**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 DEVELOMPENTS (CG THREE) LIMITED**

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

**OPENING STATEMENT**

**On behalf of**

**ASHFORD BOROUGH COUNCIL**

**Introduction**

1. There can be few instances where the provision of appropriate and timely infrastructure is of greater importance than when developing a major urban extension based on Garden Suburb principles. By far the largest part of the new South of Ashford Garden Community is Chilmington Green. Whether Chilmington Green is both to embody successful placemaking and be a sustainable and thriving new community, as required by the terms of its governing section 106 Agreement, are ultimately the central questions in these appeals. Whilst the Appellant seeks to portray its appeals as seeking to defer compliance with existing obligations rather than removing or avoiding them,[[1]](#footnote-1) the extensive suite of well over 100 changes which it seeks includes more removals than deferrals and will substantially undermine the purpose of those obligations to the very significant detriment of the public interest.
2. Whilst the Appellant seeks to attribute the blame for the slow progress of the development and its own breaches of many obligations on a whole host of factors said to be beyond its control, its portrayal of the facts is not an accurate one. Although a site such as this will inevitably have delivery challenges over the course of its development, those are capable of being managed in a way which will provide the viable return on its investment which the Appellant seeks. Further, both Councils have shown appropriate flexibility to assist this to happen, it being in both their interests that the development (appropriately regulated by the planning obligations) proceeds.
3. This s.106B appeal is against non-determination of applications under s.106A(3) 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 supplemental agreement dated 29 March 2019 and deed of variation dated 13 July 2022) (“**the Agreement**”). In these opening submissions, we outline the reasons why the statutory tests for modification or discharge are not met.
4. In the vast majority of cases, the Appellant accepts the obligation it proposes to modify/discharge does still serve a useful purpose: the justification is really simply one of the claimed effect on the viability of the development. In relation to the Appellant’s viability claims ABC makes two responses. Firstly, reliance on viability as a relevant “purpose” in a section 106A application and consequent section 106B appeal is misconceived as matter of principle. Secondly, on the evidence the Appellant has not begun to justify the modifications and discharges which it is seeking.

