sums are paid (and no such restriction on occupation until payment is made is offered). KCC would have no enforceable security. If HDL was not in a position to pay the sums due (as was the case with the bonded sum under PS1) KCC would have to litigate (as it is currently having to do for unbonded sums on PS1), secure a charging order against the land and then seek an order for sale when the land is already heavily mortgaged. That is no security for the forward funding.

A28

14. The s.278 was expressly entered into for the "purpose of securing payments by the developer to KCC to ensure that the A28 DS is provided at no cost to KCC" [sch 18A recital 2.5] (underlining added). That purpose remains fundamental to it and provides the justification for the bond.

15. No other security for KCC expenditure is offered. If there is no requirement for bond: (1) there is no occupation restriction in the sch 18 para 1; (2) there is no obligation on HDL to make any payments to fund the A28 at all (because there is

³⁷ Save for PS4 where the sum is less given that it is a 2FE site but with a

no obligation on Hodson to enter into a fresh s.278); and (3) irrespective as to (2) there will be no A28DS.

Availability of bonds

16. The bond topic paper shows that bonds are regularly required for forward funding of projects delivered by KCC in education and highways. They are not limited (contrary to the unevidenced assertions of ID and BH) to situations where the developer is constructing the infrastructure. ID did not engage with the Sturry example in his evidence or in the RT. There was no challenge to the evidence relating to the funding mechanism agreed for New Dover Road education provision.
17. Bonds are available in the market. See the bond paper to cover both highways and education provision. A bond was obtained here for PS1.
18. The issue with bond availability is clearly not to do with the market not being willing to provide them for developments or to provide them in large sums (*Sturry*) or to provide them for highways or education. The issue is that the market is not prepared to provide bonds to HDL. That is the only way of reading JC Appx VI. It is a function of the credit worthiness and past performance of HDL. There is no evidence bonds would not be available for this development (rather than this developer). If HDL cannot secure it alone then it will need to find a partner who provides sufficient comfort to the market to secure it.

INDEXATION

19. HDL seeks to move the indexation date from 2014 to 2018 because, it claims, indexing from 2014 results in the sums payable being more than required to deliver the necessary infrastructure.
20. The point is misconceived. From KCC's perspective the issue is most stark in respect of Primary Schools and this closing therefore focusses on this as did the evidence.

The Current S.106

21. Each PS Contribution is defined as £6m for that primary school or for Education Purposes³⁸ index linked. There is no request to vary that £6m which is an agreed 2014 estimate of the cost of a 2FE PS with early years (nursery) provision³⁹.

³⁸ Defined as other schools on the development

³⁹ See definition of "Primary School 1"

22. The “useful purpose” of the index linking is to account for relevant inflation over the years to ensure that the £6m retains its real value: ITP3.1.
23. Index Linking is provided for in clause 28.1 of the s106 agreement. It requires the relevant sum (here £6m) to be adjusted by the percentage change in the “Relevant Index”. The relevant index chosen as appropriate by the parties to the s.106 agreement for sch 15 (education) is the BCIS General Building Cost Index (“GBCI”).
24. The GBCI is a nationally recognised and commonly used index to track inflation in the construction industry - used as a matter of course in construction contracts and S106 agreements: see Indexation RT and ITP3.1. There is no claim and no evidence that it systemically overstates inflation when applied to schools.
25. Application of it simply fulfils the role of adjusting the £6m (2014) for inflation thereafter. That always was and remains the Useful Purpose of indexation and is KCC’s headline and simple point.

HDL’s Argument

26. HDL contends that the result of application of the index means that the obligations deliver more than the current cost of the relevant works. There are multiple answers to that.
27. First, even if that were so, it is irrelevant:
- a. under the s106, the agreement provides for a contribution that allows for delivery of a school to the specification which £6m represented at the time. Even if it is (which is denied) in the upper quartile then that is simply because that is agreed and provision of an upper quartile school would (if this was the case on the facts which it is not) serve the UP of providing a higher specification school than the norm.
 - b. under the s.106, if there was any surplus on say PS2, it could be spent on the other schools in the development (“Education Purposes”);
 - c. if the sums are not spent on those purposes then there is provision for repayment – sch 15 para 48;
 - d. the s.106 therefore already allows for the position if (which is not the case) that the £6m index linked is too high.
28. Second, this is really an attack on the £6m being too high at the outset – but there is no application to modify that sum.

29. Third, the claim that the indexed sum (now about £8.8m) is too high is plainly wrong (despite the contortions BB has had to go through in recent days to try to maintain its position to the contrary). CD14.23 shows that (all figures adjusted to Q1 2025):

- a. the outturn for PS1 was £9.4m⁴⁰ - well in excess of the indexed sum. KCC had to pay that excess. It was under a strong incentive to keep costs to the £8.8m sum and could not do so;
- b. the EBD OG National Benchmarking [DA Supplementary Bundle p5] provides a national cost benchmarking study for DFEE in November 2023. Page 16 provides a gross cost of £3731 sqm which when indexed equates to £11.2m [CD14.23];
- c. the DFEE Scorecard [DA Supplementary Bundle p39] shows cost per child of £26,967 for new build which when multiplied for student numbers is £11.6m [CD14.23]
- d. the BCIS Mean adjusted for the excluded items (£1.875m) is £9.625m
- e. the BCIS lower quartile properly adjusted for the excluded items is £8.62m.

