

# Statement of Case

## Appeal by Bloor Homes South West Land at Filands, Malmesbury (Whychurch Farm)

Against the non-determination by Wiltshire Council of:

*“Discharge of planning obligation relating to  
N/11/04126/OUT”*

LPA Ref: 20/05470/106

June 2021

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# 1. Introduction, Background and Context

## Context and Background to the Appeal

- 1.1 This Statement of Case has been prepared by Turley on behalf of Bloor Homes South West, herein referred to as 'the Appellant'.
- 1.2 This Statement sets out the Appellant's grounds of appeal relating to the failure of Wiltshire Council to determine an application to discharge a planning obligation under S106A of the TCPA 1990 relating to land at Filands, Malmesbury, also referred to as Whychurch Farm ('the Appeal Site'). The description of development is as follows:  
  
*"Discharge of planning obligation relating to N/11/04126/OUT"*
- 1.3 The application (LPA ref. 20/05470/106) was submitted to Wiltshire Council by Turley and validated 2 July 2020. The application was not determined within the statutory determination period.
- 1.4 We request this appeal is heard together with another non-determination appeal on the same site. This second appeal is against the non-determination of an outline application for residential development, where Wiltshire Council advance objection on the basis that the site should include land for educational uses due to the planning obligation the subject of this application and appeal.
- 1.5 This appeal is accompanied by:
  - Completed S106B Form<sup>1</sup>;
  - A copy of the application to the relevant authority and the certificate accompanying that application;
  - The instrument by which the obligation was entered into - being a Unilateral Undertaking dated 15<sup>th</sup> February 2013 (herein referred to as 'the UU');
  - All correspondence with the authority relating to the application.
- 1.6 For the avoidance of doubt, the relevant obligation the Appellant is seeking to discharge (herein referred to as 'the Transfer Obligation') is contained at Paragraph 4.5 of Schedule 1 of the Unilateral Undertaking which imposed a planning obligation to transfer part of the development site (defined in the UU and herein referred to as 'the Primary School Land') to Wiltshire Council for the (then anticipated) provision of a Primary School. The Transfer Obligation reads as follows:

*"4.5 Not to Commence the Development until the Owner has transferred the Primary School Land to the Council in accordance with the terms and conditions of transfer of Part 2 below."*

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<sup>1</sup> <https://www.gov.uk/government/publications/modify-or-discharge-a-planning-obligation-s106b>

## Appeal Procedure Statement

1.7 Application of the criteria set out at Annexe K of the PINS Procedural Guide ('the Procedural Guide') for Planning Appeals lead to the conclusion that a public inquiry is the appropriate procedure for determining this appeal. Accordingly, this appeal should be determined by the public inquiry procedure, and the Appellant requests that it is. Our request is provided at **Appendix 1** and is summarised as follows:

- The issues in relation to this case are complex as it relates to a wider use of the site. In the other appeal submitted on this site, which we request this appeal is heard together with, Wiltshire Council advance the planning obligation and need for educational uses on the site as an objection and implied reason for refusal;
- By connection, the other appeal includes evidence on planning balance and compliance with the development, and housing land supply matters which will need to be explained by witnesses;
- The correct application of the NPPF presumption in favour of sustainable development will need to be considered by the decision maker which will be best considered at inquiry;
- Detailed evidence on five year housing land supply will be presented which will include large amounts of information which considers the deliverability of sites included in Wiltshire Council's supply. Case law has confirmed that the degree of any shortfall in housing land supply, how long this may persist, and any steps being taken to address the shortfall are all relevant to the weight that can be given to the most important policies for determining the application and to the benefits of housing delivery;
- Legal submissions need to be made in relation to this case including, but not limited to, case law on housing land supply and S106A TCPA 1990. The issues covered by these submissions are complex and need to be heard orally at the inquiry; and
- The case is complex because it includes one planning appeal, and one S106B appeal – it is envisaged the Inspector will need to determine whether the S106 obligation should be discharged on the site, and whether the proposals have provided the necessary early years education infrastructure.

1.8 Given the above complexities, and the nature of the issues of this case, there is a need that the evidence be tested through formal questioning by an advocate.

## Planning History

1.9 The relevant land (i.e. subject to the Transfer Obligation and UU as the relevant planning obligation) falls within a wider area subject to an outline planning permission, granted under reference N/11/04126/OUT for 180 dwellings and provision of land for a Primary School. The relevant previous planning application was submitted by Gleeson Strategic Land in December 2011 and was refused by the Council in March 2012. The refusal was appealed and the appeal was allowed, and outline planning permission

granted, in March 2013. Bloor Homes subsequently acquired this development site from Gleeson Strategic Land and have subsequently progressed the delivery of new homes which are now complete.

- 1.10 The relevant planning obligations in relation to the development include those related to education, as set out at paragraph 4 of Schedule 1 of the UU. The application was accompanied by a Site Location Plan (ref: MAL3D01) (**Appendix 2**) which identifies the area to which these obligations relate.

