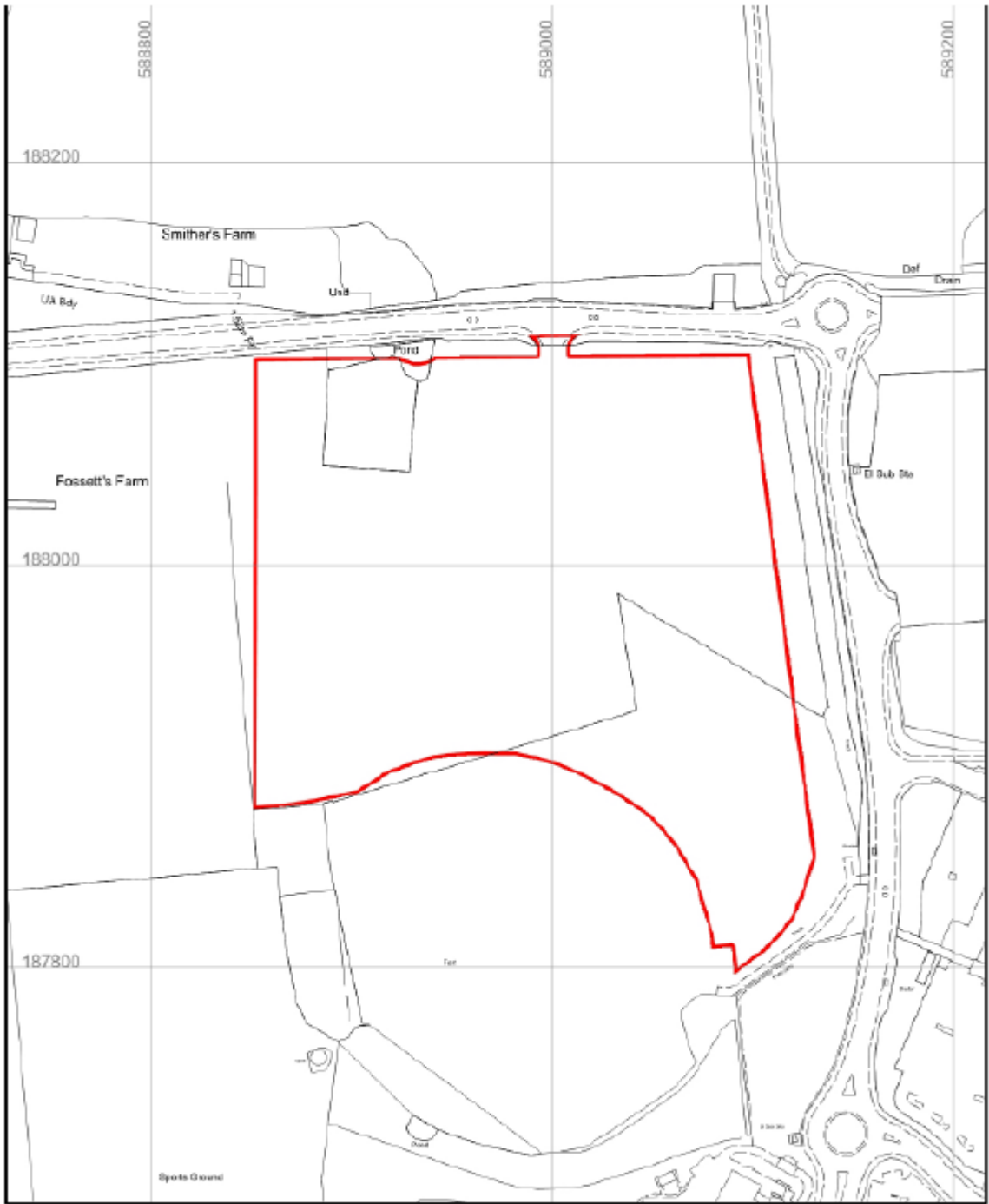


Reference:	24/02032/DOV	
Application Type:	Deed of Variation	
Ward:	St Lukes	
Proposal:	Modification of planning obligation (Section 106 agreement) dated 30th September 2022 pursuant to application 20/00337/OUTM dated 30.09.2022 to modify Biodiversity Net Gain (BNG)	
Address:	Land At Fossetts Farm, Sutton Road, Southend-on-Sea, Essex	
Applicant:	Keepmoat Homes and Homes England	
Agent:	Kate Holland of Invicta Planning	
Consultation Expiry:	3 rd February 2025	
Expiry Date:	7 th March 2025	
Case Officer:	Charlotte White	
Plan Nos:	N/A	
Additional information:	Cover Letter from Invicta Planning dated 19 December 2024 and BNG Technical Note by Keepmoat Homes dated December 2024	
Recommendation:	DELEGATE to the Director of Planning and Economy or Service Manager – Development Management and Enforcement to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 30th September 2022 and previously signed pursuant to outline planning permission reference 20/00337/OUTM, as amended by previously signed Deed of Variation ref. 23/01656/DOV and enter into a Planning Obligation by Deed of Variation to allow the modifications as set out in 8.1 of this report.	



