



ASHFORD
BOROUGH COUNCIL

Statement of Case of the Local Planning Authority in respect of:

Land at Chilmington Green, Ashford Road, Great Chart, Ashford, Kent

Appeals 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.

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

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

Ashford Borough Council References: AP-90718 & AP-90647

Contents	Page
1.0 Introduction	2
2.0 The Council's approach in responding to this appeal	3
3.0 Appeal Site Context	4
4.0 Legal framework	11
5.0 Planning Policy and Guidance relevant to whether the section 106A(6) tests are met	16
6.0 Statement of Common Ground	20
7.0 Witnesses	20

Annexes

- A Schedule of the Council's responses to the proposed modifications
- B S106 Obligations Compliance Status - ABC Obligations

Appendices

- A Chilmington Green Area Action Plan (AAP) 2013
- B Chilmington Green Outline planning permission dated 6 January 2017
- C Ashford Local Plan 2030
- D Affordable Housing SPD 2009
- E Public Green Spaces and Water Environment SPD 2012
- F Chilmington Green Design Code SPD
- G Chilmington Green Design Code Regulatory Plan
- H Chilmington Green Quality Charter

1.0 Introduction

- 1.1 This Statement of Case is submitted on behalf of the Local Planning Authority (the “LPA”), Ashford Borough Council (“the Council”).
- 1.2 On 20 October 2022 an application was made to the Borough Council to discharge and/or modify multiple of the obligations under the Agreement dated 27 February 2017 between (1) Hodson Developments (Ashford) Limited and others (2) BDW Trading Limited (3) Ashford Borough Council (ABC) and (4) Kent County Council (KCC) (“the s.106 Agreement”) concerning land at Chilmington Green, Ashford Road, Great Chart, Ashford, Kent (“the Site”).
- 1.3 On 17 October 2023, the appellant submitted an appeal to the Planning Inspectorate (“PINS”) against the Council’s non-determination of the application. PINS made the appeal valid on the 5 July 2024 and at the same time requested additional documentation from the appellant. This was submitted by the appellant and PINS issued the appeal Start Letter on 5 November 2024.
- 1.4 The Council did not determine the application because it considered that it was invalid. However, the Council sought to engage, jointly with the County Council (“KCC”), in discussions with the appellant about the proposed modifications and, via letter dated 13 October 2023, proposed a series of meetings with Hodson to discuss and potentially agree amendments to the Agreement, without fundamentally affecting the balance of infrastructure and services necessary to support the Chilmington Green community. The appellant initially agreed to this proposal and the Council’s proposed dates for a series of meetings throughout February and March 2024. However, the appellant subsequently asked for the meetings to be delayed, and the meetings did not take place.
- 1.5 Prior to the submission of this application and related appeal, the appellant submitted two sets of requests, in 2020 and 2021 respectively, to discharge and/or modify several of the planning obligations in the s.106 Agreement. Hodson could not apply to modify or discharge those provisions pursuant to s.106A(3) TCPA 1990 at that time, therefore the Council considered those requests pursuant to s. 106A(1)(a) TCPA 1990. The Council, jointly with KCC, considered both sets of requests and largely rejected them. The response to the first requests (in October 2020) was the subject of a claim for judicial review by the appellant which was settled by consent in April 2021. This settlement precipitated the second set of requests, the response to which was also subject to a claim for judicial review by the appellant which was not successful because the High Court refused permission for it to proceed.

- 1.6 This Statement of Case responds to the application made on 20 October 2022 as updated and amended. The Council understands the appellant's case now to be comprised of the following:
- (a) A revised Statement of Case dated October 2023 but updated and served on the Council on 25 October 2024;
 - (b) A schedule of proposed changes updated to reflect the revised Statement of Case and illustrated by a version of the Agreement showing the effect of the proposed changes by way of tracked changes; both of which were supplied to the Council on the Inspector's direction on 25 October 2024;
 - (c) An updated and revised Explanatory Statement supplied to the Council on 1 November 2024.