**Relevant background**

1. Chilmington Green is a strategic urban extension located to the south of Ashford town centre. The aim is for it to create a positive and lasting legacy for the town[[2]](#footnote-2) as an exemplar Garden Suburb, and to deliver up to 5750 homes; a district centre; two local centres; a secondary school; four primary schools; shops; healthcare; sports and leisure facilities; with significant areas of public open space including a strategic park. It is to be “a truly sustainable new community”.
2. As to the genesis of the vision for Chilmington Green, Policy CS5 of the Ashford Core Strategy 2008 identified the Chilmington Green area for major urban extension. This set the framework for the development of an Area Action Plan to guide the detailed planning of the area, and ensure it would be planned and implemented in a comprehensive way that is linked to the delivery of key infrastructure. Core aim (d) of Policy CS5 set out the need for the Area Action Plans to identify and ensure that off-site and on-site infrastructure would be provided, when needed, linked to the rate of development of the site.
3. This was taken forward in the Chilmington Green Area Action Plan (the “AAP”)[[3]](#footnote-3) which set out the aspiration for the whole development to its “end state” (AAP paragraph 1.8), and this is reiterated at 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 provision are avoided. These principles are enshrined in AAP Policy CG1 which at (b) 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.” AAP paragraph 4.27 refers to the use of triggers to guarantee that at all stages of the development there is sufficient infrastructure in place “adequately to serve the resident population”.
4. In that connection, a phased Infrastructure Delivery Plan was set out at appendix 3 to the AAP, providing four phases. These phases balance an evenly spread timescale for infrastructure delivery with ensuring the necessary infrastructure was in place at the appropriate time.
5. The application for outline planning permission for almost the whole of the AAP area came before planning committee on 15 October 2014 with an Officers’ Report (“**OR**”)[[4]](#footnote-4) providing a recommendation to grant, and discussion of the phasing of the development at paragraphs 380-383. The conclusion at 383 was that the documents submitted with the application complied with the approach to the four main phases set out in the AAP. In relation to viability, the OR provided at paragraphs 404-411 a summary of the work that had been done to establish that the development would be deliverable, which included setting out a greater number of phases for viability review purposes than were provided for in the AAP itself.
6. The committee resolved to grant permission[[5]](#footnote-5), and negotiation followed with the developers over the Agreement (which included detailed and extensive consideration of viability matters, with agreement that the Development would not be viable in the first phase, but that viability would improve over time in subsequent phases). ABC granted outline planning permission on 6 January 2017[[6]](#footnote-6), with the Agreement being dated 27 February 2017.[[7]](#footnote-7)
7. The Agreement was entered into freely by the Appellant in full knowledge that the AAP and its planning application provided for a 5750 dwelling scheme and with a very detailed understanding of the required infrastructure and importantly, its costs. Whilst the Appellant makes much of the fact that it assumed a “Master Developer” role in relation to the development, it did so in full knowledge of the extent of the obligations it was assuming and their costs implications.
8. Progress on site to date has not been as hoped for. The AAP envisaged the first phase (comprising 1501 homes; a primary school; district centre with a supermarket; retail units; public house; community hub; employment uses; sports facilities; public open space and landscaping; and a frequent bus service to Ashford town centre) would take approximately six years to complete.
9. To date, reserved matters approval has been granted for 763 homes, the first primary school is in place and the secondary school is under construction.[[8]](#footnote-8) Although construction commenced in 2017, over the past seven years only approximately 370 homes in Phase 1 have been occupied alongside the first primary school, and the secondary school is due to open in September 2025, with a further 339 homes currently under construction. Reserved matters applications for the remainder of Phase 1 were submitted in December 2022 and January 2023, and for Phase 2 in January 2025. These applications include the remaining Phase 1 dwellings, 1222 dwellings in Phase 2 and the District Centre; sports facilities; ecological mitigation; flood attenuation and landscaping.[[9]](#footnote-9) ABC is currently constrained in its ability to approve further reserved matters applications for dwellings by the issue of Nutrient Neutrality[[10]](#footnote-10), but it has engaged constructively on these applications to enable the grant of early approvals when that constraint is addressed. However, the progress of many is held up awaiting further information from the Appellant.
10. As to performance of the Agreement, a number of financial and non-financial obligations have fallen due. Whilst some contributions have been paid or partially paid, invariably without the necessary indexation, and in most cases late, and some obligations have been complied with by delivery on site, delays in paying others have necessitated ABC having to withdraw monies from the Developers’ Contingency Bank Account to deliver compliance. Compliance with some remains outstanding. The Appellants are currently in breach of the Agreement.[[11]](#footnote-11)
11. ABC has sought to be constructive in relation to breaches. For example, on 10 February 2023, it entered into a Settlement Agreement with the Appellant to seek to resolve the then numerous breaches of the Agreement, setting a pathway to remedy the breaches and to progress consideration of the Appellant’s proposals for modifying and varying the Agreement but the Appellant did not engage and the Settlement Agreement was itself breached by it.[[12]](#footnote-12)
12. ABC considers that it has taken every reasonable step available to it to avoid matters reaching this juncture, and avoid the further time and expense of this inquiry for all parties when resources on all sides would better have been deployed on progressing the development. The evidence shows the development is viable on the Appellant’s own terms, without the discharges and modifications it is still seeking.

