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

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

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

OPENING COMMENTS ON BEHALF OF KENT COUNTY COUNCIL

1. KCC endorses, adopts and does not repeat the opening of ABC.

2. In respect of s106 obligations relating to KCC, the existing s.106 obligation provides a freely agreed framework for delivery of the infrastructure necessary to ensure the development of 5750 units at Chilmington Green ("CG") is sustainable and does not create severe impacts (highways – sch 18, 19 and 21) and provides residents with the essential social infrastructure they need (education and other KCC services – sch 15, 16, 25).

3. Hodson now seek very wide-ranging changes to its obligations. In so doing it applies the wrong legal test. The question is not whether the obligation meets the reg 122 tests or is necessary to make the development acceptable or is reasonable and viable[1] but whether it serves a useful purpose (which is not even constrained to the original purpose or any planning purpose). It is clear that the ultimate question the Appellant poses is whether the development is viable with the suite of obligations. If not, it claims, the obligation cannot serve a useful purpose because the development will not be delivered. That approach is misconceived in principle for the reasons given by ABC.

4. Properly understood, the statutory test for discharge is not met if the obligation continues to serve *any* useful purpose. This is a high bar for an applicant but not a surprising one. The statutory scheme created by Parliament creates a narrow statutory entitlement for modification or discharge but in a context where (i) LPAs retain a wide discretion to act in the public interest including by agreeing, modifying or deciding not to enforce an obligation, such decisions being subject to judicial review as appropriate and (ii) those subject to the obligation can always apply for a new planning permission (whether a full

[1] The various ways the Appellant has put the test over time

application or under s.73) upon which application and/or any resulting appeal the planning balance can be reconsidered.

5. Set against the statutory test, properly understood, it is impossible to contend that preventing further development until the funding of the A28 dualling scheme is secured does not serve any useful purpose.

6. As to modification, that is only possible under s.106A if the obligation will continue to serve a useful purpose "equally well" – partially meeting the purpose or delaying the delivery of the purpose is not sufficient. In particular, passing risk to KCC, delaying payment or paying lesser sums to KCC does not, <u>by definition</u>, serve the purpose of obligations to reimburse KCC for forward funding expenditure by it. Yet that is what is sought across KCC services and in particular education.

7. It is appropriate to address the key elements shortly in Opening.

<u>A28 Dualling Scheme</u>

8. The changes sought to sch 18 (and sch 18A) are the most dramatic and far reaching. The Appellant seeks to remove <u>*any*</u> enforceable obligation to deliver the A28 dualling scheme ("the A28 DS") at all[2].

9. If accepted, there will be no route to securing the A28 DS. CG will be able to proceed without the key highway infrastructure necessary to make its development acceptable and severe implications for the highway network will result.

10. The allocation of CG for 5750 units was, from the outset, always predicated on the A28 DS between the Matalan and Tank Roundabouts at the expense of the developer[3].

11. That was for the short and obvious reason that there was inadequate capacity on that part of the highway network to accommodate the increased flows associated with the development of CG. The A28 DS was necessary, not least, to ensure that CG did not generate unacceptable and severe impacts on the highway network.

12. The policy and highway imperative is embodied in sch 18 para 1. There was to be a forward funding structure. KCC would contract for the construction of the A28 DS but would only do so when it had the required bond which provided security that its expenditure would be repaid. Absent the bond, KCC would not contract for the A28 DS for the obvious reason

[2] Or indeed any improvements to the A28 in that location beyond the minor works required by the Possingham permission.

[3] See Hogben proof at 3.1-3.8 and CD4.6 at paras 9.17-24.

that the financial risk of default by the developer would be being passed to it and that it could end up bearing the cost of the scheme.

13. That was and remains a non-negotiable. KCC has no means to fund the A28 DS and there are no other public funding pots. If CG is to go beyond 400 occupations, the developer has to secure the bond to allow KCC to commit to contracting for its construction.

14. The fundamental need for the A28 DS is not in dispute. Mr Dix's own evidence at Possingham showed how severe the impacts would be (even with about just ½ of the CG development and even after the Possingham works to the Matalan roundabout and the Loudon Way junction)[4]. KCC's VISSIM work confirms the basic point that the A28 DS is fundamental to the acceptability of further development at CG.

15. Yet, without engaging with that fundamental impediment to development at CG, the Appellant seeks to discharge the requirements of sch 18 para 1 on the basis that: (1) it cannot obtain the requisite bond; and (2) the requirement makes the development unviable.

16. As to (1), KCC has produced clear evidence that bonds to support equivalent obligations to this are obtainable in the market and have been secured elsewhere. Correspondence from Hodson's agent in 2016 and 2021 confirm that position in relation to the CG development itself. It appears that any inability to obtain a bond is a function of the particular circumstances of Hodson. There is no evidence that its funders could not obtain a bond or provide equivalent security.