1 Site and Surroundings

- 1.1 The application site is irregular in shape and some 6.01 hectares in size and slopes down gently from south to north. The majority of the site was previously covered in a mix of bramble, mixed small trees, mixed long grass, vegetation and saplings, but has now largely been cleared with protective fencing (to protect the Scheduled Monument and trees) and reptile fencing now installed.
- 1.2 The site is to the south and west of Fossetts Way. It is currently undeveloped, vacant land historically used for agricultural purposes. To the immediate north of the site is Fossetts Way, to the immediate east is a Medieval Green Lane with Fossetts Way beyond. To the south is a large circular enclosure, known as Prittlewell Camp, a Scheduled Monument (SM). To the west of the site is undeveloped, vacant, previously agricultural land. Planning permission has been granted to redevelop the site to the west under reference 17/00733/FULM which includes relocation of Southend United Football Club. This has not commenced so far. To the north of the site planning permission was granted by Rochford District Council under reference 11/00224/TIME for three outside training pitches, an all-weather floodlit training pitch and surface car parking. To the south of the site, beyond the SM is an out-of-town retail area with a Waitrose supermarket and petrol station, B&Q, a terrace of 3 commercial units and the Wellesley Hospital. To the east of the site, beyond Fossetts Way, planning permission has been granted for a residential development of 221 units (reference 21/00711/FULM) and the development has commenced on this site. A vehicular access from Fossetts Way has been constructed to the north of the site.
- 1.3 The site has no specific allocation within the Development Management Document Proposals Map. Within the Core Strategy Key Diagram, the general area that the site is located within (Fossetts Farm) is identified as an industrial/employment area. The site is subject to a development brief - the "Development Brief for Land at Fossetts Way" which states '...the subject site is within the ownership of Southend University Hospital Trust and was allocated as 'Safeguarded Land' for employment purposes within the second alteration to the Southend Local Plan. It is now recognised that the site has long term development potential to provide a high quality, sustainable mixed-use residentially led scheme to provide new housing and supporting uses.'
- 1.4 The site is within Flood Zone 1 – low probability of flooding.

2 The Proposal

- 2.1 Outline planning permission was granted on 30th September 2022 (ref. 20/00337/OUTM) to "Erect up to 131 residential units with associated car parking, landscaping and ancillary works at land on Fossetts Way (Outline Application)." All matters were reserved apart from access.
- 2.2 The outline planning permission was subject to a Section 106 (S106) legal agreement dated 30th September 2022. The S106 agreement secured a number of contributions which, beyond the emboldened one below – subject of this DoV application, included affordable housing contributions, a financial contribution towards secondary education, RAMS payments, highways contributions, an enhanced bus service, a contribution towards investigations into works to local cycleways, car club vehicle and spaces, transfer of the Schedule Monument (SM) land within its ownership to the Council, payment of a proportion of the costs to implement the SM Archaeological Conservation Management Plan, **mitigation to ensure that the net loss of biodiversity at the site as a result of the development is off-set within the City of Southend, with a minimum of 10% biodiversity net gain achieved within the city**, release of a restriction imposed on a 2004 S106 which restricted residential use at the site and a monitoring fee.