2.0 The Council's approach in responding to this appeal

- 2.1 The Schedule attached as **Annex A** to this Statement contains the Council's response to each of the appellant's proposed modifications. The Council has approached each modification by asking the four essential questions which are applicable to an application pursuant to s. 106A(3) TCPA 1990 (refer to para 4.5 below). The Council has only responded in the Schedule to the modifications that involve obligations to the Borough Council. Obligations to the County Council are dealt with separately in their Statement of Case. Where an obligation applies to both the Borough and County jointly, the Schedule indicates which Council has responded on behalf of both Councils.
- 2.2 Where the appellant proposes to discharge an obligation entirely, the Council has responded only to that proposal to discharge and has not commented on any alternative (because the appellant made clear in correspondence earlier in 2024 that it was withdrawing any such alternatives previously referred to). If viability is the only justification put forward for a modification sought, then the Council has assessed the application on that basis.
- 2.3 Where there is inconsistency between the proposal put forward in the appellants proposed modifications table and the accompanying supporting material, including modifications that appear in the appellants' draft amended Agreement but are not referred to in their modifications table, the Council has highlighted this in their response. In these instances, the appellant should make it clear immediately what modification they propose to avoid any misunderstanding. The appellant should also make clear immediately if it appears the Council has misinterpreted any modification sought due to these inconsistencies between the different documents submitted.

2.4 The Council reserves its position as to the lawfulness of allowing the Appellant to amend or modify its proposals during the appeal process.

3.0 Appeal site context

3.1 Chilmington Green is a strategic urban extension located to the south of Ashford town centre that is proposed to deliver up to 5750 homes; a district centre; two local centres; a secondary school; four primary schools; shops; healthcare; sports and leisure facilities; and, significant areas of public open space, including a strategic park. The ambition is for Chilmington Green to be an exemplar Garden Suburb.

3.2 The Site is bounded to the west by the A28 which is a main arterial road between Tenterden and Ashford, from which access to the M20 (J9) is gained to the north-west of the Site. There is a network of 'C' and unclassified rural roads which run through the Site.

3.3 The development at Chilmington Green is guided by the Chilmington Green AAP 2013 ("the AAP") (refer to Appendix A) which forms part of Ashford's Development Plan. The AAP is a site-specific plan that "establishes a policy and delivery framework which provides clear and firm guidance to ensure that the Council's aims set out for Chilmington Green are achieved" (AAP paragraph 1.2).

3.4 The AAP was "influenced by the Chilmington Green masterplan which is a background document to the AAP" (AAP Paragraph 1.4). The masterplan comprises three strategic diagrams (AAP pages 131-139), which combined, establish "the broad location of a range of important uses proposed within the built footprint (such as the District Centre, the secondary school, the four primary schools, green corridors and SUDs), the proposed movement network (for vehicular and non-vehicular movements), as well as establishing an appropriate range of residential densities across the site" (AAP paragraph 1.6).

3.5 The AAP is supported by a Policies Map (AAP page 129) "that 'fixes' key elements of the Chilmington Green development. These include the extent of the AAP boundary and therefore where the policies in this AAP apply, the extent of the development, relevant constraints (including Ancient Woodland; listed buildings; the location of the 1 in 100 year floodplain); the principal vehicular access points for the site; as well as the location and size of both the strategic park and the secondary school" (AAP paragraph 1.9).

3.6 The AAP forms part of the context in which the appeal has been considered by the Council. The AAP must be read as a whole, but the following parts of the AAP are particularly material.

