

LITTLE STANION

SECTION 106A APPLICATIONS

SUPPORTING STATEMENT

ON BEHALF OF : JME DEVELOPMENTS LIMITED

14 May 2021

Gateley LEGAL

1. INTRODUCTION

- 1.1 This supporting statement is made in respect of two concurrent applications to North Northamptonshire Council (**NNC**) under section 106A of the Town and Country Planning Act 1990 (**TCPA90**) whereby modifications are proposed to the planning obligations contained or referred to in the decision notice dated 25 August 2016 (the **Decision Notice**) issued by the former Corby Borough Council (**CBC**) pursuant to sections 106A (6) (c) and (8) of the TCPA90 (the **Current Planning Obligations**).
- 1.2 The Current Planning Obligations are set out in the schedule to the Decision Notice, a full copy of which is at **appendix one**. The Decision Notice was issued by CBC on behalf of itself and also the former Northamptonshire County Council (**NCC**) which had transferred authority to CBC to determine the duplicate s106A application then before both those authorities.
- 1.3 JME Developments Limited (**JME**) was formerly named JME Civils Limited but has updated its registered company name at Companies House to better reflect its core business.
- 1.4 Within the framework set by the Current Planning Obligations JME applied for and was granted by CBC - amongst other consents - the following planning permissions:
 - 1.4.1 Full planning permission 17/00702/DPA (the **FPP**) authorising 66 residential units, retail space and community building (the **Multi Use Square Development**); and
 - 1.4.2 Outline planning permission 17/00703/OUT (the **OPP**) authorising up to 135 residential units and related infrastructure (the **Outline Development**).
- 1.5 On 1 April 2021 both CBC and NCC ceased to exist and the new NNC came into being as – amongst many other things – the sole local planning authority (**LPA**) for the land bound by the Current Planning Obligations (the **Site**).
- 1.6 NNC is therefore the LPA empowered to modify planning obligations pursuant to s106A TCPA90 and JME Developments Limited (**JME**) now applies to NNC by way of two separate applications:
 - 1.6.1 first – and in order to effect *a long-term solution* to the non-viability of both the Outline Development and the Multi-Use Square Development – it has applied to reduce the financial costs payable to NNC under the Current Planning Obligations (the **Primary S106A Application**); and
 - 1.6.2 second – and in order to effect *a short-term improvement* to the cash-flow for the Outline Development and the Multi Use Square Development - it has applied to defer the time / trigger point at which certain financial costs would otherwise fall due in order to at least enable building to continue (the **Secondary S106A Application**).
- 1.7 The Secondary S106A Application is not an alternative to the Primary S106 Application. If it were approved it would at least enable sustainable development to be continued at the Site until the deferred time/trigger point now proposed had been almost arrived at, but would not obviate the need for the modifications proposed in the Primary S106A Application.
- 1.8 The Primary S106A Application and the Secondary S106A Application are referred to together as “**the S106A Applications**” below.

2. THE LEGAL FRAMEWORK

2.1 Section 106A of the TCPA90 provides where material:

“(1) A planning obligation may not be modified or discharged except...

(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...

(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.”

2.2 JME is entitled to make the S106A Applications and subject as provided in the Current Planning Obligations and to the law, it is a person against whom the Current Planning Obligations are enforceable.

2.3 The expressions “...the obligation...” and “...the planning obligation..” used in sub-section (6) mean the section 106 agreement or undertaking as a whole – they do not refer to individual clauses or other provisions within such a document. The expression “planning obligation” is the technical name for any section 106 agreement or undertaking for the purposes of sections 106 and 106A TCPA90. When therefore the question of the “useful purpose” served by a “planning obligation” is addressed under section 106A, the terms of the planning obligation are to be viewed holistically, and a view must be formed as to the highest level “purpose” the relevant planning obligation can be properly be understood to serve.

2.4 Mr Justice Garnham stated in *R (oao Mansfield District Council) v Secretary of State for Housing, Communities and Local Government* (the **Mansfield Case**):

“28. As is common ground before me, the correct approach to considering an application under Section 106A is that articulated by Richards J in *R (The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin). He said at paragraph 28 that in addressing an application under section 106A:

“there are four essential questions to be considered: what is the current obligation? what purpose does it fulfil? is it a useful purpose? and if so, would the obligation serve that purpose equally well if it had effect subject to the proposed modifications? Mr Elvin lays stress on the words “equally well” and describes them as ordinary English

words importing a principle of equivalence. Section 106A involves a precise and specific statutory test and does not bring in the full range of planning considerations involved for example in an ordinary decision on the grant or refusal of planning permission.””