**Legal framework**

1. The legal framework is set out in detail in section 4 of ABC’s Statement of Case. Subsection 106A(6) TCPA 1990 provides that in respect of an application made under this section, the decision maker needs to determine:
   1. Whether the planning obligation shall continue to have effect without modification;
   2. If the obligation no longer serves a useful purpose, that it shall be discharged; or
   3. 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.
2. In determining an application, the four essential questions are:
3. What is the current obligation?
4. What purpose does it fulfil?
5. Is it a useful purpose? And if so,
6. Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?[[13]](#footnote-13)
7. The “useful purpose” need not be a planning purpose or the same as the original purpose for entering into the obligation.[[14]](#footnote-14) A change in planning policy or circumstances such that the original obligation would not now be sought in a new agreement does not, therefore, mean there is no useful continuing purpose.[[15]](#footnote-15)
8. Further, the application of s.106A does not require consideration of whether a given obligation would meet the tests under regulation 122(2) of the Community Infrastructure Regulations 2010.[[16]](#footnote-16) Nor is consideration of s.38(6) of the Planning and Compulsory Purchase Act 2004 part of the exercise. The planning merits of the development are not in consideration; the s.106A 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.[[17]](#footnote-17) Even where the decision-maker concludes that one or more of the Regulation 122 tests would not have been met when the obligation was entered into and/or might now not be met, the obligation can still serve a useful purpose.

Viability[[18]](#footnote-18)

1. ABC maintains its position that viability cannot be relevant under s.106A (3) and (6) or in a s.106B appeal. If a development cannot be viably delivered that does not mean that its governing obligations do not serve a useful purpose. The purpose of the obligations is to regulate the development if it proceeds. The useful purpose of obligations is not contingent on their having no adverse effect on the delivery of the regulated development. Although viability may have informed the extent of regulation and which purposes fell to be secured by the obligations, securing viable delivery is not a “purpose” of any of the obligations.
2. This position emerges clearly from the statutory scheme itself. The proper forum for consideration of viability issues is through planning applications, which engage the s.38(6) duty, or through the operation of any bespoke provisions within the relevant agreement which allow for review of viability at stages in the development.
3. Whereas s.106A(4) is concerned with whether a given obligation serves a useful purpose, viability considerations relate fundamentally to whether the development should be permitted to proceed in the absence of the obligation and regardless of the utility of its purpose. The Appellant’s contrary argument is to turn the statutory scheme on its head, and change the test into one of asking simply whether an obligation, cumulatively with other obligations, frustrates viable delivery of a scheme. That is misconceived. The test under s.106A is a bespoke and narrow one for each obligation in question, expressly not involving taking into account the broad range of considerations which would be material to the determination of a planning application.
4. Even if that were wrong, viability can have no relevance to the discharge of negative obligations, which are for the very purpose of acting 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 overall scheme viability reasons in no way affects its essential purpose which is to prevent development progressing until it is. It follows that, where the obligation serves a useful purpose, it continues to do so even where it might render the development unviable.
5. Even if that were wrong, the existence of a claimed viability barrier to delivery does not by implication negate *any* useful purpose that a particular obligation might have. The purpose of the obligations is to require some payment or provision in kind in relation to infrastructure, services or similar and/or prevent steps being taken until the payment or provision is made. Viability is not the purpose of any of these and, even if it were *a* purpose, it could not be said to be its *only* purpose. It follows that even if viability is taken to be potentially relevant (which the Councils do not accept), a further analysis would always still be required in order to comply with the statute, as to whether there remains *any other* useful purpose.
6. If the Appellant were right, the statutory scheme would be undermined by entirely displacing the test of whether individual obligations serve a useful purpose, in favour of a different question i.e. whether purely scheme-wide financial considerations justify the modification or discharge of an individual obligation. That cannot be the way the regime was intended to operate. It would require reading down the express statutory wording and rendering it meaningless.
7. However, even if all this were rejected, this is a case in which the viability evidence submitted jointly by ABC and KCC shows that the Appellant’s own viability position is not in any event made out for reasons which we summarise shortly below.