- 1.11 In relation to the need for the Primary Schooling contributions, we note that paragraphs 83 to 86 of the previous appeal decision stated:

*“83. Regarding schooling, Malmesbury School (Secondary) has capacity for the foreseeable future but the town’s successful C of E Primary School is effectively full. This latter concern is a problem which requires an urgent solution but is not something which, on its own, would justify a refusal of planning permission for the appeal scheme.*

*84. The Local Education Authority has a duty to provide school places for appropriately aged children living in its area. There are some spare primary places in surrounding village schools so bussing is an option; if not an ideal one. Indeed, the Appellant’s completed Unilateral Undertaking (UU) offers £238,000 (two hundred and thirty eight thousand pounds) towards the costs of this. Alternatively, it would be physically possible to provide some temporary accommodation at the C of E Primary School site despite the Governor’s objections to this course (and accepting the likely conversion of the school into an Academy).*

*85. The offer of a primary school site, as part of the Filands’ proposals, remains in place but that does not mean that an inefficient, split school, site has to be the result. The 2ha, or so, area of land remains available to the community at a nominal cost whether or not a new primary school is built there; subject only to a covenant that the land be used solely for educational purposes.*

*86. The Appellant’s UU will provide £1,057,211 (one million, fifty seven thousand, two hundred and eleven pounds) as part of its Primary School Education Contribution. Add this sum to the likely Government’s New Homes Bonus, of about £1,670,000 (one million, six hundred and seventy thousand, pounds), payable on completion of 180 or so new dwellings provided by the implementation of any approved appeal scheme, and it is obvious that substantial funds could be made available for use by the local community as part of the dMNP process. Some of these monies could purchase more land close to the existing primary school so that it could be expanded, to provide additional pupil places, in situ.”*

- 1.12 It is clear, therefore, that the Primary School site was included as one of multiple potential options to remedy the schooling shortfall in the Town at the time of determination. Bloor Homes subsequently acquired the site and built out the residential elements of the scheme. The safeguarded land for the Primary School site remains undeveloped.
- 1.13 As referred to above, the appeal parcel is subject to a planning obligation that requires the Primary School Land to be transferred to Wiltshire Council subject to a covenant that

the land be used solely for educational purposes. Bloor Homes have applied to Wiltshire Council to discharge this obligation following historic attempts to transfer the Primary School Land to Wiltshire Council for use as a Primary School.

- 1.14 Wiltshire Council did not proceed with the transfer of the Primary School Land, and it is understood that this is because the Primary School Land was not required for the provision of a primary school, with Wiltshire Council opting to take a different approach to the provision of school places in Malmesbury.
- 1.15 In February 2021, Turley then submitted two outline planning applications on the site, on behalf of the Appellant, for a development of approximately 70 homes with one application including 0.2ha of land for a nursery (ref 21/01363/OUT), and one application without land for a nursery (ref 21/01641/OUT).
- 1.16 The latter application is also subject to an appeal against Wiltshire Council's non-determination, against which Wiltshire Council advance an objection based on lack of educational infrastructure provided on the site.

## 2. The Appellant's Case

### S106A and S106B

- 2.1 The attached extract of S106A and S106B TCPA 1990 (**Appendix 3**) states that a person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the local planning authority by whom the obligation is enforceable for the obligation to be discharged.
- 2.2 The 'relevant period' if no period is prescribed (as in this case), is the period of five years beginning with the date on which the obligation is entered into. The obligation was entered into on 15 February 2013 and so the relevant period has now expired.
- 2.3 S.106A TCPA 1990 states that where an application is made to an authority under subsection S.106A(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.
- 2.4 Appendix J of the Procedural Guide sets out that where an appeal is against non-determination, the appellant must address the areas that the appellant considers most likely to comprise the local planning authority's objections to the development proposed.
- 2.5 In this case, given the lack of determination, it is assumed that the LPA has determined that the obligation shall continue to have effect without modification.
- 2.6 It is the case of the Appellant that the planning obligation no longer serves a useful purpose, and that it should be discharged.
- 2.7 The Appellant's case is that the planning obligation no longer serves a useful purpose for the following reasons.