- 2.3 The Biodiversity Net Gain (BNG) requirements of the original S106 (summary of which is **emboldened** above) was subsequently altered by a Deed of Variation under ref 23/01656/DOV. This allowed Schedule 2, Part 3 of the S106 which relates to Biodiversity Net Gain (BNG) to be updated to provide a hierarchical approach to providing BNG (so allowing, as an ordered sequence of priorities; BNG to be provided on site, or, if not, then within the City Area, or, if not then within the wider region or, if not, then finally utilising the Government's Biodiversity Credits Scheme), in line with Section 10 of the Environment Act 2021 and associated guidance from Central Government. This was instead of the original wording, which was drafted prior to the current BNG legislative framework, which required the biodiversity loss to be mitigated with on-site and/or off-site off-setting within the city area only. This Deed of Variation also added a clause to the S106 agreement to allow the developer a right of access onto the SAM transferred land for the purposes of implementation of the planning permission and to undertake the works within the SM buffer area.
- 2.4 However, since the previous agreed Deed of Variation (ref. 23/01656/DOV), the applicant has continued to explore how the BNG requirements could be met and have made it clear that "...there is a significant shortage of BNG credits within Essex due to delays in registering land through the Natural England Statutory Credit system. There are therefore no available credits close to Southend-on-Sea." The applicant goes on to state that due to the lack of options to provide the BNG requirement on site, or off site and the lack of statutory credits in Essex, the only way that suitable BNG can be achieved under the current S106 requirements is by purchasing credits on sites a significant distance from Fossetts Farm, and outside of the county (potentially in Kent).
- 2.5 The applicant is therefore seeking to vary the S106 given that there was no mandatory BNG requirement at the time the outline permission was granted and to seek to provide the ecological enhancements in a way that would benefit the city of Southend-on-Sea directly.
- 2.6 The applicant now seeks to vary the S106 legal agreement to provide a financial contribution of £400,000 to allow for biodiversity enhancement measures to be undertaken on this Council's owned land and sites. The applicant has, in consultation with their ecologist and taking into account the proposed biodiversity actions contained within the Council's "Parks and Green Spaces Strategy (2015-2020)", proposed that the financial contribution is spent on:

From the Parks and Green Spaces Strategy (2015-2020):

- Improve Biodiversity by continuing to implement wildlife friendly schemes and management within the city's parks and green spaces.
- Increase the number of Green Corridors within the city.
- Continue to deliver subsidised donated tree scheme.
- Create a network of community orchards.

[Officer comment:

- Green Corridors mean continuous green areas or linked spaces along a route providing opportunities for place, contemplation and recreation and protect and encourage biodiverse wildlife, flora and fauna and included cycle ways, walking routes, bridle ways, rights of way and transport routes across the city providing opportunities for walking, cycling and horse riding (see Southend-on-Sea Parks and Green Space Strategy 2015-2020).
- Donated Tree Scheme is where a tree can be purchased by a donation to the Council and for planting in parks, open spaces and in suitable locations on the highway (see Southend-on-Sea Tree Policy 2020-2030).]

From the Applicant's ecologist:

- Creation of wildflower grassland and bulb planting;
- Planting of native and / or wildlife friendly scrub, shrubs and perennials;
- Planting of native and / or wildlife friendly trees including flowering orchard species;
- Planting of native and / or wildlife friendly climbers;
- Native woodland creation and / or enhancement;
- Installation of green and / or brown roofs to existing structures such as bus stops and cycle stores;
- Enhancement of blue corridors through pond or scrape creation; [**Officer comment:** Scrapes are shallow depressions with gently sloping sides which seasonally hold water and remain damp for most of the year, they are beneficial to wildlife (amphibians and invertebrates)].
- Creation of reptile refuges and hibernacula within open green spaces and parkland; [**Officer comment:** A hibernacula is a shelter where animals hibernate during the winter.]
- Nesting enhancement for invertebrates through measures such as installation of bee bricks, insect nesting aids and bug hotels;
- Enhancements for nesting birds through installation of nest boxes within new and existing buildings and onto suitable trees within parkland and open green spaces. Both generalist and priority species should be targeted such as swifts, house martins and house sparrows.
- Enhancements for roosting bats through installation of bat boxes within new and existing buildings and onto suitable trees within parkland and open green spaces.

2.7 The scope of these proposed changes has been altered, and agreed with the Applicant during the course of the application, in response to consultation responses received as follows:

From the Parks and Green Spaces Strategy (2015-2020):

- Improve Biodiversity by continuing to implement wildlife friendly schemes and management within the city's parks and green spaces.
- ~~Increase~~ **Improve** the existing number of Green Corridors within the city.
- Continue to deliver subsidised donated tree scheme.
- Create a network of community orchards.

From the applicant's ecologist:

- Creation of wildflower grassland and bulb planting;
- Planting of native and / or wildlife friendly scrub, shrubs and perennials;
- Planting of native and / or wildlife friendly trees including flowering orchard species;
- Planting of native and / or wildlife friendly climbers;
- Native woodland creation and / or enhancement;
- ~~• Installation of green and / or brown roofs to existing structures such as bus stops and cycle stores;~~
- Enhancement of blue corridors through pond or scrape creation;
- Creation of reptile refuges and hibernacula within open green spaces and parkland;
- Nesting enhancement for invertebrates through measures such as installation of bee bricks, insect nesting aids and bug hotels;
- Enhancements for nesting birds through installation of nest boxes within new and existing buildings and onto suitable trees within parkland and open green spaces. Both generalist and priority species should be targeted such as swifts, house martins and house sparrows.
- Enhancements for roosting bats through installation of bat boxes within new and existing buildings and onto suitable trees within parkland and open green spaces.
- **To fund or part fund an Ecologist or Biodiversity Net Gain Officer and/or**

associated ecological resources.