17. As to (2), the viability case is considered below. It is not accepted that delivery of the A28 DS is not viable.

18. In any event, those two issues miss the central point. If there is no ability to provide a bond or the provision of the bond and funding of the A28 would make the development unviable, then the development cannot proceed further. Sch 18 para 1 serves the purpose for which it was imposed of preventing any further development - because allowing CG to proceed without the A28 DS being secured would be unacceptable.

19. Thus, in a nutshell, sch 18 para 1 serves the useful purpose of preventing the development going beyond 400 occupations without the bond - the bond being fundamental to unlocking the delivery of the A28 DS. Without the bond, there will be no A28 DS and thus further development would be unacceptable.

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[4] See Hogben proof at 7.1-7.8.

20. The Appellant also seeks discharge of payment obligations in the s.278 agreement (sch 18A). That agreement was entered into in 2017 [CD10/18]. It is not possible through a s.106A application to vary a separate deed lawfully entered into under s.278.

Education

21. The short point is that provision of education spaces at the right time at the expense of the developer serves a useful purpose of meeting education need without reliance on public funding.

22. The s.106 meets that basic purpose through a scheme of obligations premised on forward funding and construction by KCC – which in turn explains: (1) the bonds, the indexation and the repayment obligations and their timing; and (2) the site transfer and access requirements.

Education Need

23. All but two of the myriad of points relied on in the Education Statement of 23rd December 2024 have been abandoned and there is a comprehensive statement of common ground which essentially reflects KCC's approach, figures and analysis.

24. There are two remaining issues in terms of assessing education need: (1) the mix of units to be assumed at this stage in deciding whether there should now be changes to the education obligations for the life of the development; and (2) the primary school population trajectory after 2033.

25. As to (1), irrespective as to the precise housing mix assumed, applying KCC's method there is still predicted to be a need for PS4 towards the end of the build out of CG [SOCG 3.4]. The point, thus, goes nowhere.

26. In any event Condition 100 is permissive of a mix including the Melton Mix – the short point being that, unless and until C100 is amended, the Melton Mix is a possible outcome here. There is no s.73 application to amend C100 to tie the mix to that assumed by Mr Hunter. Thus, the Melton Mix could still be delivered and the s.106 has to continue to reflect that potential situation.

27. Recently, Mr Hunter has claimed that: (a) the mix in the early phases has been of more flats and fewer houses than the Melton Mix (about 20% flats not the third he originally sought to rely on); and (b) that there is inadequate land to deliver 5750 with the Melton Mix. As to (a), many of the parcels in the early phases are in areas originally identified for higher density development. It is not therefore surprising that the mix to date has not

reflected the Melton Mix[5]. As to (b), the 5750 was reflected in and derived from the density parameter plan with the outline planning permission. Despite repeat requests, Mr Hunter has produced no evidence that CG cannot accommodate 5750 units with the Melton Mix. Mr Collins provides no evidence to support his assertions in this regard either.

28. As to (2), we are here concerned with primary school pupil number predictions out to 2048 – for a period well beyond that which current data on births extends to (for obvious reasons). There is obviously uncertainty as to the level of primary school demand so far into the future – based as it will be on fertility rates, immigration profiles and policies; consequent births and consequent pupil yield then occurring. Modelling and projections are therefore needed now to determine whether *now* it can be said with confidence that in 20 years or so time there will be no requirement for PS4 such that the obligations in respect of it now serve no useful purpose.

29. Mr Hunter, based on no evidence, no modelling and only on unevidenced assertions directly conflicting with the expert analysis of the ONS, assumes the continuation of the current "trend" to show a very steep decline in primary student numbers over the build-out period to 2048. That flies in the face of all the evidence. First, part of the current "trend" is explicable by one off factors (a bulge in births now working its way through the school system)- there is no evidence those will repeat. Second, and more importantly, when looking into the medium term, it is always the case that - by definition - projections are required. In that regard, there is a well-established, nationally adopted ONS methodology for looking further ahead – and is used for long term planning of public service provision (as here). The ONS provided borough specific projections to 2043 in 2018 [DAP/67]. That shows the births in Ashford staying broadly flat in the short term before increasing from 2030 – the opposite of what Mr Hunter assumes: see SoCG para 3.2 bullet 8. There is no warrant to adopt his approach. He focusses on the supposed uncertainty in the ONS work (especially on future fertility) but produces no evidence in support his view which is the direct opposite of what the ONS has modelled. Most recent (2025) ONS data overall (not borough specific) shows a 6% reduction in primary pupil numbers over the relevant time frame – compared to his (incredible) 53%. His assumption (and that is all it is) is implausible and no possible basis for amending the s.106 now.