### **Reason 1 – Wiltshire Council have not progressed the transfer of the Primary School Land and have secured an alternative strategy for Primary School provision in Malmesbury**

- 2.8 Bloor Homes made a concerted effort to engage with Wiltshire Council and transfer the Primary School Land to Wiltshire Council in late 2015 early 2016. These efforts are documented at **Core Document 1** but, ultimately, were not progressed by Wiltshire Council.
- 2.9 The timeline of relevant correspondence between Bloor Homes (and its representatives) and Wiltshire Council (and its officers/representatives) is as follows:

- **6 October 2015** – email from Bloor Homes' legal advisors Osborne Clarke (hereafter 'OC') to Kathy Fraser (Solicitor at Wiltshire Council) enclosing revised title plan and requesting response on the draft transfer document and licence.
- **19 October 2015** – response from Kathy Fraser at Wiltshire Council to OC attaching draft transfer with comments.
- **23 October 2015** - response from OC to Kathy Fraser at Wiltshire Council confirming agreement to the amendments made to the transfer and confirming that: *"If at all possible we would like to complete this transfer by the end of next week"*.
- **27 October 2015** – response from Kathy Fraser at Wiltshire Council to OC seeking confirmation that: *"facilities will be provided without cost to the Council"*.
- **28 October 2015** - response from OC to Kathy Fraser at Wiltshire Council confirming that Bloor Homes have allowed to provide mains services to the site.
- **10 Nov 2015** – email from OC to Kathy Fraser at Wiltshire Council referring to a voicemail left by Kathy confirming a meeting being held by Wiltshire Council to discuss obligation and asking for update thereafter.
- **30 Nov 2015** – further email from OC to Kathy Fraser at Wiltshire Council asking for any update.
- **3 December 2015** – email from Andrew Driscoll at Bloor Homes to OC (copying in Kathy Fraser and Stephen Morgan (Assets Portfolio Manager (Estates)) at Wiltshire Council) confirming a call between himself and Stephen Morgan; confirming that Stephen needs to respond to Kathy; and confirming that: *"[Bloor Homes] are keen to get this land transferred to Wiltshire as soon as possible and if there is anything further I can do in the meantime, please let me know."*
- **9 December 2015** - further email from OC to Kathy Fraser at Wiltshire Council asking if progress can be made.
- **9 December 2015** – email from Kathy Fraser at Wiltshire Council to OC stating Wiltshire Council expected to come back 'next week'.
- **4 January 2016** - further email from OC to Kathy Fraser at Wiltshire Council asking for any update.
- **5 January 2016** – email from Andrew Driscoll at Bloor Homes to Stephen Morgan at Wiltshire Council seeking an update.
- **7 January 2016** - email from Alex Smith (Senior Planning Officer at Wiltshire Council) to Andrew Driscoll at Bloor Homes confirming a discussion with Clare Medland (Head of School Place Commissioning) and confirming that: *"They are reviewing the upcoming s106 funding and have asked if you have any anticipated timescales for 1st occupation and occupation of 30 dwellings at the Filands site?"*.



- **7 January 2016** – email response from Andrew Driscoll at Bloor Homes providing anticipated occupation timescales and asking: *“Can you have a word with Claire (sic) please about the transfer of the school land. Despite our best efforts, we are getting no where with your property or legal team in handing this over.”*
- **7 January 2016** – email response from Alex Smith at Wiltshire Council to Andrew Driscoll at Bloor Homes confirming that *“I’ve forwarded the dates onto Clare and asked about the school land transfer as well. I’ll let you know if I get an update on the land transfer.”*
- **8 January 2016** – email reply from Stephen Morgan to Andrew Driscoll at Bloor Homes stating that *“I am meeting with our internal solicitor again on Monday, following which we hope to get back to you.”*

2.10 The above timeline is based on the correspondence that Turley has been provided with by the Appellant to date and so may not be exhaustive, however, it does demonstrate that a clear and sustained attempt was made by the Appellant to transfer the Primary School Land to Wiltshire Council. Should further correspondence be identified, then it will be provided to the inquiry.

2.11 Some 4 years later and following:

- no further progression of the transfer of the Primary School Land by Wiltshire Council; and
- the completion of the build-out of the residential development,

2.12 The Appellant's legal representatives formally wrote to Wiltshire Council on 3 March 2020 (**Core Document 2**). The letter was sent from Andrew Thomas at Gowling WLG to Helean Hughes (Director for Education and Skills at Wiltshire Council) confirming the attempts that had been made by Bloor Homes to transfer the Primary School Land, but that this was not progressed by Wiltshire Council. No response was ever received to the letter.

2.13 It is understood that the context and rationale for Wiltshire Council not accepting the transfer of the Primary School Land is that, since the UU was entered into and the Transfer Obligation secured, Wiltshire Council have pursued an alternative strategy for Primary School provision in the area. This has been, as we understand, provision at Malmesbury Primary School and at nearby Lea & Garsen Primary School.

2.14 The position, therefore, in this appeal is that all relevant parties agree that there is no need for a primary school (or any primary school infrastructure) to be delivered on the Appeal Site.