3 Relevant Planning History

3.1 The most relevant planning history for the determination of this application is included below:

Amendment Application (Section 73):

3.2 24/01115/AMDT – Application to vary Conditions 02 (approved parameter plans) and 08 (details of public open space) to allow for changes in layout (Material Amendment to outline planning permission ref. 20/00337/OUTM) – Pending determination. **Report appears elsewhere on this Committee agenda.**

Reserved Matters Application:

3.3 24/00450/RESM - Application for the approval of Reserved Matters including details of Appearance, Layout, Scale and Landscaping relating to the development of the site, comprising of 131 residential dwellings (Class C3) with associated car parking, landscaping and ancillary works at land on Fossetts Way, submission of details for discharge of conditions 06 (Details of Levels), part discharge of condition 07 (Hard and Soft Landscaping), 09 (Tree Protection Measures), 10 (Noise Impact Assessment), 13 (Compliance of Building Regulations Part M4(2) and M4(3)), 15 (Site Contamination Parts a-e1), 16 (Lighting Assessment and Lighting Design), 19 (Cycle Parking), 20 (Car Parking), 22 (Vehicle Cycle and Pedestrian Routes), 23 (Waste Servicing Plan), 24 (Refuse and Recycling stores), 25 (Drainage Infrastructure and Drainage Strategy), 26 (Flood Mitigation Strategy), 27 (Ecology) and 30 (Compliance of Aviation Safety) (Approval of reserved matters following outline permission 20/00337/OUTM dated 30th September 2022 – Pending Determination.

Outline planning permission:

3.4 20/00337/OUTM (**the Outline Permission**) - Erect up to 131 residential units with associated car parking, landscaping and ancillary works at land on Fossetts Way (Outline Application) – outline permission granted.

Screening Opinion

3.5 19/01171/RSE - Development of site and erect up to 145 residential units, landscaping, open space and ancillary works (Request for Screening Opinion) – EIA not required.

Deed of Variation (DOV):

3.6 23/01656/DOV (**the 2023 DOV**) - Modification of planning obligation (Section 106 agreement) dated 30th September 2022 pursuant to application 20/0337/OUTM to vary the wording of the S106 to allow a hierarchical approach to the Biodiversity Net Gain requirement (to allow the biodiversity net gain to be provided on site, within the City Area, within the wider region or by utilising the Biodiversity Credits Scheme) and to add a clause to the S106 agreement to allow the developer a right of access onto the SAM transferred land for the purpose of implementation of the planning permission and to undertake works within the SAM buffer area – Modification of S106 Agreed.

Approval of Details applications:

3.7 24/00294/AD - Application for approval of details pursuant to condition 03 (archaeological written scheme) and 04 (details of protection measures of The Prittlewell Camp Scheduled Monument and the Scheduled Monument Buffer) 20/00337/OUTM dated 30/09/2022 – *details approved in as far as they relate to initial site preparation works only.*

3.8 24/00246/AD - Application for approval of details pursuant to condition 06 (details of levels), 09 (tree protection measures) and 18 (Construction Environmental Management Plan) of planning permission 20/00337/OUTM dated 30/09/2022 – *details approved in as far as they*

relate to initial site preparation works only.

- 3.9 23/01582/AD - Application for approval of details pursuant to condition 03 (Archaeological Written Scheme of Investigation) of planning permission 20/00337/OUTM dated 30.09.2022 – pending determination.
- 3.10 23/01188/AD - Application for approval of details pursuant to conditions 27-part 6 (Reptile Mitigation Strategy) of planning permission 20/00337/OUTM dated 30/09/2022 – details approved, condition part approved.

Relevant Historic Applications:

- 3.11 04/00550/FUL – Construct diagnostic and treatment centre comprising part two / part three storey building and lay out 392 parking spaces with access and egress onto new link road – Planning permission granted.

Pre-application:

- 3.12 23/01207/PREAPF – Pre-application series of meetings to discuss reserved matters scheme – advice given.
- 3.13 23/00600/PREAPF - Construction of 134no. dwellings (Meeting plus written advice) – Advice given and pre-application closed.