2.5 Garnham J added (at paragraph 38 of his judgment): “38. Fourth, and perhaps most importantly, I see no reason why, as a matter of principle, the precise character of the useful purpose served by the obligation should determine whether or not the authority has the power to discharge it. The critical question is whether the objection serves some useful function, the absence of which makes the maintenance of the obligation pointless. It follows, in my judgment, that the question for the Inspector here was whether the obligation served any useful purpose, not any useful *planning* purpose”. The word “objection” in the 4th line of this paragraph of the judgment is here understood to be a typographical error since “obligation” is clearly intended.

2.6 In finding that an error of law had been made in the Mansfield Case, Garnham J added:

“43. But the failure of the Inspector to identify the benefit that maintenance of the obligation would achieve meant that none of those observations went to the crucial issue. In those circumstances, despite my recognition of the difficulty the Inspector faced because of the poor manner in which the Council presented its case to her, it seems to me that she fell into error. This was an error of law, not a matter of planning judgment. She failed to identify the useful purpose that the obligation served and to consider whether that purpose remained extant”

2.7 The Current Planning Obligations would clearly continue to serve a “useful purpose” if modified as now proposed – they would enable a sustainable (but non-viable) development to be carried out and completed including the provision of a new community building. . The critical question of whether the obligation as modified would still serve some useful function is therefore to be answered very much in the affirmative.

2.8 The Current Planning Obligations were a response to a stalled development and the high level purpose was to enable sustainable development to recommence. In the Main Report to CBC’s Planning Committee of June 2016 it was stated that: “In broad terms, improved scheme viability is secured...” and the following contemporary sections of the National Planning Policy Framework (NPPF) and the Planning Practice Guidance as well as a local policy on developer contributions were cited as relevant and supportive of the proposal to put the Current Planning Obligations into place at that time (emphases added):

2.8.1 National Planning Policy Framework March 2012:

“Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable. Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.” (Paragraph 173); and

"Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled." (Paragraph 205)

2.8.2 One Corby Policy Committee 11 September 2012 – Policy for Deferred Developer Contributions. This agreed an option of deferral of developer contributions if supported by a financial appraisal; and

2.8.3 National Planning Practice Guidance:

"...where the deliverability of the development may be compromised by the scale of planning obligations and other costs, a viability assessment may be necessary. This should be informed by the particular circumstances of the site and proposed development in question. Assessing the viability of a particular site requires more detailed analysis than at plan level." (Paragraph: 016 Reference ID: 10-016-20140306)

"In making decisions, the local planning authority will need to understand the impact of planning obligations on the proposal. Where an applicant is able to demonstrate to the satisfaction of the local planning authority that the planning obligation would cause the development to be unviable, the local planning authority should be flexible in seeking planning obligations." Paragraph: 019 Reference ID: 10-019-20140306

2.9 The non-viability of the development as it then was, was therefore central to the decision making which resulted in the Current Planning Obligations. It was a matter of common ground between JME, CBC and NCC that the development as it then was, could not be carried out any further because the burdens of the pre-existing planning obligations rendered it non-viable.

2.10 That state of affairs was so serious that the land-owning company – Silentpride Limited (**SPL**) – was in administration. The applications which resulted in the Decision Notice were made jointly by Deloitte LPP which was the appointed administrator for SPL, and JME which was the holding company that owned SPL.

2.11 The practical purpose of the Current Planning Obligations was to “uninstall” that development, enabling it to re-activate as a viable development on the best understanding of the circumstances as they then were.