30. In any event, if things turn remotely as he claims, the monitor and manage approach will ensure adequate but not excess places are provided at the right time. If it turns out that PS4 is not required in (say) 2040 then it will not be required. KCC is hardly going to require a school to be built which it does not need.

[5] It is notable that the FVA adopts the Melton Mix – consistency is required between the FVA and the ENA

Contributions

31. The sch 15 obligations serve the purpose of ensuring there are adequate places at the right time funded by the Developer under a scheme of forward funding by KCC the essential *quid pro quo* for which was the bonds, the indexation and the payment schedule. The statutory test for discharge or modification is not met in respect of any of them.

32. The s.106 embodies a *forward funding package* – KCC builds and funds the schools at the outset (not least to assist the developer's cashflow) but it only does so on the basis of a package of requirements to ensure that that is at no ultimate cost and no risk to it – hence the bonds, the indexation and the phasing of payment obligations – whilst not tying up its limited capital funds for prolonged periods at the expense of other necessary projects elsewhere.

33. Now the developer seeks to have all the advantages of the forwarding funding by KCC without the corresponding obligations (or with delayed obligations)- transferring burdens properly borne by it onto KCC and the public.

34. The *forward funding package* embodied in the s.106 obligation serves the useful purpose of ensuring the schools are built in a suitable timeframe (not too soon and not too late) so that they gradually fill as more houses are built, whilst assisting the developer's cashflow by avoiding it having to pay the full costs up front. In return, KCC delivers the schools and provides the forward funding for them with obligations on the developer to repay the sums incurred in a relatively short time scale with indexation and security provided. The obligations on the developer serve the useful purpose of ensuring that, under a forward funding model, the cost of the schools falls on the developer – not the public.

Requests

35. There is no power to amend to require repayment (A68). If the relevant obligations are discharged, the issue as to repayment is a legally separate one.

36. The sums on PS1 have been incurred. *Mansfield* applies. The purpose is to repay the forward funding provided by KCC to deliver PS1. Indexation is addressed below.

37. The current evidence shows that there is a need for PS4 under either dwelling mix.

38. A monitor and manage approach is appropriate but it must be tied to the (now largely common ground) assessment of education need.

Other KCC Services

39. The Appellant also seeks to 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). All these serve a useful purpose of making the relevant provision.

40. The only substantive arguments advanced in relation to these are 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.

41. KCC's topic papers explain why both arguments are misconceived.

42. 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. So, by way of example, for libraries 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. That is additional to the provision of a library access point on site which sch 12 already requires. The Appellant's attempt to offer a larger library facility on-site[6] is not an acceptable substitute and would be contrary to KCC's operational model.

43. 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 youth services[7], community learning[8] and adult social care[9]. There is no duplication at all.

44. The suggestion that the heritage interpretation funding duplicates the scheme secured under condition 97[10] is also misplaced. 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 relate to a much narrower set of professional work.

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[6] Via request 58
[7] CD4.3.5
[8] CD4.3.2
[9] CD4.3.1
[10] CD6.3 ep45

Indexation:

45. The case on indexation is misconceived:
    a. the s.106 makes provision for indexation - it defines the applicable index judged and agreed to be appropriate for the subject matter;
    b. those indexes are, by definition, a measure of inflation in the period since in the relevant part of the economy – the precise matter with which we are here concerned;
    c. they are an objective and independent assessment based on best available industry data of inflationary pressures relevant to the areas that they cover;
    d. those indices are used as a matter of course in contracts and s.106 obligations;
    e. there is no evidence of any systemic problem with those indices overstating inflation;
    f. there is no reason to second guess them – they are included as what was judged a suitable proxy for inflation and thus avoid having to review the cost estimates later – they serve the purpose of being adjusting for (or being a proxy for) inflationary pressures.

46. This establishes a formidable evidential hurdle against which, in fact, the evidence points decisively against the adjustment to the index date. PS1 is a good example from KCC's perspective:
    a. costs with indexing from 2014 broadly reflect actual costs incurred whilst costs with indexing from 2018 are much less than actual costs incurred[11];
    b. costs with indexing from 2014 reflect the DFEE benchmarking data – costs with indexing only from 2018 do not do so and very significantly understate cost;
    c. there are multiple flaws in the Brookbank assessment which is inconsistent with government benchmarking, actual costs incurred and the application of the relevant indexation. There are multiple fundamental flaws in the Brookbank assessment.

47. The effect of the modification will thus be to build in an underpayment of the costs of the relevant infrastructure and does not provide any uplift mechanism if the true costs are higher than it yields.

48. Conversely, the existing s.106 addresses the situation if indexed costs exceed the actual costs. If it transpires that the amount paid exceeds the cost of the relevant infrastructure there are repayment obligations. The s106 thus already addresses the alleged issue which this modification seeks to address.