- a. The AAP and the Chilmington Green Masterplan set out the aspiration for the whole development to its 'end state' (AAP paragraph 1.8). This reflects the requirement of Policy CS5 of Ashford's then Core Strategy that the area should be planned '*in a comprehensive way that is linked to the delivery of key infrastructure*', and developed '*at a rate which is supported by the delivery of infrastructure and the elements required for a balanced, mixed community*' as a core aim¹. This is repeated in Chapter 2 of the AAP and in paragraph 11.30 which provides that properly planned infrastructure delivery is required alongside the development of new housing such that any significant gaps or shortfalls in provisions are avoided.
 - b. The Council's vision for Chilmington Green is summarised in AAP paragraph 3.1 as '*a truly sustainable new community, one which delivers a healthy balance of homes, jobs and local services, supports a viable, high frequency public transport service*'. This is also reflected in the development principles within AAP Policy CG1– refer, in particular, to principle (b) which requires that '*each main phase of the development will be sustainable in its own right, through the provision of the required social and physical infrastructure, both on-site and off-site*'.
 - c. Linked to this, AAP paragraph 4.27 explains that '*to make sure that each main development phase is as sustainable as possible, the delivery/funding of infrastructure will be based on a series of 'triggers', typically threshold numbers of homes completed. These triggers will help to guarantee that at all stages of the development, sufficient infrastructure will be in place to adequately serve the resident population*'.
 - d. AAP Paragraph 9.43 explains that there is a need to provide public transport in advance of the time at which such services might be commercially viable so as '*to provide the service at a point before travel patterns and behaviour become too established by residents*' and thus the services will need to be supported by developer subsidy.
- 3.7 It is clear from these parts of the AAP (and the AAP as a whole) that the timely delivery of infrastructure as the development of Chilmington Green progresses is a key objective of the AAP, so that a truly sustainable development is achieved.
- 3.8 Prior to the adoption of the AAP, a consortium of developers, including the appellant, made an application for planning permission ("the Application") in respect of the Site for a comprehensive mixed-use development ("the Development"). The Site is almost the entirety of the area covered by the AAP.

¹ The AAP remains extant, but the Core Strategy has since been replaced. The context here is provided by the AAP, albeit the Core Strategy forms part of the genesis of the AAP.

- 3.9 The Application was considered by the Council's planning committee on 15 October 2014. The planning committee received a written report on the Application from Council officers ("the OR"). In respect of the phasing and delivery of the Development, the OR stated in paragraphs 380 – 383:

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

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

382. The four Main AAP Phases are Phase 1 – The District Centre Phase (including the hamlet and the Brisley Farm edge); Phase 2 – The Central Phase; Phase 3 – The Southern Phase and Phase 4 – the South-Eastern Phase. In order to ensure that each Phase is sustainable in its own right, in line with Policy CG1(b), the AAP also includes a phased infrastructure Delivery Plan which sets out when key infrastructure will need to be delivered and how it is anticipated this will occur.

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

- 3.10 In respect of the viability of the Development, the OR stated in paragraphs 404 – 411:

"404. Policy CG0 of the AAP sets out the need to approve sustainable development proposals at Chilmington Green which are in line with the AAP without delay, and policy CG1 sets out the key development principles that will deliver a sustainable place, including many of the matters outlined above, and specifically social and physical infrastructure to support the day-to-day needs of residents. Phasing of that social and physical infrastructure is set out in Chapters 11 and 12 of the plan and its appendix 3 – the Infrastructure Delivery Plan. As usual, it is necessary and appropriate that these matters (along with others) are delivered within the context of a s106 Agreement with the Council.

405. From the start of negotiations on this scheme, the Applicant identified that the development would not be able to bear the full costs of developer

contributions sought by this Council through the AAP at this point in time. More recently the up-turn in the housing market has lessened those viability issues, but some still remain. Officers have therefore required that independent viability consultants were involved from the outset. A full cost plan has been produced and assessed – this shows the costs of community infrastructure as required and produced by service providers, and other infrastructure needed to facilitate the development (i.e. roads, sewers etc). All costs have been the subject of scrutiny between the Council’s providers and consultants and the developers [sic.] cost consultants.