2.15 This is an important and fundamental point as clearly the original intention of the Transfer Obligation was to fulfil Primary School needs. Indeed, this intention is further reflected by:

- 2.15.1 the description of development associated with N/11/04126/OUT which refers to *'Provision of Land for Primary School'*;

- 2.15.2 the fact that the UU clearly defines and refers to the land to be transferred to Wiltshire Council as the '*Primary School Land*' which is to be transferred '*for the provision of primary school infrastructure*'; and
- 2.15.3 the fact the UU provides for the imposition of a restrictive covenant in any transfer of the Primary School land to Wiltshire Council restricting the future use of the Primary School Land to '*educational purposes by an educational institution*'.
- 2.16 Based on the above, it is our view that Wiltshire Council are seeking to expand the scope of the Transfer Obligation and the associated provisions in the UU beyond both their intended and actual parameters. The occurrence of several years of delay by Wiltshire Council also raises obvious questions regarding the continuing enforceability of the Transfer Obligation. For these reasons, it is considered that the Transfer Obligation no longer serves a useful purpose and should be discharged.

## **Reason 2 - the Education Department support discharge of the obligation for a Primary School**

- 2.17 When the application was initially submitted, Wiltshire Council's Education Department responded to and were clearly supportive of the discharge of the Transfer Obligation.
- 2.18 In summary, in the response dated 10<sup>th</sup> July 2020 (**Core Document 3**), Wiltshire Council's Education Department expressed the view that the Transfer Obligation no longer serves a useful purpose, because:
- the provision of a school site on the application site was never the preferred education solution;
  - the number of additional school places required in the town does not justify the delivery of a new school on the application site; and
  - there are plans in place to meet future school place demand without the delivery of a new school on the application site.
- 2.19 As we will come onto later in this Statement, Wiltshire Council's support of the discharge of the Transfer Obligation has subsequently been withdrawn based on Wiltshire Council's contention that the Transfer Obligation may facilitate the delivery of some alternative education provision on the Appeal Site. However, the fundamental facts remain as follows:
- 2.19.1 Bloor Homes offered to transfer the Primary School Land to the Wiltshire Council;
- 2.19.2 Having regard to all the circumstances, Wiltshire Council (as the ultimate beneficiary of the Transfer Obligation) decided not to proceed with that transfer; and

- 2.19.3 Wiltshire Council do not require the Primary School Land for the provision of a primary school

**Reason 3 – there are no alternative education schemes for the Appeal Site which are deliverable**

- 2.20 On 1<sup>st</sup> September 2020 correspondence was received from Wiltshire Council’s case officer (**Core Document 4**) asserting that the Transfer Obligation and the related provisions of the UU do not limit use of the land solely to a primary school and provide some scope for other education uses and by educational providers and potentially other than by Wiltshire Council. The Appellant does not concur with this view on the basis that, even if the Transfer Obligation is still considered to be enforceable, it does not consider the use of the Primary School Land for such alternative purpose to be within the terms and parameters of the Transfer Obligation and the associated provisions contained in the UU.
- 2.21 Following the correspondence of 1st September 2020, Wiltshire Council proceeded to consult on this basis set out above seeking alternative schemes with a sufficient degree of certainty and advancement.
- 2.22 On 12<sup>th</sup> October 2020 an additional consultation response was received from the Education Department (**Core Document 5**) asserting that there was a requirement for early years provision in Malmesbury (suggesting a 0.4ha nursery site), and therefore they did not agree to discharge the Transfer Obligation.
- 2.23 The October Education Department response stated they had obtained legal advice as to the provisions of the UU in relation to use of the land for educational purposes by an educational institution and that early years and pre-school provision would meet these criteria. The legal advice received by the Education Department was requested by the Appellant for review but not provided.
- 2.24 On 23<sup>rd</sup> October 2021, a consultation response was received from Malmesbury Town Council (hereafter 'MTC') which included two Statements of Intent (**Core Document 6**) suggesting interest in the use of the Appeal Site for alternative educational uses – these were from Malmesbury School (the local Secondary School), and YMCA Brunel Group. MTC’s response was provided in response to an email from the Case Officer of 1<sup>st</sup> September 2020, where he invited MTC to make formal submissions in respect of alternative proposals for education uses, with *‘full details as to the operator, use and timeframes and including information available as to funding availability/deliverability’*.
- 2.25 In early November 2020 (**Core Document 7**) correspondence was received from Malmesbury School - one of the possible providers who had prepared a statement of intent (N.B. not Malmesbury Primary School, which is referred to later in the Statement) confirming that they had withdrawn their statement.
- 2.26 As a consequence, the present position is that only one Statement of Intent from the YMCA Brunel Group subsists which provides that:

*“We would be extremely interested to develop a new purpose built setting in Malmesbury and specifically at the Filands Site if there was an opportunity.”*

2.27 And further:

*“We have wanted to develop a setting like this in Malmesbury for many years and given the green light would be willing to invest in detailed plans and to ensure the scheme is fully funded.*

*The opportunity to bring the whole site into full educational use presents a fantastic opportunity to create a facility that will add value long term. Whilst we are concentrating on the nursery element, we would look forward to working collaboratively with the School and any other community partners.”*

2.28 In our opinion, it is clear from the above response that:

2.28.1 there is no degree of certainty and advancement in this proposal; and

2.28.2 it only shows an initial expression of interest in the prospect of the opportunity.