[11] [Indexation Topic Paper para 3.3.4]. On the Appellant's approach just £7.023m would have been made available for PS1 when actual spend at January 2024 was £7.890m – a considerable shortfall

Bonds

49. The bonds provide the only security for KCC when embarking on forward funding of infrastructure necessary to support the development and to be ultimately funded (by instalments) by the developer. They are the necessary agreed *quid pro quo* for KCC agreeing to forward fund that infrastructure rather than the developer having to do so itself. Absent the bonds, there would be no forward funding by KCC and the developer would have had to come up with an alternative mechanism to fund the infrastructure in advance.

50. There is no triple lock: (1) most of the occupation "locks" are tied to the bond so if the requirement for the bond goes, so too does the occupation lock. In any event those occupation locks do not secure the payment - they only secure no more occupations until payment - a different thing; and (2) the schedule 30 bank account is plainly inadequate in quantum and was not designed as and is not a substitute for the bonds. Sch 30 is in any event sought to be discharged (and it does not cover the relevant contributions anyway). The bond is the only security for recovery of the forward funded sums in the event of default by the developer.

51. The logic of Lieven J[12] applies.

52. The history here shows the necessity for the bonds: PS1 C4. On the Appellant's case whenever that situation repeats itself here, the burden would fall directly on KCC rather than the developer.

Viability

53. KCC does not repeat the opening comments of ABC. It however, formally, for the last time, make the following request of Hodson – that it provides all sales values achieved for all parcels sold to date together with the essential terms of such sales including any required contributions to infrastructure and s.106 costs or any obligation to provide any such infrastructure or "in kind" s.106 provision.

54. That information is plainly material to the exercise – indeed is central to it. The Quod FVA seeks to assess the viability of the master developer role, not of a housebuilder delivering CG as a single development project. A key input to that assessment is the sums which the master developer would receive from parcel developers/housebuilders for each parcel. If there is direct market evidence available of that input, then it would, subject to any issues about its true comparability, normally provide the best and most reliable source of

[12] In her decision refusing permission on Ground 4 in case [2022] EWHC 3466 (Admin) at paragraph 20.

evidence for it[13]. As will be examined in cross-examination, the excuses for not providing it are misconceived.

55. If that information is not provided, KCC will be making a submission that no weight can be attached to the Quod FVA. No rational decision maker can rely on a FVA on behalf of an Appellant when the Appellant refuses to provide information known only to it which goes to *the central income* line of the master developer appraisal and instead adopts only a modelled assessment which ignores the real world market evidence.

56. This has nothing to do with an *expenditure* line (land cost) being relied on to reduce s.106 obligations. It is simply about market evidence.

57. A mainstay of the Appellant's case appears to be the claimed lack of viability of the continuation of the development with the level and timing of the existing obligations. First, it is not accepted that viability is a material consideration under s.106B - because it does not go to the question as to whether an obligation serves a useful purpose. Second, where there is a negative obligation, it serves the purpose of preventing X until Y occurs. If Y is not viable then X cannot occur – the obligation will have served precisely its purpose. Third, the viability case is seriously flawed in multiple, highly value-significant respects. Fourth, and fundamentally, the Appellant has failed to provide basic and fundamental information known only to it and which is central to the FVA.

Other matters and conclusion

58. KCC echo ABC's concern as to the way in which their conduct in seeking to support the delivery of CG has been misrepresented in the Appellant's evidence. Like ABC, KCC considers it has taken every reasonable step available to avoid matters reaching this juncture which include, for KCC, support in lobbying DfE to support the delivery of the secondary school through the Wave Programme; support in engaging with Homes England and SELEP to secure funding for the A28 DS; agreeing to spread secondary school contributions across a longer period of time; entering into a loan agreement with the Appellant to fund the access to the Secondary School; and stepping in to provide sustainable access routes to PS1 where the Appellant had failed to do so. In addition, notwithstanding, the numerous breaches of contract and obligation which have arisen, KCC has consistently shown itself willing to act constructively and reaching appropriate compromises wherever possible.

[13] See the RICS Guidance Note on Comparable Evidence in Real Estate Valuation (referred to in the Professional Standard "Assessing viability in planning under the National Planning Policy Framework 2019 for England" (April 2023)) at section 4. In the courts, an equivalent approach to the hierarchy of evidence available for the valuation of hereditaments was set out in ***Lotus & Delta Ltd v Culverwell (V.O.) and Leicester City Council*** [1976] R.A. 141

59. Like ABC, KCC will correct to the extent necessary the many factual errors in the Appellant's evidence – in particular that of Mr Collins and Mr Hodson.

60. In due course, KCC will invite the Inspector to dismiss the appeals.

David Forsdick KC

Matthew Dale-Harris

18th February 2025