30. All the data (other than that from HDL) shows that the £6m indexed is appropriate and, against most comparators, is well below the real cost of provision of a PS. It is on a par with the lowest quartile of BCIS appropriately adjusted.

31. HDL's approach is misconceived. Brookbank were provided with costs estimates by TH. They did not undertake their own assessment but relied on his figures. As a test, they used BCIS without adjusting for the factors that the BCIS costs do not include - a basic and fundamental error that they did not notice until it was pointed out to them by KCC's expert. HDL's building cost estimate (BCE) at £5.26m is so far off beam as to warrant no further comment⁴¹. The BCIS properly adjusted shows if £6m is indexed just from 2018 the figure which would be available under the amendment to the indexing would be £7.7m. *That is nearly £1m below the BCIS lower quartile adjusted figure⁴² (£8.62m).* BB's very late attempt to make a much lower adjustment should be rejected both procedurally and on the merits. The indexation as modified therefore does not serve the UP of keeping up with inflation or of ensuring that sufficient sums are available to the school.

32. Further, of course, the delivery model under the s.106 is for delivery by KCC not by HDL. The supposed in-house costs of HDL are therefore not relevant.

⁴⁰ The suggestion in RT that that is contradicted by the £8m in KCC's evidence ignores the fact that the school was completed a considerable time ago and the £8m is unadjusted. The £9.4m reflects the indexation of the sums spent on PS1.

⁴¹ It is 19% below the BCIS lowest ever recorded figure (adjusted for excluded items) of £6.51m

⁴²

33. Whilst not relevant to the s.106B test, KCC has every incentive to keep the costs down – for the reasons given by DA and not subject to any XX. First it is forward funding the schools. Money spent on a school is not then available for other priorities. Second, it carries that capital injection of a significant period – the lower that commitment the better for it. Third, any costs overrun are borne by it – the evidence shows that indexed £6m is unlikely to be enough. Fourth, these schools will be delivered under a value for money procurement framework which KCC uses when it is delivering schools. Value for money is thus built in.
34. The change of indexation (at least applicable to PS) is unjustified in principle.
- a. Indexation from 2014 serves the useful purpose of adjusting for relevant inflation from 2014 (the date the £6m was treated as fixed);
 - b. the amendment of the date makes no sense – it indexes from a date by reference to which the £6m was not set – the correct approach would have been to seek to argue that the £6m at the outset was wrong but that is not the basis of the modification sought; and
 - c. on the merits, the modification is based on the false premise that you can build a new PS for less than £8.88m. The indexed figure is below the range of actual costs in the real world. The costs put forward by Hodson have no credibility.

Viability

35. As explained orally, in the interests of avoiding duplication, KCC adopts as its own AL's evidence and ABC's XX of CW. It adopts and endorses ABC closing on:
- a. the legal relevance of viability;
 - b. the factual relevance of viability in respect of negative obligations;
 - c. even if relevant, the need for any modifications based on viability to be the minimum necessary to secure delivery and the failure of HDL to demonstrate with evidence from funders that the development is fundable with the proposed changes and not fundable with less than the proposed changes – a fundamental evidential gap.
36. KCC highlighted in opening its serious concerns about the non-provision of parcel sale information available only to HDL. HDL has now made three inconsistent excuses for failing to be transparent with this key information:
- a. First, it was said that the sales values could not be relied upon under the PPG. That is nonsense. Sales values for parcels are no different in principle from sales for houses and the latter is at the core of the plot valuation;
 - b. When that excuse was exposed, it was said that on examination the parcel transactions were not relevant. It turns out that lack of relevance is based

on TH's say so and no examination of the documents themselves – the same TH who invented the 7000 story. The Inspector should be very wary of relying on self-serving unevidenced assertions of TH (for reasons already addressed);

- c. When that excuse was exposed in XX, TH asserted for the first time that the transactions were confidential. He produced no verifiable evidence to that effect (not even the front page and the relevant clause); nor did he make any effort to get any confidentiality waived.

37. Confidentiality in any event is no excuse for him failing to give the £ value of the transactions.

38. Given HDL's refusal to provide the basic best evidence on parcel values, the only real world evidence is from AL as to the Barratt – that was not challenged in XX and TH did not dispute the £11m figure. That shows that HDL's parcel value assertions are grossly understated. No wonder TH refuses to reveal them because they would be fatal to his case.

39. The Inspector is thus invited to proceed on the basis that HDL is deliberately withholding the central relevant evidence on parcel values because it will be seriously harmful to its valuation case and to rely on what the Barratt material indicates.

Conclusion

40. Save for minor changes to sch 19 and 21 and to the triggers for PS2 and PS3 (and hopefully the M&M) which will be subject to drafting outside of the inquiry process, the appeal in respect of all of the modifications/discharges sought in respect of KCC should be dismissed.

David Forsdick KC

30th April 2025