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

408. Chapter 1 of the AAP deals with scheme viability. Para. 1.19 identifies that major housing developments tend to have heavily front loaded costs especially the main elements of new infrastructure (roads, utilities, off-site highway improvements etc.), but become relatively more profitable in their later stages. The viability appraisal carried out by the applicants demonstrates this is currently the case here [...] On current modelling, the whole scheme can just support a total of 10% affordable housing (if all other infrastructure needs are met) as required by the AAP, and the developers are looking to fix this for the first phase (in viability terms) of 1,000 dwellings; to put this into perspective the costs of a 5% additional tranche of [affordable housing] would be approximately £2m for that phase (an additional 50 dwellings). However, on present costs/returns the later phases of the development are viable.

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

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

Phase 1 = 1000 dwellings

Phases 2 – 8 = 600 dwellings each

Phase 9 = 550 dwellings ...”

- 3.11 The OR recommended that outline planning permission be granted for the Development. The planning committee agreed with this recommendation and resolved to grant outline planning permission on 15 October 2014.
- 3.12 The Council and the consortium of developers negotiated the Agreement to secure the necessary mitigation and infrastructure required for the Development. Those negotiations included extensive discussion of the issue of viability, as described in the OR, including the production of viability appraisals for the Development. The approach adopted following those viability appraisals was that the Development would not be viable in the first phase, but the viability would improve over time with each subsequent phase (as reflected in the OR – see above).
- 3.13 Following these negotiations, the Council issued the outline planning permission for the Development by a decision notice dated 6 January 2017 (“the Permission”). A copy of the Permission is provided in Appendix B. The Agreement was made on 27 February 2017. The outline planning permission has since been amended by non-material amendments 12/00400/AMND/AS, 12/00400/AM01/AS & 12/00400/AM10/AS and proposes the comprehensive mixed-use development on the Site comprising:
- up to 5,750 residential units, in a mix of sizes, types and tenures;
 - up to 10,000 m² (gross external floor space) of Class B1 use; up to 9,000 m² (gross external floorspace) of Class A1 to A5 uses;
 - Education (including a secondary school of up to 8 ha and up to four primary schools of up to 2.1 ha each);
 - Community Uses (class D1) up to 7,000 m² (gross external floorspace);
 - Leisure Uses (class D2) up to 6,000 m² (gross external floorspace);
 - Provision of local recycling facilities;
 - Provision of areas of formal and informal open space;
 - Installation of appropriate utilities infrastructure as required to serve the development, including flood attenuation works, SUDS, water supply and wastewater infrastructure, gas supply, electricity supply (including substations), telecommunications infrastructure and renewable energy infrastructure (including CHP in the District Centre);
 - Transport infrastructure, including provision of three accesses on to the A28, an access on to Coulter Road / Cuckoo Lane, other connections on to the

local road network, and a network of internal roads, footpaths and cycle routes;

- New planting and landscaping, both within the Proposed Development and on its boundaries, and ecological enhancement works; and
- Associated groundworks.

where appearance, landscaping, layout and scale are reserved for future approval and where access is reserved for future approval with the exception of the three accesses onto the A28 and the access onto Coulter Road/Cuckoo Lane

3.14 The Permission approved a series of parameter plans relating to land use; residential density; storey heights; open space; building parameters; footpaths and cycle routes; and access and strategic vehicular routes. Condition 14 of the Outline planning permission requires the development to be carried out in accordance with these parameter plans.

3.15 The Permission was subject to several conditions. Conditions 2 – 9 of the Permission set out the time periods for each phase, in particular conditions 2 and 3 concern the first phase of the Development (referred to as “Main AAP Phase 1”):

2. The development within each Reserved Matters Site within Main AAP Phase 1 (except for any Detailed Development within that Main AAP Phase) must be begun by no later than the expiration of 2 years from the date on which approval of the last Reserved Matter approved for that Reserved Matters Site within Main AAP Phase 1 is approved ...

