

SECTION 106B OF THE TOWN AND COUNTRY PLANNING ACT 1990

**AGAINST THE NON-DETERMINATION BY ASHFORD BOROUGH COUNCIL AND
KENT COUNTY COUNCIL OF:**

**APPLICATION UNDER S.106A TO DISCHARGE AND/OR MODIFY VARIOUS OF
THE OBLIGATIONS UNDER AN AGREEMENT MADE PURSUANT TO S.106 OF THE
TOWN AND COUNTRY PLANNING ACT 1990**

DATED 27 FEBRUARY 2017

APP/W2275/Q/23/3333923 & APP/E2205/Q/23/3334094

**OPENING SUBMISSIONS ON BEHALF OF
THE APPELLANT**

1. There is a national crisis in the provision of housing. There is also a crisis locally: Ashford does not have a five-year housing land supply, meaning that its policies for delivering housing are failing to deliver and are deemed out of date.
2. Chilmington Green is a strategic urban extension located to the south of Ashford town centre that is proposed to deliver up to 5,750 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. A significant part of the delivery of homes in Ashford in the short, medium and long term is by Chilmington Green. Other parts will be delivered by development close by: at Possingham Farm, Court Lodge (not yet consented) and Kingsnorth.

4. That delivery has stalled.

The problem

5. ABC resolved to grant outline planning permission on 15 October 2014, but permission was not issued until 6 January 2017. By then, two of the four developers of Chilmington Green had dropped out, leaving Hodson Developments to take up their land, and to assume the role of master developer (which means providing the infrastructure for a massive site and selling development plots to other homebuilders) as well as building some of the homes, with Jarvis building out a small part.
6. The build-out has progressed slowly. Whilst Hodson have built strategic infrastructure (highways, services, drainage, etc) to service land for approximately 2,000 dwellings and £12m worth of s.106 payments, only 360 homes in Phase 1 have been occupied alongside the first primary school and the provision of the first community facilities. The secondary school and around another 339 homes are currently under construction.
7. The development has been stalled by a number of factors:¹
 - (i) Delays in getting utilities and electricity to the site;
 - (ii) Reconstitution of the development model and a reduced build rate;
 - (iii) Delay and uncertainty surrounding nutrient neutrality;
 - (iv) The Covid-19 pandemic;
 - (v) Significant increases in build costs compared to sales values;
 - (vi) The failure of the Council to determine reserved matters and detailed applications, many of which have been outstanding for up to four years². This is not a unique problem to Chilmington Green; the Kingsnorth application was submitted in 2015, appealed for non-determination and then allowed on appeal in November 2023. The Court Lodge application was submitted in 2018 and is now being appealed for non-determination;
 - (vii) Problems with the workings of the planning obligations, including relating s106 reviews to the ability to sell plots; and

¹ For the first five, see John Collins proof, para 1.3.32.

² See Appendix 1 to the SoCG.

(viii) The scheme as it stands, with the current planning obligations, is unviable and unfundable.

8. The viability experts are still seeking to resolve issues between them, but Mr Wheaton for the Appellants calculates a negative residual land value for the master developer of minus £247.1 million. Mr Leahy for the Councils produces a residual land value of minus £23.37 million. So, it is common ground that the development site is worth less than nothing. Even if the land came free, which it does not, the developer would make a loss in carrying out the project.
9. The benchmark land value is £109.1 million, so on the Councils' own figures, a loss of £132 million would be made. On the Appellants' evidence, the loss is even more eye-watering. It may be that development values will increase faster than costs, helping to improve the figures, but that is not a basis to contribute to the Government's target of 1.5 million new homes in this Parliament.

The solution

10. Some progress has been made towards bringing these sites forward, but all has required the assistance of the Planning Inspectorate:
 - (i) Hodson Developments secured planning permission for a waste water treatment works on appeal in September 2023;
 - (ii) Hodson Developments have also secured planning permission for Possingham Farm on appeal;
 - (iii) As already mentioned, Kingsnorth has been allowed on appeal.
11. The present appeals are a further stage in that process. The aim is to unblock investments and sites by enabling developers, investors and funders to come forward. Some of the changes are mechanical but of practical importance. Other changes seek to reduce the costs by removing unnecessary expenditure or deferring it to a more appropriate time. That will reduce the overall costs to the master developer, including significant savings in interest, and also reduce the peak debt burden as costs are more closely related to receipts from land sales. The scheme is more fundable if the total debt at any point is smaller.

12. The two essential questions in this appeal for any obligation are does it serve a useful purpose, and, if so, would it serve that purpose equally well if it had effect subject to the proposed modifications?
13. Useful purpose needs to be looked at in two respects:
 - (i) Whether on its own, the obligation serves a useful purpose or can be modified to serve that equally well;
 - (ii) Whether the obligation contributes to the scheme being unviable.
14. If an obligation (on its own or in combination with other obligations) renders a development incapable of being carried out or completed because it makes the scheme unviable or unworkable then the decision maker may conclude that it does not serve a useful purpose.
15. There should be no doubt of the consequences if Chilmington Green does not proceed. The site has been long-identified by government as a Garden Village. It is strongly supported by the development plan. It would be disastrous for the Council's housing land supply if Chilmington Green is not developed.
16. But the harm goes beyond the concerns of planning. What is held up are the homes for over 12,000 people; and the improvements to their lives, and the lives of those who will be able to move into other homes and share in the education, social and environmental benefits of the scheme. A failure to deliver Chilmington Green will be a disaster for the residents of Ashford and the county. It will be a disaster for Ashford Borough Council and Kent County Council who will be concerned to ensure that homes are provided and the county develops.
17. Obligations which prevent this from happening can be said not to serve a useful purpose. As the Appellants have said, there is a distinction between obligations which may in themselves be justifiable but not at the cost of the scheme not happening, and any obligations which are so vital that the scheme should never be allowed to proceed without them. In the latter case the 'showstopper' obligation serves a useful purpose despite frustrating the whole project. The distinction between the two situations is recognised in handling planning applications, when obligations which would

otherwise meet the necessity test are not required for viability reasons. It applies, on the appropriate statutory formulation, of useful purpose.

18. One of the Inspector's questions before the inquiry was:

"May a decision maker applying the 'useful purpose' test, conclude: a) that an obligation is not in or of itself so important for the scheme such that permission might have been granted without that obligation to make the development acceptable in planning terms, yet still conclude that it serves a useful purpose, and b) may do so even if it renders the scheme unviable and so not likely to happen. (para 13 submissions)"

19. The question in any appeal is to get the right result. In the present context, the answer is 'no'. An obligation which is not so important that permission could have been contemplated without it will not serve a useful purpose if it renders the scheme for a further 5,400 homes unviable. It would flatly contradict the objectives of the government to deliver substantial amounts of new housing in the next five years and in the longer term. It would not just be the wrong decision, but is likely to be irrational in the public law sense given national and local policy.

20. We have a substantial raft of modifications in the appeal. A small number have been agreed. Some compromise modifications have been mooted, and discussions are in progress between the parties to seek to resolve other issues. The Appellants welcome a positive approach in those discussions. If agreement is reached on modifications outside the appeal proposals, then a deed of variation will be prepared and the related appeal modifications would therefore fall away.

21. As it stands though, we have over 5,000 proposed new homes which are rendered unviable and this appeal needs to find a way through, to deliver national and local policy and aspirations.

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39 Essex Chambers, London

19 February 2025