**Effect of changes**

1. The premise for the applications, beyond viability, is that obligations either serve no useful purpose or else deferral of the trigger will serve the purpose equally well. In relation to the purpose served, ABC’s topic papers put beyond doubt that this premise is wrong. If the changes are accepted, the development will end up with significant issues arising from harmfully delayed and inadequate provision of infrastructure, under-sized services and facilities with uncertain/inchoate maintenance provision; all to the detriment of the placemaking which is necessary to deliver both a quality and a viable development. The changes would therefore be self-defeating, and in no sense can it be contended that the statutory requirement of equivalence would be met.
2. Just by way of example, the discharges and modifications sought would result in the following problems:
   1. Bus services (Schd. 20): The delay in the commencement of the service would mean up to 500 households having to rely on private cars to meet day-to-day transport needs. The delayed and modified service, with no specified level of minimum service, combined with deletion of the bus voucher scheme and bus related infrastructure would undermine the objective for Chilmington Green of achieving a 20% public transport mode share for trips to and from the site.
   2. The A28 dualling scheme, essential according to the Appellant’s own evidence to the very recent Possingham Inquiry[[19]](#footnote-19), would not go ahead, resulting in severe congestion on the local highway network.
   3. Up to 2201 households (circa 5283 residents) would have access to only one undersized playspace, with that site being shared with the CMO First Premises (Schds. 8, 9, 11).
   4. Up to 3250 households (circa 7800 residents) would have access only to a single small temporary building for community use (CMO First Premises) and time restricted access to facilities at the secondary school. Even when the facilities in the reduced-size community hub will be available, it will be very unlikely to have facilities to accommodate everybody. The proposed revised costing provided confirms the specification would fall far short of what is required to serve the purpose.
   5. Up to 3500 households (circa 8400 residents) with only limited access to sports and recreation facilities – having to rely on the facilities at the secondary school (Schds. 7, 10).
   6. No certainty that the community hub would be provided at the Development within the proposed new timescales or at all (Schds. 12, 14, 24).
   7. No certainty about when the District Centre would be delivered and no certainty as to the type of shops/services the centre would provide (Schds. 12, 14, 24).
   8. A funding gap for the CMO that would render it unable to function, leading to an inability to manage and maintain the community facilities and amenities (including large areas of public realm) required of it, with no certainty that these facilities and amenities would be managed and maintained in perpetuity and to the high standard envisaged (Schds. 4 & 5).
   9. No community development activities for residents because there would be no funding to deliver the Early Community Development Strategy and the Creative Chilmington Strategy (Schds. 4 & 5).
   10. Reduced and deferred affordable housing provision which would not be well integrated with market housing as a consequence (Schds. 1 & 23).
   11. No monitoring by the Council of the quality of the Development being delivered and limited ability to monitor compliance with the Agreement and therefore seek redress; together with no assurance that any defects in the Community Assets would be remedied by the Appellants (Schds. 4, 6-10, 12, 17, 26, 28, 29).
3. The end result of the above (and the other changes, set out more fully in evidence) is a development that would fail to achieve the placemaking and sustainability aims that have been a golden thread running through the plans for this Garden Suburb and Garden Community. These changes should be rejected.