3. THE PRIMARY S106A APPLICATION

- 3.1 The reason for the S106A Applications now made by JME is that the detailed scheme provided for in the Current Planning Obligations further development has again proven nonviable. A further adjustment is therefore necessary in light of the changed circumstances since the Decision Notice was issued, so that the purpose of the Current Planning Obligations can continue to be realised.
- 3.2 The Primary S106A Application therefore seeks to restore financial viability to the development without which it will be moth-balled with less than half the housing authorised by the FPP and the OPP having been constructed.
- 3.3 It seeks to restore viability by removing from the Current S106 Obligations two significant financial costs namely:
- 3.3.1 the "Little Stanion Community Sum" (being £11,000 (eleven thousand pounds) for every Dwelling to be used for the reimbursing the public purse in respect of some of the costs of Little Stanion Primary School); and
- 3.3.2 "the Little Stanion Up-lift Sum" (defined as "a sum equal to 34% of the Additional Dwelling Sale Profit, also for contributing towards those pre-incurred costs of providing Little Stanion Primary School.
- 3.4 The Primary S106 Application is supported by a financial viability appraisal prepared by AspinallVerdi (the **FVA**) (a copy of which is at **appendix two**). This demonstrates that the development is not viable unless the current S106 Obligations are modified and the former CBC agreed that that was an accurate assessment of the lack of viability of the development.
- 3.5 JME itself now owns Site against which the Current Planning Obligations are enforceable (albeit subject to significant encumbrances including a deed of pre-emption and two legal charges). The former owner – SPL – was a subsidiary of JME; SPL has now transferred the Site to JME. The encumbrances also include 6 charges over JME's assets generally arising from various housebuilding companies holding security for certain funds which are not available to JME for general purposes at all but only for completing highway works (for which those monies have now been largely expended).
- 3.6 The burden of the Little Stanion Community Payment and the Little Stanion Uplift Sum needs to be understood against the background of complex private sector financing and mortgaging which has been necessary to comply with other elements of the Current Planning Obligations.
- 3.7 The Decision Notice itself effected modifications to pre-existing planning agreements namely: an agreement dated 4 July 2006 between Corus UK Limited (1) CBC (2) and Northamptonshire County Council (**NCC**) (3); a supplemental agreement dated 28 July 2008 between SPL (1) CBC (2) NCC (3) and AIB Group (UK) plc (4); and a supplemental agreement dated 6 September 2010 between Silentpride Limited (1) CBC (2) NCC (3) and AIB Group (UK) plc (4) (the **Old Agreements**). The purpose was to restore development viability. There is a precedent for the approach now proposed by JME through the Primary S106A Application accordingly.
- 3.8 The Old Agreements related to major residential development at Little Stanion much of which had already been built – 700 new homes, a small community facility (the Welcome Centre) and a primary school (the **Primary School**) already existed.

- 3.9 The need to modify the Old Agreements arose from the non-viability of the development authorised by an outline planning permission 04/00442/OUT dated 5 July 2006 (the **2006 OPP**) – a new community comprising “Residential development of not more than 970 dwellings; public open space, primary school and community facility, associated development including provision of roads and infrastructure; access to Longcroft Road including provision of dual carriageway between A43 roundabout and eastern access point to the development” (the **Little Stanion Development**).
- 3.10 SPL was insolvent and the infrastructure and community facilities to serve the Little Stanion Development were “stalled” and incomplete.
- 3.11 That left a network of estate roads unsurfaced and incomplete and not being actively maintained; street lighting incomplete and where present not being maintained, and sewers constructed to serve the development unadopted and not being actively maintained.
- 3.12 The practical effect of the Decision Notice was therefore to replace the Old Agreements with new less onerous obligations – this enabled the completion of the outstanding infrastructure (through the release of the land-owning company – SPL - from administration in autumn 2017) and the subsequent programme of works which has been successfully carried out by JME.
- 3.13 Setting aside certain provisions relevant to adjacent land to the east of the Site which would not be affected by the proposed modifications, the current planning obligations can be grouped as set out in the first column of the table below (also showing whether or not they have been performed (column two) and whether performance or further performance thereof is “viable” (column three)):

Type of Obligation	Performed/Not yet performed?	Viable as of May 2021?
Infrastructure (completion of estate roads / street lighting / sewers)	Already performed (with limited exceptions vis-a- vis highway works in the Lagan development area). Sewers have been adopted. Phase 1 of the pre-existing road infrastructure serving the Little Stanion Development was adopted by NCC in March 2021.	Yes – maintenance of the remaining phases 2-4 inclusive is viable provided that NCC adopt without imposing additional cost on landowner
Community Facilities (public open space / new community building / small retail outlet)	Partially performed	Yes – but only if the Current Planning Obligations are modified as now proposed
Financial Reimbursement (a roof tax of £11,000 per Dwelling plus an additional uplift sum if the development were to be more profitable than a defined level)	Not yet performed	No – please see the analysis and findings set out in the FVA for the consideration of NNC

3.14 With the kind support of the former CBC, the serious deficiencies in infrastructure to serve the Little Stanion Development have been successfully addressed. In respect of the phases of estate roads the coloured phases shown on the plan appended hereto **at appendix 3** have been completed on the dates shown in the table below.