2.29 Importantly, following withdrawal of the statement of intent from Malmesbury School, further correspondence was received from them in relation to application 21/01641/OUT which proposed the following development: *“Outline planning application (all matters reserved) for residential development, associated infrastructure and public open space”*. That letter confirms that it is Malmesbury School's intention to pursue a nursery on its site and, as a consequence, they raised objection to the outline planning application (which included land for a 0.2ha nursery) on the basis that this could undermine the progression of its own proposals.

2.30 If notwithstanding the points above, the Inspector finds it appropriate to explore potential alternative educational uses for the Primary School Land beyond the fact that the obligation is not required for a Primary School, it is clear in our view that the only potentially useful alternative purpose advanced by Wiltshire Council is for a nursery/early years provision. However, the actual delivery of this potential alternative use on the Appeal Site cannot be considered to be useful in this context as:

2.30.1 there are no such schemes in respect of the Appeal Site with any degree of certainty; and

2.30.2 the pursuit of a nursery/early years provision on the Appeal Site would undermine the potential for early years provision to come forward on a far more suitable site in the Town.

2.31 On the basis of the above, the Transfer Obligation does not serve a useful purpose even if the Transfer Obligation and associated obligations in the UU may permit early years provision on the Primary School Land. Indeed, should Wiltshire Council pursue early years provision on the Primary School Land, this could actually serve a negative purpose in terms of the delivery of a far more suitable and sustainable nursery/early years provision in the Town. We consider this in more detail under Reason 4, below.

**Reason 4 – there are preferable alternative nursery schemes in the Town, which do have a degree of certainty and advancement, and which provision of a nursery on the Appeal Site would undermine**

2.32 We understand Wiltshire Council's current position to be:

- 2.32.1 that the Transfer Obligation cannot be discharged unless some sort of educational provision is included on the Appeal Site; and
- 2.32.2 the only potential alternative education provision considered to have a sufficient degree of certainty and advancement to warrant determination that the obligation still serves a useful purpose is the provision of a nursery on the Appeal Site.

2.33 We accept and agree that there is demand for nursery provision in Malmesbury, however, we submit that there are preferable alternative nursery schemes in the Town, which do have a degree of certainty and advancement, and which provision of a nursery on the Appeal Site would undermine.

2.34 In the connected residential appeal on the site, we provide S106 Heads of Terms for financial contributions for an Early Years project in the Town, as do multiple other residential sites in the Town.

2.35 The 12<sup>th</sup> October 2020 Education Department Response (**Core Document 5**) acknowledges the possibility of early years education provision being located at Malmesbury Primary School. This states:

*“S106 contributions have already been secured from other local developments for additional early years places. Originally the intention was to create a small 30 place nursery at Malmesbury Primary School. However, such a small provision would not be a financially viable proposition for potential providers nor would it meet the demand. There is insufficient land at the school to accommodate a larger provision. At least two potential providers have been actively searching for land in Malmesbury and have expressed an interest in setting up a new early years education provision in the town.*

*Once the land is transferred the Council would tender the opportunity to provide early years provision. The tender process would ensure procurement regulations are met and would be managed by Wiltshire Procurement hub and Families and Children’s Commissioning team. The providers who have already expressed informal interest in developing early years provision in Malmesbury would be invited, along with any other potential providers, to participate in the tender process to develop an early years provision on the Whychurch land.”*

2.36 As stated, we have submitted outline planning applications for residential development on the site. We have received consultation responses on both applications from Malmesbury Primary School (**Core Documents 8 and 9**). On the application including land for a nursery (21/01641/OUT), Malmesbury Primary School object, and state:

*“Malmesbury Primary School (MPS) has been looking at the possibility of providing an 80 place nursery school on the Malmesbury Primary School site for some while. To date*

*we have been involved in detailed discussions with an end user and their specialist developer and have recently submitted an application to the Dept of State for Education, seeking their approval for the release of one third of an acre within the school boundary for the development.*

*As far as MPS is concerned we would much rather see any new nursery school provision on the school site itself, rather than up at Filands. We have previously made our feelings clear to Wiltshire Council and representatives of the Town Council and we acknowledge that a new nursery is very much needed in Malmesbury. Creating such a nursery has been part of the Governors' vision for the school since early 2018. This vision was developed with parents, pupils and staff and it is specifically to have a nursery on the school site..."*

2.37 It has been clearly indicated, therefore, that to the contrary to the responses of the Wiltshire Education Department, Malmesbury Town Council and the Case Officer, that there is a strong ambition and advanced proposal at Malmesbury Primary School.