**Viability**

1. For reasons set out above, ABC (and KCC) consider that viability is clearly not relevant to the issues that fall to be determined in these appeals. Notwithstanding that position, if viability is to be brought into the equation, the scale of harm to the public interest which would result from the discharges and modifications sought necessitates the most robust and transparent process of viability assessment. This necessitates full compliance with guidance, good practice and professional standards so as to facilitate proper scrutiny by ABC/KCC and yourself.
2. The PPG makes clear that viability assessments must be transparent and publicly available[[20]](#footnote-20); and that the weight to be given to a viability assessment is determined having regard inter alia to “the transparency of assumptions behind evidence submitted.”[[21]](#footnote-21) Nor is there doubt as to the importance of transparency of information to professional conduct and competency under the RICS ‘Professional Standard on Financial Viability in planning: conduct and reporting’ (2019)[[22]](#footnote-22); and the subsequent ‘Assessing Viability in planning under the National Planning Policy Framework 2019 for England’ (2021).[[23]](#footnote-23) Indeed the crucial importance of transparency has been emphasised recently by the High Court in *R (Holborn Studios Ltd) v London Borough of Hackney (No. 2)* [2020] EWHC 1509 (Admin) at [64]-[71], per Dove J.
3. The Appellant’s Financial Viability Assessment (“FVA”) has serial and fundamental deficiencies which undermine its evidential value. These include:
   1. The plot sales values adopted in the assessment (a critical element of a Master Developer Viability Assessment) have been grossly underestimated; and the Appellant has steadfastly refused to provide the evidence of relevant comparables from the plot sales values it has actually achieved as the Master Developer at Chilmington Green. Such evidence as is available to the Councils, supports the residual valuation of plots undertaken by their consultant BPC which identifies that plot sales values very nearly double that assumed by the Appellant are capable of being achieved.
   2. As with actual sales values, it is also essential to a robust viability assessment to know what costs have been incurred by the Master Developer and when. Both impact on the cash flow analysis. Despite promises, even as the Inquiry commences, the Appellant has failed to disclose this most basic and essential information. Instead, it advances an appraisal based on an updated schedule of infrastructure and Agreement costs using indices from 2016. By not providing actual costs and values to date, BPC are unable to ascertain whether the methodology of indexing costs is accurate and you are deprived of being able to judge whether the Appellant’s appraisal is a “real world” one.
   3. The interest payable by the Master Developer is predicated on an interest rate of 11.2% being paid on a 100% debt basis. That is substantially higher than an appropriate going rate in the present market (7%). The basis for this appears to be that this is the rate at which that this Appellant has been able to secure funding. The process of viability appraisal is an objective market based one; not subjective. When corrected, the interest cost within the model reduces very substantially.
4. BPC’s review of the Appellant’s appraisal shows that when adjustments are made to reflect the available comparable evidence, a market rate of 7% for Master Developer interest and some other minor changes, the residual land value is improved by some £223.63M; well above the £99M improvement which the Appellant states it needs to proceed with the development. Other than the discharges and modifications accepted by the Councils in their Statements of Case and Evidence, this increase in viability requires none of the other discharges/modifications argued for by the Appellant.
5. Therefore, even on the Appellant’s case that viability is in principle relevant, the evidence only serves to undermine rather than support the Appellant’s principal case for discharge/modification to enable delivery.

**Other matters**

1. To the extent necessary, ABC will correct the many factual errors in the Appellants evidence, in particular that of Mr Collins and Mr Hodson, and this will be done through the hearing sessions and formal sessions. In particular, ABC wishes to place on record at the outset that it does not accept that the narrative of events as portrayed by Mr Hodson in his statement is either accurate or fair.

**Conclusion**

1. For these reasons and others which will be more fully set out in evidence, the appeals should be dismissed.

SIMON BIRD KC

JONATHAN WELCH

19 February 2025

Francis Taylor Building

Inner Temple

London

EC4Y 7BY

DX 402 4DE

**List of appearances for Ashford Borough Council**

Simon Bird KC and Jonathan Welch of Counsel

Instructed by: Jeremy D I Baker, MA, Principal Solicitor and Deputy Monitoring Officer, Ashford Borough Council

Witnesses:

* Faye Tomlinson, BA (Hons), MA (UD), MRTPI. Team Leader, Strategic Applications, Ashford Borough Council.
* Andrew M Leahy, BSc FRICS MIoD. Director, Bespoke Property Consultants.
* Neil Shorter, Chilmington Management Organisation Board Member.