3. All submissions for the approval of Reserved Matters for Reserved Matters Sites within Main AAP Phase 1 must be made by no later than the expiration of 6 years from the date of this permission ...”

Progress on site to date

3.16 The AAP envisaged that the Development would take at least 25 years to be fully built out, over four phases (CGAAP paragraph 1.15). The first phase: - comprising 1501 homes; a primary school; the district centre with a supermarket; retail units; public house; a community hub; employment uses; sports facilities; public open space and landscaping; and a frequent bus service to Ashford town centre, was envisaged to take circa six years to complete. The second phase: - comprising a further 1124 homes; a secondary school; the second primary school; further community and sports facilities; and the expansion of the bus service to Ashford town centre was anticipated to take a

further five years (AAP Appendix 3 – Infrastructure Delivery Plan, pages 153-158).

- 3.17 To date, reserved matters approval has been granted for 763 homes, the first primary school and the secondary school. Construction on the development commenced in 2017, however, over the past seven years only circa 370 homes in Phase 1 have been occupied alongside the first primary school, and the secondary school and a further circa 339 homes are currently under construction. The Development remains within both Main AAP Phase 1 and the first phase for the purposes of viability (refer to OR paragraph 411). The development is therefore being delivered at a significantly slower rate than envisaged in the AAP and when outline planning permission was granted.
- 3.18 Reserved matters applications were submitted in December 2022 and January 2023 for the remainder of the Main AAP Phase 1 land parcels: - comprising a further 745 dwellings; the district centre; sports facilities; ecological mitigation; flood attenuation and landscaping. The 6 January 2023 was the date by which all reserved matters applications for Main AAP Phase 1 land parcels had to be submitted in accordance with condition 3 of the Permission. These applications have not yet been determined, in some cases, due to on-going discussions with the appellant about how to secure nutrient neutrality for the schemes and, in other cases, due to amended drawings and additional information having been requested by the Council.
- 3.19 Since the Permission was granted several financial and non-financial planning obligations in the Agreement have fallen due. Some of these have been paid in full or in part or delivered on site. Others have been paid in full or in part by the Council withdrawing monies from the Developers' Contingency Bank Account, and others have not been paid at all. Consequently, the appellants are currently in breach of the Agreement. A schedule of the obligations that have fallen due that have been met and those that are in breach is provided in **Annex B**
- 3.20 An attempt to resolve numerous breaches of the Agreement was made in the latter half of 2022 which resulted in a Settlement Agreement between the appellant and the Council completed on 10 February 2023. The Settlement Agreement set out a pathway by which the breaches of the Agreement that existed at that time would be resolved. This included some of the outstanding monies owed by the appellant to the Council being withdrawn from the Developers' Contingency Bank Account with an agreement that the bank account would be replenished, in addition to the delivery of the CMO First Operating Premises; the first children's and young person's playspace and the initial bus service to serve the development. To date only the CMO First Operating Premises has been delivered, and the account has not been replenished.

4.0 Legal framework

4.1 Pursuant to s.106 of the Town and Country Planning Act (TCPA) 1990, 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 (see s.106(1)(d)).

4.2 A planning obligation may not be modified or discharged except pursuant to s.106A TCPA 1990 which so far as is material to this appeal provides:

- “(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 ...*

(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)*

...

(11) *In this section “the appropriate authority” means ...*

- (b) *in the case of any other planning obligation, the local planning authority by whom it is enforceable ...”*

4.3 The effect of s.106A (after 30 April 2016) is that modification or discharge of a planning obligation may occur in one of two ways: either (1) by agreement between the appropriate authority (as defined) pursuant to s.106A(1)(a) at any time; or (2) by an application pursuant to s.106A(3) after expiry of the “relevant period”. The “relevant period” for the purposes of s. 106A(3) is five years from the date when the obligation was entered into.