2.38 The Primary School Project is patently a better option for the Town than a possible nursery site at Filands. Building on the points made in the Primary School objection (**Core Document 8**) when viewed in context, the Primary School Project:

- Is located in a more sustainable location, in the centre of the Town, and would allow trips to be combined between parents/carers who are also visiting the services in the Town Centre and who have other children at the Primary School;
- Is a more advanced proposal with the Primary School having detailed discussions with an end user and specialist developer, and having submitted an application to Department of State for Education to release the land;
- Has more certainty, with the Primary School activity promoting the deliverability of their proposal;
- There are pooled financial contributions from multiple planning permissions in the Town, which equate to hundreds of thousands of pounds, dedicated to delivery of a suitable project;
- Would simply provide a better provision, as documented in the Primary School objection, through sharing school experience and training, transition for school children, shared mutual resources and space.

2.39 An alternative project for the purposes of early years provision on the Appeal Site would not serve a useful purpose. In practice, it would undermine another project in the Town which has some degree of certainty to its delivery (unlike those relied on by Wiltshire Council for the Appeal Site) is patently more advanced in its progression and which would deliver a better outcome for the Town. Wiltshire Council using the subject Transfer Obligation to provide a competing site for another project in a more sustainable location in the Town is simply neither sensible nor useful.

### 3. Conclusion

- 3.1 Bloor Homes made clear and reasonable attempts to transfer the Primary School Land to Wiltshire Council in 2015/16 in accordance with the terms of the UU. Wiltshire Council decided not to progress this transfer and no further action was subsequently taken in respect of the Transfer Obligation. The residential development to which the Transfer Obligation is linked is now complete and it is questioned whether the Transfer Obligation remains capable of enforcement.
- 3.2 It has come to light through the S.106A application process that all relevant parties agree that there is no need for a primary school (or any primary school infrastructure) to be delivered on the Primary School Land. In its initial response to the S.106A application, Wiltshire Council's Education Department supported the S.106A application and confirmed that the Transfer Obligation should be discharged on this basis. The second response from Wiltshire Council's Education Department re-iterates that the Primary School Land is not required for primary places.
- 3.3 The terms of the UU clearly set out that the Primary School Land is to be used '*for the provision of primary school infrastructure*' and that any transfer will be subject to a restrictive covenant limiting the use of such land to '*educational purposes by an educational institution*'. It follows, therefore, that any use outside of these narrow parameters is not a deliverable alternative and should not be taken into account in the determination of this appeal. In this regard, it is also noted that the comments made by the Inspector at paragraphs 83 – 86 of the previous appeal decision (referred to in paragraph 1.11 of Section 1 of this Statement) do not operate to negate or qualify the clear terms of the UU.
- 3.4 A robust consultation process was undertaken by Wiltshire Council in connection with the S106A application and no consultation responses have been received which, in the Appellant's view, demonstrate that the Transfer Obligation continues to serve a useful purpose.
- 3.5 Given the terms and restrictions set out in the UU (as highlighted in paragraph 3.3 above), the Appellant's view is that the scope for the delivery of anything other than a primary school on the Primary School Land is extremely limited. Therefore, it is considered that the alternative education scheme advanced by Wiltshire Council (i.e. early years/nursery provision) cannot be lawfully delivered and should not be taken into account in deciding whether the Transfer Obligation continues to serve a useful purpose.
- 3.6 Should the Inspector disagree with the Appellants view on the ability of Wiltshire Council to deliver an alternative education scheme on the Primary School Land, the Appellant maintains that the alternative education proposal actually put forward by Wiltshire Council does not have a sufficient degree of certainty and/or advancement to be considered a realistic or viable option.
- 3.7 Indeed, the only alternative scheme being advanced by Wiltshire Council is the request of a 0.4ha site for a nursery, which is supported by a single high level Statement of

Intent from one provider which was obtained by the Town Council and, as we have demonstrated in the preceding sections of this Statement:

- there is no substantive evidence that there is demand for a nursery site in this location; and
- there are preferred, more advanced and certain proposals for nursery provision in the Town, which could be undermined by provision of a nursery on the Appeal Site.

3.8 For the reasons set out above, we are of the view that the Transfer Obligation should be discharged on the basis it no longer serves a useful purpose.



## Appendix 1: Procedure Statement

### CRITERIA FOR DETERMINING THE PROCEDURE FOR PLANNING APPEALS

1. The Planning Inspectorate has the power (on behalf of the Secretary of State) to determine the appeal method for appeals made under section 78 of the TCPA 1990 by reference to specified criteria.
2. The relevant criteria for determining the procedure for planning appeals is set out in Annex K of the Planning Inspectorate's Procedural Guide: Planning appeals – England (March 2021, Version 14).
3. In accordance with the procedural guide, an inquiry will be appropriate if:
  - (a) There is a clearly explained need for the evidence to be tested by formal questioning by an advocate; or
  - (b) The issues are complex; or
  - (c) The appeal has generated substantial local interest to warrant an inquiry as opposed to dealing with the case by a hearing.
4. The use of the word 'or' clearly indicates that only one of these criteria is required in order to justify the use of the inquiry procedure.