Phase	Completion Date
Red Phase	18 th January 2018
Yellow Phase	26 th February 2018
Green Phase	21 st May 2018
Blue Phase	29 th June 2018

3.15 JME has therefore expended over £2 million in carrying out these works and is in detailed discussions with NCC with the shared objective of adoption of these completed estate roads.

3.16 JME has also completed street lighting to serve the Little Stanion Development and has entered into a legal agreement with CBC for its future adoption.

3.17 The sewers serving the Existing Development have been adopted by Independent Water Networks Limited (**IWNL**) on 29 September 2017.

3.18 These infrastructure requirements have therefore been largely met over the period autumn 2017 until summer 2018 and the highway works have now begun to be formally adopted (phase 1 having become highway maintainable at the public expense on 30 March 2021) by agreement with the former NCC under section 38 of the Highways Act 1980.

3.19 The replacement of the unsafe and incomplete estate road network with properly surfaced, lit, edged and drained carriageway highways in performance of part of the Current Planning Obligations was a major step forward in itself, and JME has also met its obligations to seek planning permission for further residential development.

3.20 It was an unusual feature of the Current Planning Obligations that they included requirements to apply *for further planning permission* – this is a significant indicator of the fundamental purpose of the Current Planning Obligations, which was to re-activate sustainable development at the Site not to secure guaranteed planning benefits in kind or financial contributions to address the impacts of a development whose characteristics had already been fully established through planning permission.

3.21 That is corroborated by the inclusion of an obligation to use reasonable and commercially sensible endeavours to seek control of other land adjacent to but outside the Site, so that if planning permission were to be granted for further residential development on that land also (the so-called ‘Tata site’) there would be another circa 125 housing units which would generate value to meet the Little Stanion Community Payment & the Little Stanion Up-lift Sum.

3.22 The extent to which community facilities have yet been delivered however is more limited. A small retail unit near the Multi Use Square occupies a pre-fabricated building but this is not a requirement of the Current Planning Obligations.

- 3.23 The public open space work approved by the former CBC under planning permission 17/00701/DPA has been substantially completed with the exception of: (a) one of the play areas; and (b) the Multi Use Games Area.
- 3.24 The Current Planning Obligations however also provide for the construction of:
- (a) a Community Building; and
 - (b) a Retail Store
- both subject to a planning permission acceptable to JME being granted therefor.
- 3.25 The FPP authorises the construction of a community building and retail store and JME has now discharged the pre-commencement conditions on that planning permission.
- 3.26 The only issue preventing the FPP being “acceptable” to JME for the purposes of the Current Planning Obligations is that the Multi Use Square Development is not viable. As the FVA demonstrates, both the Multi Use Square Development and the Outline Development taken together are not financially viable if the Current Planning Obligations remain unmodified.
- 3.27 The reimbursement provisions in the Current Planning Obligations comprise:
- 3.27.1 the "Little Stanion Community Sum" (defined as “a sum payable once only in respect of each Dwelling being £11,000 (eleven thousand pounds) – LESS the aggregate cost of all the other planning benefits required to be paid to ...the County Council, or provided in kind pursuant to any Further Obligation or payable by way of Community Infrastructure Levy when expressed on a ‘per new housing unit’ basis – which payment shall be used for contributing towards the costs of Little Stanion Primary School"); and
 - 3.27.2 “the Little Stanion Up-lift Sum” (defined as “a sum equal to 34% of the Additional Dwelling Sale Profit ...for contributing towards the costs of Little Stanion Primary School...”).
- 3.28 *As at summer 2016* the viability of further development of up to 166 new units of residential accommodation and the outstanding community facilities at Little Stanion was assessed in the expert report defined in the Current Planning Obligations as “the Approved EVA” being “the AspinallVerdi Viability Assessment of November 2015”.
- 3.29 AspinallVerdi have now carried out an up-dated appraisal, re-assessing the financial viability of such further development as at July 2019 i.e. the FVA.
- 3.30 The FVA establishes that:
- 3.30.1 The Little Stanion Community Sum renders the development non-viable; and
 - 3.30.2 There is no realistic prospect that the Little Stanion Up-lift Sum will ever be payable in part or at all.
- 3.31 The precise modifications now applied for are set out in the draft **schedule of modifications** but in summary these changes would remove the provisions for Little Stanion Community Sum and the *Little Stanion Up-lift Sum* in their entirety in view of:

- 3.31.1 the significant financial and practical constraints affecting JME and the land (which were unknown in summer 2016 when the Current Planning Obligations were put into place);
 - 3.31.2 the fact that further development – including the outstanding community facilities – is not viable if these onerous reimbursement requirements were to remain.
- 3.32 Since summer 2016 JME has discovered or experienced a series of significant constraints on its ability to deliver the further development at Little Stanion contemplated by the Current Planning Obligations including:
- 3.32.1 a short-fall of over £1m – first revealed in autumn 2017 when SPL was released from administration – in the cash held in the company’s bank accounts;
 - 3.32.2 the repeated refusal of Taylor Wimpey – the holder of pre-emption rights over the Site – to allow JME to create a special purpose vehicle (**SPV**) for part of the site only, with the specific effect that lenders are deterred from taking security over specific elements of the further development;
 - 3.32.3 the inability of Homes England (**HE**) to provide funding for any part of the further development (which is understood itself to be partly because the development could not achieve a loan-to-value ratio satisfactory to HE, and partly a consequence of the inability to create an SPV and transfer a relevant part of the Residual Site to it together with relevant rights over roads and services corridors on the rest);
 - 3.32.4 the reluctance of private-sector lenders generally to provide funding (JME having approached circa 30 potential funders before putting into place its current arrangements which are consequently at high interest (14% – 16%).
- 3.33 The Administrator’s lawyers had informed JME that circa £600,000 would be available in SPL’s accounts on conclusion of the administration, whereas in the event only £92,870 was transferred to JME at that stage. JME also had to give an undertaking to the Administrators to pay off some creditors of SPL’s with the result that it had available cash of only circa £50,000 – only one twelfth of the anticipated cash holding. (It should be added that the monies used to finish the existing highways to an adoptable standard were separated into ‘closed’ accounts and could only be used *for that specific purpose*; those monies did not form part of the ordinary cash capital of the company when released from administration and JME has no access to any monies from those closed accounts to use towards other infrastructure such as the community building).
- 3.34 It should also be noted that the FVA uses a much lower borrowing figure – only 6% – than the actual interest rate JME is having to pay. Even with that much lower borrowing cost being used in the FVA, the further development is not viable. The reality is even more negative given JME’s experience of the private sector lending available to it and the actual cost of servicing the loans extended to it.
- 3.35 Furthermore, the complex drafting in the Current Planning Obligations respecting the Little Stanion Up-lift Sum is itself a significant deterrent for lenders. It is difficult to explain to lenders and is perceived by them as a threat to their ability to sell a relevant part of the Site in the exercise of their power of sale under a mortgage/legal charge, in the event that the borrower were to default. This affects both JME as a company – and the land it owns at Little Stanion.

- 3.36 Additionally, JME is not an attractive lending proposition whilst the Little Stanion Up-lift Sum remains in effect because a lender contemplating having to realise its security by selling the company's assets as a whole or simply trying to sell the land would have to overcome the reluctance of potential buyers to take on the risk when they are faced with a complex form of planning-related overage that would weaken any up-side the purchase might ultimately give them. Foreseeing that situation, lenders are reluctant to lend to JME whilst the Little Stanion Up-lift Sum remains within the Current Planning Obligations.
- 3.37 The combined effect of these circumstances is that in the three year period since the Current Planning Obligations were put into place JME has had little or no working cash capital available for performing the Current Planning Obligations *generally*, and in the absence of funding by HE, JME has had to borrow in the private sector at very high interest rates.
- 3.38 Despite these constraints JME was able with its planning consultants, iPlan Solutions, to obtain planning permission for the Multi Use Square Development and the Outline Development. It will however be unable to actually deliver the sustainable development authorised by the former CBC through these consents unless the Current Planning Obligations can be modified broadly in the manner indicated in the schedule of modifications.
- 3.39 Those lending arrangements which are in place have already had to be backed by personal guarantees given by James Moore – the principal Director of JME – to the lenders. JME has already taken on significant risk as a company, and Mr Moore as its principal Director has also done so in a personal capacity.
- 3.40 The FVA applies a methodology based upon that which was approved by CBC in 2016 through the “Approved EVA” and updates this to accord with the current central government planning practice guidance respecting viability appraisal.
- 3.41 It concludes (emphasis added):
- 3.41.1 in respect of the Little Stanion Community Payment “...the scheme cannot afford to deliver any affordable housing or the £11,000 per Dwelling ...”; and
- 3.41.2 in respect of the Little Stanion Uplift Sum “...there is unlikely to be additional overage generated by this scheme”.
- 3.42 Current national and international economic pressures are a matter of daily media reporting – the painful re-adjustment of trade between the USA and China alone is prejudicial to the world economy and the effects of Covid 19 and BREXIT continue to exert significant downward pressure on UK growth forecasts.
- 3.43 The period since the Current Planning Obligations were put into place in August 2016 has been one of significant economic constraint and it is not a surprise that the cost of carrying out the further development versus the potential sale receipts from the new apartments and houses was in deficit as at July 2019 in the manner set out in detail in the FVA. That remains the case as at May 2021.
- 3.44 JME was not therefore in the position JME and the former CBC expected it to be in when SPL was first released from administration – in particular, it lacked cash which it was also expecting to be concurrently released which it could use for general purposes. It is disappointing that HE was not able to provide any funding to support the further housing development which CBC as a local planning authority has now authorised.