4.4 Under section 106(6) the two tests which fall to be applied are on a section 106A(3) application are:

- (a) For applications for the discharge of obligations, whether the relevant obligation “*no longer serves a useful purpose*”;

(b) For applications for the modification of obligations, whether the relevant obligation “*continues to serve a useful purpose but would serve that purpose equally well*” if it had effect subject to the proposed modification.

4.5 In determining an application pursuant to s 106A(3), there are four essential questions (the “Four 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), [2004] 1 P. & C.R. 39 per Richards J at [28].

4.6 The “useful purpose” in s.106A(6)(b) and (c) (reflecting the third question noted in the paragraph above) may, but need not be, the same as the original purpose for entering into the planning obligation (Garden and Leisure Group Ltd @46). See also R. (Renaissance Habitat Ltd.) v West Berkshire Council [2011] J.P.L. 1209 per Ouseley J at [33]. There is no requirement that the “useful purpose” needs to “relate to the impact of the development at all or to the same impact for which it was originally sought” (Renaissance Habitat at [34]).

4.7 A change in planning policy or circumstances such that the original charge would not now be sought in a new agreement does not mean that there is no useful planning purpose to be served by enforcing the agreement or anything unlawful in doing so: Renaissance Habitat at [41].

4.8 The application of s.106A does not require consideration of whether the obligation(s) in question would, if considered in the context of an application for planning permission, meet the tests under reg. 122(2) of the Community Infrastructure Regulations 2010 for a planning obligation to be a reason for granting permission. The obligation therefore does not need to be “necessary to make the development acceptable” or required by planning policy. See Renaissance Habitat @ [34] R and (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government [2019] PTSR 540 @ [40] & [48] Fordham J.

4.9 A determination pursuant to s.106A(3) and (6) is not a determination to which s.38(6) of the Planning and Compulsory Purchase Act 2004 applies. The planning merits of the development with the proposed modifications are not in

consideration. The application is not a new application for planning permission on different terms, nor is it an opportunity to change the essential basis on which the planning permission was granted or to undermine the planning balance on which it was granted. See R (Millgate Developments Limited) v Wokingham Borough Council [2011] EWCA Civ 1062 @ [29] Pill LJ.

- 4.10 That said, where the development would be unacceptable with the modification proposed, that will be a strong indication that the obligation continues to serve a useful purpose.
- 4.11 The question of whether the obligation serves a useful purpose is not confined to consideration of whether the obligation serves a useful *planning* purpose because the restrictive word “planning” should not be implied: See Mansfield at [38].

Viability

- 4.12 Viability is not relevant at all under s.106A(6) or section 106B. A modification or discharge cannot be justified on the basis that an obligation impacts on viability. If a development cannot be viably delivered that does not mean that its governing obligations do not serve a useful purpose. That purpose is to regulate the development if it proceeds, and the useful purpose of an obligation is in no sense contingent on the absence of an adverse effect on the delivery of the regulated development. Viability informed the extent of regulation imposed and which purposes fell to be secured by the obligations, but securing viability is not a “purpose” of any of the obligations.
- 4.13 Therefore, the fact that the development does not or cannot proceed for viability reasons, has no bearing on the purposes for which the obligations were sought and viability does not bear on any of the four questions which must be considered under section 106A(6).
- 4.14 There is nothing in the statutory scheme, the NPPF or the PPG which supports the Appellant’s contention that viability falls to be considered as a material consideration in a section 106A(3) application and ensuing section 106B appeal. Further, the legislative history of the 1990 Act supports the Council’s position that viability is not a material consideration in either.
- 4.15 As a consequence of the 2008 financial crash, Parliament legislated to enact section 106BA of the 1990 Act to allow the discharge of obligations where that was necessary to secure development viability. Viability issues could not satisfy the s.106A tests; the obligations continued to serve a useful purpose. S106BA was enacted to allow for discharge if viability considerations necessitated that. Had section 106A been suitable for addressing viability considerations, the amended provision would not have been necessary.