### APPLICATION OF THE CRITERIA

5. The Appellant's position is that the first two criteria are relevant to this Appeal. The Appeal is against the non-determination of a S106A application, which we submit should be heard alongside another non-determination appeal of an outline application for residential development on the same site, also made by Bloor Homes South West.
6. Having regard to Wiltshire Council's position and consultation responses, the Appellant considers that the following areas are in contention between the parties and will require detailed evidence to be produced by each party in relation to their respective positions and tested under cross examination:
  - (a) Complexity – there is one planning appeal, and one S106B appeal which are interconnected. Wiltshire Council advance an objection to the residential application on the basis of the need to provide educational infrastructure on the site, derived from the obligation in question in the S106B appeal.
  - (b) Planning Policy – conflict with the development plan, scale of development, principle of development, need for the development;
  - (c) Five Year Housing Land Supply;
  - (d) Whether the S106 obligation should be discharged on the site, and whether the proposals have provided the necessary early years education infrastructure.

7. The Appellant intends to use two witnesses to advance its case in respect of planning (including S106B) and housing land supply.

8. Legal submissions need to be made in relation to this case including, but not limited to, case law on housing land supply and S106A. The issues covered by these submissions are complex and need to be heard orally at the inquiry.

9. The Appellant considers that evidence and cross-examination will last approximately four days. This exceeds the single day (or two days in exceptional circumstances) reserved for hearings.

## **CONCLUSION**

10. The Appellant requests that the Appeal is determined by way of the inquiry procedure.

11. The Appellant considers that the written representations procedure and the hearing procedure would be inappropriate for this Appeal, having regard to the applicable guidance. There is a real risk that the relevant issues will not be properly scrutinised without the opportunity for the evidence to be tested through formal questioning by an advocate.

## **Appendix 2:    Site Location Plan (ref: MAL3D01)**



## **Appendix 3: S106A and S106B TCPA 1990**



# Town and Country Planning Act 1990

## 1990 CHAPTER 8

### PART III

#### CONTROL OVER DEVELOPMENT

##### *Other controls over development*

#### **[<sup>F1</sup>106A Modification and discharge of planning obligations.**

- (1) A planning obligation may not be modified or discharged except—
  - (a) by agreement between [<sup>F2</sup>the appropriate authority (see subsection (11))] and the person or persons against whom the obligation is enforceable; or
  - (b) in accordance with [<sup>F3</sup>—
    - (i) this section and section 106B [<sup>F4</sup>, or
    - (ii) sections 106BA and 106BC.]
- (2) An agreement falling within subsection (1)(a) shall not be entered into except by an instrument executed as a deed.
- (3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to [<sup>F5</sup>the appropriate authority] for the obligation—
  - (a) to have effect subject to such modifications as may be specified in the application; or
  - (b) to be discharged.
- (4) In subsection (3) “ the relevant period ” means—
  - (a) such period as may be prescribed; or
  - (b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.
- (5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.

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- (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.
- (7) The authority shall give notice of their determination to the applicant within such period as may be prescribed.
- (8) Where an authority determine [<sup>F6</sup>under this section] that a planning obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.
- (9) Regulations may make provision with respect to—
- (a) the form and content of applications under subsection (3);
  - (b) the publication of notices of such applications;
  - (c) the procedures for considering any representations made with respect to such applications; and
  - (d) the notices to be given to applicants of determinations under subsection (6).
- (10) Section 84 of the <sup>M1</sup>Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to a planning obligation.
- [ In this section “ the appropriate authority ” means—
- <sup>F7</sup>(11) (a) the Mayor of London, in the case of any planning obligation enforceable by him;
- [ the Secretary of State, in the case of any development consent obligation <sup>F9</sup>...;
- <sup>F8</sup>(aa)
- <sup>F10</sup>(ab) .....]
- (b) in the case of any other planning obligation, the local planning authority by whom it is enforceable.
- (12) The Mayor of London must consult the local planning authority before exercising any function under this section.]]

#### Textual Amendments

- F1** S. 106- 106B substituted for s. 106 (25.10.1991 so far as substituting the new s. 106, 25.11.1991 for certain purposes and otherwise 9.11.1992) by [Planning and Compensation Act 1991 \(c. 34, SIF 123:1\), s. 12\(1\); S.I. 1991/2272, art. 3\(1\)\(a\); S.I. 1991/2728, art. 2; S.I. 1992/2831, art. 2](#)
- F2** Words in s. 106A(1)(a) substituted (6.4.2008) by [Greater London Authority Act 2007 \(c. 24\), ss. 34\(2\), 59; S.I. 2008/582, art. 2\(a\)](#)
- F3** Word in s. 106A(1) inserted (25.4.2013) by [Growth and Infrastructure Act 2013 \(c. 27\), s. 35\(2\), Sch. 2 para. 4\(2\)\(a\)](#)
- F4** Words in s. 106A(1) inserted (25.4.2013) by [Growth and Infrastructure Act 2013 \(c. 27\), s. 35\(2\), Sch. 2 para. 4\(2\)\(b\)](#)
- F5** Words in s. 106A(3) substituted (6.4.2008) by [Greater London Authority Act 2007 \(c. 24\), ss. 34\(3\), 59; S.I. 2008/582, art. 2\(a\)](#)