- 3.45 By working constructively together CBC and JME have achieved significant progress over the circa three and a half year period since SPL was finally released from administration.
- 3.46 The NCB and the Retail Store remain outstanding however; these have the requisite planning permission but despite its reasonable endeavours to obtain funding JME cannot build them because – even with the additional housing authorised through 17/00703/OUT – they are not financially viable.
- 3.47 They will become viable however as part of that development if modifications are made to the planning obligations so as to lift the £2 million+ burden of the “roof tax” in the form of the Little Stanion Community Payment, and remove the complex deterrent to lenders which is the Little Stanion Up-lift Sum.
- 3.48 As the FVA confirms, JME is prepared to accept:
- 3.48.1 a level of developer’s profit far below the standard 20-25% rates used in viability appraisal;
 - 3.48.2 developer’s risk; and
 - 3.48.3 high borrowing costs
- but in order to deliver the outstanding community facilities in the difficult financial circumstances facing the UK economy in general and this scheme in particular, NNC is respectfully invited to conclude that the modifications proposed are necessary and appropriate.
- 3.49 JME first contacted the former CBC in August 2019 to request that a deed of modification might be entered into in order to effect the modifications proposed in what is now the Primary S106A Application. JME provided a copy of the FVA to CBC.
- 3.50 CBC took advice respecting that viability assessment from White Land Associates who agreed with JME that the development was not viable. A copy of a letter from CBC dated 20 December 2019 is attached at **appendix 4** and so confirms.
- 3.51 The former NCC however – whilst it did not disagree with the FVA – nonetheless rejected the proposed modification on the basis set out in its letter of 26 February 2021 (**appendix 5**). In that letter the former NCC did not take issue with the viability assessment evidence at all. Its sole basis for refusal to modify was a narrow interpretation of *the purpose* of the Current Planning Obligations.
- 3.52 The former NCC focussed exclusively upon only two aspects of the Current Planning Obligations namely: (i) the reimbursement of costs of constructing the Little Primary School; and (ii) the making good of the network of estate roads serving the existing housing development even though the proposed modifications did not seek any change to the latter at all.
- 3.53 The former NCC’s response was therefore flawed both in respect of (i) by planning upon the Current Planning Obligations and their purpose an interpretation which wholly ignored the evidence that restoring viability to the scheme clearly was the purpose in the context of s 106A TCPA90; and in respect of (ii) by a significant mis-understanding of what the scope of the proposed modifications actually was. JME is now making the Primary S106A Application to NNC accordingly.