- 4.16 Viability is not therefore a matter which either must or may be taken into account in determining a section 106A(3) application or a section 106B appeal. The proper forum for consideration of viability issues is through planning applications which engage the section 38(6) duty and not via s.106A(3) applications. If a development cannot be viably delivered with a given obligation or obligations, that may impact on whether permission should be granted at all. That fundamental issue falls outside the scope of section 106A(3) applications and section 106B appeals.
- 4.17 In any event, even were it capable of being a material consideration as a matter of generality, viability can certainly have no relevance to the discharge of negative obligations. Such obligations are entered into because it is agreed that it is necessary that before the trigger event, the specified requirement is met. Such negative obligations act as a bar to further development unless and until the obligation is met for whatever reason. The fact that the obligation may not be capable of being met for viability reasons in no way affects its essential purpose which is to prevent development or further development progressing until it is.
- 4.18 If, contrary to its submissions, the Inspector rejects the Council's position above, he will need to consider the viability implications of the suite of modifications/discharges he is considering. The Council will seek to assess the value significance (in broad terms) of each modification/discharge or group of modifications/discharges to allow the broad scale of their impact on viability to be established. However, if viability is the basis for removing/deferring certain obligations, then a process will be required to ensure that the totality of the changes accepted by the Council or accepted by the Inspector is the minimum necessary to secure viability.
- 4.19 Notwithstanding the above, the Council has been prejudiced in responding to the appeal by the inadequacy of the viability evidence submitted by the applicant in support of their application and appeal, in particular, the absence of a Full Viability Appraisal. That prejudice will continue unless and until the appellant provides that Appraisal. Provision at exchange of evidence would be of very significant concern given that any response would need to be by way of rebuttal evidence providing little time for the Council to respond to the appellant's up to date position prior to the opening of the Inquiry.
- 4.20 The Council wrote to the Inspector on the 26 September 2024, providing a letter jointly with KCC, from Bespoke Property Services (the Council's jointly appointed viability consultants) which details the information that needs to be updated and why to enable the Council's viability consultants to fully analyse and comment on the appellant's evidence in relation to viability. To progress matters on viability in a timely manner the Council's viability consultant has sought to engage with the appellants consultant and discussions have taken

place. The appellant has helpfully indicated that it will provide its Full Viability Appraisal to the Council's prior to Christmas.

4.21 The Council reserves its position in relation to the substance of the Appellant's viability case until it has seen the promised Full Viability Appraisal.

5.0 Planning policy and guidance relevant to whether the section 106A(6) tests are met

5.1 The Council will refer as necessary to the following policy and guidance in demonstrating that the relevant section 106A(6) test either has or has not been met.

5.2 The relevant elements of the Development Plan for Ashford:

- i. the Ashford Local Plan 2030 (adopted February 2019).
- ii. the Chilmington Green AAP (adopted July 2013).

5.3 There are no Neighbourhood Plans relevant to the Site.

5.4 The Ashford Local Plan (see Appendix C) sits alongside the Chilmington Green AAP as part of the Development Plan and many of the policies with the AAP are consistent with the policies of the Local Plan which sets out the planning policy for the wider borough. The Council has referred to both the relevant AAP policies and the aligned Local Plan policies in its Schedule of Responses to the proposed modifications. The relevant policies are listed below.