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- F6** Words in s. 106A(8) inserted (25.4.2013) by [Growth and Infrastructure Act 2013 \(c. 27\)](#), s. 35(2), **Sch. 2 para. 4(3)**
- F7** S. 106(11)(12) inserted (6.4.2008) by [Greater London Authority Act 2007 \(c. 24\)](#), **ss. 34(4)**, 59; S.I. 2008/582, **art. 2(a)**
- F8** S. 106A(11)(aa)(ab) inserted (1.3.2010) by [Planning Act 2008 \(c. 29\)](#), **ss. 174(3)**, 241 (with s. 226); S.I. 2010/101, **art. 3(k)** (with art. 6)
- F9** Words in s. 106A(11)(aa) repealed (1.4.2012) by [Localism Act 2011 \(c. 20\)](#), s. 240(2), Sch. 13 para. 77(2)(a), **Sch. 25 Pt. 20**; S.I. 2012/628, art. 7
- F10** Words in s. 106A(11) repealed (1.4.2012) by [Localism Act 2011 \(c. 20\)](#), s. 240(2), Sch. 13 para. 77(2)(b), **Sch. 25 Pt. 20**; S.I. 2012/628, art. 7

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#### Marginal Citations

- M1** 1925 c. 20.





# Town and Country Planning Act 1990

## 1990 CHAPTER 8

### PART III

#### CONTROL OVER DEVELOPMENT

##### *Other controls over development*

#### **106B** <sup>F1</sup>Appeals [<sup>F2</sup>in relation to applications under section 106A].

- (1) Where [<sup>F3</sup>an authority]—[<sup>F4</sup> (other than the Secretary of State <sup>F5</sup>...)]
  - (a) fail to give notice as mentioned in section 106A(7); or
  - (b) determine [<sup>F6</sup>under section 106A] that a planning obligation shall continue to have effect without modification,the applicant may appeal to the Secretary of State.
- (2) For the purposes of an appeal under subsection (1)(a), it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification.
- (3) An appeal under this section shall be made by notice served within such period and in such manner as may be prescribed.
- (4) Subsections (6) to (9) of section 106A apply in relation to appeals to the Secretary of State under this section as they apply in relation to applications to authorities under that section.
- (5) Before determining the appeal the Secretary of State shall, if either the applicant or the authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
- (6) The determination of an appeal by the Secretary of State under this section shall be final.
- (7) Schedule 6 applies to appeals under this section.

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[<sup>F7</sup>(8) In the application of Schedule 6 to an appeal under this section in a case where the authority mentioned in subsection (1) is the Mayor of London, references in that Schedule to the local planning authority are references to the Mayor of London.]

#### Textual Amendments

- F1** Ss. 106-106B substituted for s. 106 (25.10.1991 so far as substituting the new s. 106, 25.11.1991 for certain purposes and otherwise 9.11.1992) by [Planning and Compensation Act 1991](#) (c. 34, SIF 123:1), [s. 12\(1\)](#); S.I. 1991/2272, [art. 3\(1\)\(a\)](#); S.I. 1991/2728, [art. 2](#); S.I. 1992/2831, [art. 2](#)
- F2** Words in s. 106B heading inserted (25.4.2013) by [Growth and Infrastructure Act 2013](#) (c. 27), s. 35(2), [Sch. 2 para. 5\(2\)](#)
- F3** Words in s. 106B(1) substituted (6.4.2008) by [Greater London Authority Act 2007](#) (c. 24), [ss. 34\(6\)](#), 59; S.I. 2008/582, [art. 2\(a\)](#)
- F4** Words in s. 106B(1) inserted (1.3.2010) by [Planning Act 2008](#) (c. 29), [ss. 174\(4\)](#), 241 (with s. 226); S.I. 2010/101, [art. 3\(k\)](#) (with [art. 6](#))
- F5** Words in s. 106B(1) repealed (1.4.2012) by [Localism Act 2011](#) (c. 20), s. 240(2), Sch. 13 para. 77(3), [Sch. 25 Pt. 20](#); S.I. 2012/628, [art. 7](#)
- F6** Words in s. 106B(1)(b) inserted (25.4.2013) by [Growth and Infrastructure Act 2013](#) (c. 27), s. 35(2), [Sch. 2 para. 5\(3\)](#)
- F7** S. 106B(8) inserted (6.4.2008) by [Greater London Authority Act 2007](#) (c. 24), [ss. 34\(7\)](#), 59; S.I. 2008/582, [art. 2\(a\)](#)

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