4. THE SECONDARY S106A APPLICATION

- 4.1 The elapse of time since JME had first drawn attention to the lack of viability (in summer 2019) meant that the former NCC's rejection of the proposed modifications some 20 months later was highly prejudicial to the ongoing work on the Multi-Use Square Development. This is being developed pursuant to the FPP and it comprises four blocks, denoted "A" to "D". JME has successfully constructed Blocks A and B at this stage.
- 4.2 In order, however, to obtain project finance to construct Block D (since JME is unable to finance construction out of cash reserves for reasons already given in this statement), JME will need to be able to demonstrate to potential lenders that the entirety of Block D can be constructed *without triggering* the requirement for the payment of the Little Stanion Community Payment.
- 4.3 A parallel problem arises in respect of Parcel 6 of the Outline Development – which is part of the land benefited by the OPP. JME has constructed 8 of the houses for which reserved matters approval has been granted at Parcel 6 *but cannot obtain funding to proceed with the remainder* for the same reason.
- 4.4 The Secondary S106A Application therefore proposes a basis on which the building work can at least sensibly proceed somewhat further, whilst further time is taken by NNC to give detailed consideration to the Primary S106A Application should NNC consider itself to need such further time.
- 4.5 The Site - regarded as a whole - it is currently benefitted by, in particular:
- 4.6 The FPP authorising 66 residential units; and
- 4.7 The OPP authorising up to 135 residential units.
- 4.8 The maximum number of residential units authorised by those permissions is therefore 201, and if the Current Planning Obligations could be modified to provide that up to 100 of these can be occupied *before any requirement to make the Little Stanion Community Payment* is triggered, that would at least enable JME to continue building the development for such reasonable period as would permit JME to liaise further with NNC to seek approval of the Primary S106A Application.
- 4.9 The position taken by the former NCC in its letter of 26 February 2021 has effectively placed JME in an impossible position. JME has demonstrated, as a matter of financial reality – through the viability work that was done in 2019 and approved by the former CBC's independent consultant – that the development is not viable if it is subject to the Little Stanion Community Payment at all.
- 4.10 The former NCC did not contest that, but in effect took the position that *if the scheme were viable and enabled that payment in August 2016* (when the current s106 framework was put into place), then there is no basis for modifying it now, *whatever material changes might have taken place since that time*.
- 4.11 That was an unreasonable position and unreconcilable with the Statutory Code of which Sections 106 and 106A of the TCPA90 form an integral part. Since the effect of refusing to entertain any modification is to cause the development to 'stall' once again, the fundamental planning purpose of the Current Planning Obligations – which was to re-start a stalled scheme - *would be entirely frustrated* if NNC were to take such a position.

5. CONCLUSION

- 5.1 JME has - since August 2019 - been seeking modification of the Current Planning Obligations.
- 5.2 The *purpose* of the Current Planning Obligations was to re-activate a major “stalled” development, by reducing and restructuring the pre-existing section requirements so that – if further housing development could be authorised to generate revenues – a sensible package of planning benefits could be delivered.
- 5.3 Since summer 2017 when SPL was released from administration, JME has been working hard to deliver the planning benefits and obtain and implement planning permissions for further housing development through the FPP and the OPP.
- 5.4 It cannot proceed much further however without modification of the Current Planning Obligations and this is now urgent given that it was first requested nearly two years ago when it had already been established that the overall scheme including the new housing authorised by the FPP and the OPP was not viable.
- 5.5 No reasonable basis for declining to modify the Current Planning Obligations was identified by either the former CBC or the former NCC – on the contrary, both of them accepted the viability evidence which had been approved by CBC’s own consultants.
- 5.6 The former NCC however rejected the proposed modifications on the basis of an apparent misunderstanding of their scope and seemingly on the basis of an unfounded belief that this would retain the prospect of further recovery of the invested costs of the Little Stanion Primary School. The latter however *could not be a reasonable basis for rejecting the proposed modifications* since the Little Stanion Community Payment is not payable unless and until more than 50 % of the dwellings in a relevant development are occupied and since it was common ground that it was not viable to build more than that, *the practical effect of rejecting modification is that nothing will be payable towards that in any event*.
- 5.7 The further effect however is that planning benefits which would still be viable *if* the Primary S106A Application can be approved – including in particular the new Community Building which should form part of the Multi Use Square Development – will not be delivered either. The Site will be moth-balled.
- 5.8 The modification of planning obligations in order to sustain the viability of an approved development is a well-founded practice which the Current Planning Obligations themselves were the product of.
- 5.9 If they are modified as now proposed, the Current Planning Obligations *will clearly continue to serve a useful function* – in fact, it is necessary that they *should* be modified if the fundamental purpose of the Current Planning Obligations is to be delivered upon.
- 5.10 The Primary S106A Application is therefore respectfully commended to NNC for approval.
- 5.11 If NNC considers that it would require more time in order to assess the Primary S106 Application however the Secondary S106A Application is also respectfully commended to NNC as an interim measure, to at least enable development to proceed somewhat further whilst the Primary S106A Application is under consideration.