Chilmington Green AAP

CG1	Chilmington Green Development Principles
CG3	The District Centre and High Street Character Area
CG8	Meeting the Recreational Needs of Chilmington Green
CG9	Discovery Park
CG10	Developing a Community
CG11	Highways and Access
CG12	Public Transport
CG13	Cycling and Walking

CG16	Indoor Sports & Community Leisure Provision
CG17	Social and Community Facilities
CG18	Provision of Affordable Housing
CG19	Sustainable Design and Construction
CG20	Sustainable Drainage
CG21	Ecology
CG22	Phasing, Delivery and Implementation

Ashford Local Plan 2030

SP1	Strategic Objectives
SP6	Promoting High Quality Design
HOU1	Affordable Housing
TRA1	Strategic Transport Schemes
TRA4	Promoting the local bus network
TRA5	Planning for Pedestrians
TRA6	Provision for Cycling
TRA7	The Road Network and Development
TRA8	Travel Plans, Assessment and Statements
ENV1	Biodiversity
ENV10	Renewable and Low Carbon Energy
ENV11	Sustainable Design and Construction – Non-residential
ENV15	Archaeology
COM1	Meeting the Community's Needs
COM2	Recreation, Sport, Play and Open Spaces

COM3	Allotments
COM4	Cemetery Provision
IMP1	Infrastructure Provision
IMP2	Deferred Contributions
IMP4	Governance of public community space and facilities

Other relevant policy and guidance

Affordable Housing SPD 2009 (refer to Appendix D)

Public Green Spaces and Water Environment SPD 2012 (refer to Appendix E)

Chilmington Green Design Code SPD 2016 (refer to Appendix F)

5.5 The Chilmington Green development is also guided by the Chilmington Green Design Code SPD (the “Design Code”) July 2016. The Design Code was prepared on behalf of the Chilmington Green Consortium. The Design Code is to be read in conjunction with the “Chilmington Green Design and Access Statement submitted with the Outline Planning Application” for Chilmington Green (Design Code page iii). Refer to the Chilmington Green Design & Access Statement (CGD&AS) dated July 2012, and the Addendum to the Chilmington Green Design & Access Statement (Addendum CGD&AS) dated September 2013, both prepared by John Thompson & Partners.

5.6 The Design Code aims to ensure that a high-quality environment is delivered, including a sequence of public spaces and a variety of character areas. “The purpose of the Design Code is to set clear guidelines and establish design controls within a well-structured masterplan framework to assist in the preparation and approval of reserved matters applications” (Design Code section 1.5, page 3). The Design Code includes a Regulatory Plan (refer to Appendix G) which “provides all mandatory requirements on a single scalable drawing, that must be adhered to in order to achieve the vision for Chilmington Green” (Design Code, Section 1.1, page 1).

Chilmington Green Quality Charter (refer to Appendix H)

5.7 The Quality Charter is a statement of intent and a set of practical steps that all the developers at Chilmington Green have committed to. It is intended to guide progress towards the goal of creating a vibrant community and a very special place at Chilmington Green. The Charter is divided into the following key themes, with a set of specific actions for each theme: - making a successful

community; great homes that meet changing needs; designing a great place; and, delivering a great place’.

National Planning Policy Framework (NPPF) 2023

- Section 2 Achieving sustainable development
- Section 5 Delivering a sufficient supply of homes
- Section 6 Building a strong, competitive economy
- Section 8 Promoting healthy and safe communities
- Section 9 Promoting sustainable transport
- Section 11 Making effective use of land
- Section 12 Achieving well-designed and beautiful places
- Section 15 Conserving and enhancing the natural environment
- Section 16 Conserving and enhancing the historic environment

National Planning Practice Guidance (NPPG)

Design: process and tools

Healthy and safe communities

Historic Environment

Housing needs of different groups

Housing for older and disable people

Natural environment

Open space, sports and recreational facilities, public right of way and local green space.

Planning obligations

Renewable and low carbon energy

Town centres and retail

Transport evidence bases in plan making and decision taking

Travel Plans, Transport Assessment and Statements

Viability

6.0 Statement of Common Ground

- 6.1 The Council has received a copy of the appellant's draft Statement of Common Ground and will work with the appellant to agree a final draft.

7.0 Witnesses

- 7.1 The Council provisionally proposes that expert evidence will be presented on matters relating to 'Planning' and 'Viability'.