**ANNEXE – VIABILITY AND S.106B – RESPONSE TO INSPECTOR’S LETTER OF 17.02.2025**

This Annexe responds to the fifth issue raised in the Inspector’s letter, seriatim:

1. The general concept of viability has nothing to do with the useful purpose of particular obligations. Viability may be relevant to viability review mechanisms within a s.106 but has no general applicability to obligations for which it is not the purpose.
2. If the scheme would not have been permitted without the particular obligation, then viability can have no bearing on the useful purpose.
3. In response to this question:
   1. Yes, a decision maker may conclude that an obligation is not in or of itself so important for the scheme that permission might not have been granted without the obligation to make the development acceptable in planning terms, and still conclude that it serves a “useful purpose”. This point is confirmed by *Renaissance Habitat* at [34] and *Mansfield* at [40] & [48]. Regulation 122 of the Community Infrastructure Regulations 2010 is not relevant to the exercise under s.106A.
   2. Yes, that conclusion may, and in fact *must*, be reached regardless of its effect on viability, since the useful purpose of the obligation in question exists regardless of whether a development will be delivered (which is a separate question).

1. See e.g. Collins proof para.1.2.11 p.10 [↑](#footnote-ref-1)
2. Chilmington Green Area Action Plan para.3.2 p.18 [↑](#footnote-ref-2)
3. CD 4/6. [↑](#footnote-ref-3)
4. Officer report: CD 6/1; Update OR: CD 6/11; OR appendix - Heads of Terms: CD 6/14. [↑](#footnote-ref-4)
5. CD 6/2. [↑](#footnote-ref-5)
6. CD 6/3. [↑](#footnote-ref-6)
7. CD 1/14. See Supplemental S106 (29 March 2019) at CD 1/15, and Deed of Variation (13 July 2022) at CD 1/16. [↑](#footnote-ref-7)
8. The Secondary School was forward funded by the DfE avoiding the need for the Appellant to make payments of £13.55M between January 2020 and April 2024 [↑](#footnote-ref-8)
9. 6 January 2023 was the was the long-stop date for reserved matters submission for main AAP Phase 1. [↑](#footnote-ref-9)
10. Notwithstanding the approval of the Waste Water Treatment Works. The capacity of this Works when licensed and constructed, based on the anticipated maximum discharge rate, and without additional but currently unknown mitigation measures being put in place, will be 980 dwellings. When the approved Possingham Farm units (655no.) are taken into account, only a further 325 dwellings at Chilmington Green could currently be delivered subject to the Appellant entering into a s.106 Agreement to secure the connection to the Waste Water Treatment Works. [↑](#footnote-ref-10)
11. Details of the obligations that have fallen due and have been met or not met are provided in Annex B to ABC’s Statement of Case. [↑](#footnote-ref-11)
12. For example, the Developers’ Contingency Bank Account has not been replenished, the first children’s and young person’s playspace and initial bus service have not been provided. [↑](#footnote-ref-12)
13. *R. (Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin); [2004] 1 P. & C. R. 39 (per Richards J (as he then was) at [28]). [↑](#footnote-ref-13)
14. *Garden and Leisure* at [46]. [↑](#footnote-ref-14)
15. *R. (Renaissance Habitat Ltd.) v West Berkshire Council* [2011] J.P.L. 1209 (per Ouseley J. at [41]). [↑](#footnote-ref-15)
16. *Renaissance Habitat* at [34]; and *R. (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 540 (at [40] and [48] per Fordham J). [↑](#footnote-ref-16)
17. *R. (Millgate Developments Limited) v Wokingham Borough Council* [2011] EWCA Civ 1062 (at [29] per Pill L.J.). [↑](#footnote-ref-17)
18. An annexe to these opening submissions addresses the questions raised by the Inspector in his letter of 17 February 2025. [↑](#footnote-ref-18)
19. CD 10/5; 10/22. [↑](#footnote-ref-19)
20. Paragraph 10-010-20180724. [↑](#footnote-ref-20)
21. Paragraph 10-008-20190509. [↑](#footnote-ref-21)
22. Paragraphs 1.2, 2.4, 2.10, section 4. [↑](#footnote-ref-22)
23. Paragraphs 1.2.12, 2.5, 3.4.12, A1.1. [↑](#footnote-ref-23)