4 Representation Summary

Public Consultation

- 4.1 Five (5) site notices were displayed around and close to the site. No representations have been received.

4.2 Natural England

No comments.

4.3 Parks

- The suggested contribution is very welcome and will make a significant improvement on the number and quality of habitats available across the city.
- There are limited opportunities to increase the number of green corridors, but there is significant scope to improve the existing ones such as Prittlebrook, Prittlewell Chase, Thorpe Hall Avenue, Southchurch Boulevard and Victory Path. [**Officer comment: the wording (see above) has been changed in this respect to enable the contribution to be spent on improving existing green corridors, rather than creating new green corridors.**]
- Not supportive of green roof proposal as there is little value to these sporadic features, with greater benefits gained from connected spaces. [**Officer comment: as above, it is proposed to remove this from the proposal accordingly.**]
- There are few opportunities for bird/bat boxes on park buildings which are all single storey and too low for the purpose. [**Officer Comment: it is proposed to leave this in as an option, should it be possible to install such features on such buildings and trees.**]
- There is scope for the creation of new ponds/scrapes but this is likely to be limited and this overlaps with the Catchment Cost Project. [**Officer Comment: It is proposed to leave this in as an option, as whilst limited, there are some possible opportunities for this.**]
- Suggest that the funding is also used to fund an ecologist to design and develop a suite of projects. [**Officer Comment: with the Applicant's agreement, this has been added to the list of things that the contribution can be spent on**

(emboldened above)

4.4 Strategic Planning

When the outline planning permission was granted, whilst the development resulted in a net loss of biodiversity on site, the Biodiversity Net Gain (BNG) requirements were not mandatory. The applicant, did however, commit to achieving 10% BNG through a Section 106 agreement, albeit this was prior to the publication of the relevant secondary legislation and guidance on BNG and the mechanisms for delivery of at least 10% BNG off-site, and the difficulties of securing appropriate sites within or close to Southend to achieve a local benefit for biodiversity were not fully understood.

Surveys of several public open spaces in the city undertaken in 2023 identified considerable potential for biodiversity enhancements, but there is currently no legal mechanism in place to secure mandatory BNG on Council owned sites, and there is a lack of other suitable sites within Essex for the applicant to purchase off-site biodiversity units. Purchase of National Credits, in line with the mandatory BNG mitigation hierarchy, would likely mean the funds would be directed to sites remote from Southend with no benefit locally.

The variation proposed to the legal agreement, to provide a financial contribution to Southend-on-Sea City Council to allow for a package of enhancement to be undertaken to Council owned properties and land (as set out in the technical note dated December 2024), is a reasonable solution to offset the loss of biodiversity on the application site and improve biodiversity across Southend. Given that the planning permission pre-dates the mandatory requirement for BNG, it is not considered necessary or preferable in these particular circumstances to follow the Defra trading rules to off-set the loss of biodiversity on site with like-for-like or better habitat, or to purchase credits through the national scheme. The legal agreement should allow for improvements to biodiversity within the city's parks and green spaces, and other biodiversity measures as identified in the Parks and Green Spaces Strategy 2015-2020 or successor document.

5 Procedural matters

- 5.1 This application is presented to the Planning Committee because it relates to an application for a Deed of Variation to a S106 and relates to a major.

6 Planning Policy and Legislation Summary

- 6.1 Town and Country Planning Act 1990 (as amended): Section 90A, Schedule 7A (Biodiversity Net Gain)
- 6.2 The National Planning Policy Framework (NPPF) (2024)
- 6.3 Planning Practice Guidance (PPG) (2024)
- 6.4 National Design Guide (NDG) (2021)
- 6.5 Core Strategy (2007): Policies KP1 (Spatial Strategy), KP2 (Development Principles), KP3 (Implementation and Resources), CP1 (Employment Generating Development), CP3 (Transport and Accessibility), CP4 (The Environment and Urban Renaissance), CP6 (Community Infrastructure), CP7 (Sport, Recreation and Green Space) and CP8 (Dwelling Provision).
- 6.6 Development Management Document (2015): Policies DM1 (Design Quality), DM2 (Low Carbon Development and Efficient Use of Resources), DM3 (Efficient and Effective Use of Land), DM5 (Southend-on-Sea's Historic Environment), DM6 (The Seafront - for RAMS), DM7 (Dwelling Mix, Size and Type), DM8 (Residential Standards), DM10 (Employment Sectors), DM11

(Employment Areas) DM14 (Environmental Protection) and DM15 (Sustainable Transport Management).

- 6.7 Southend-on-Sea Design and Townscape Guide (2009)
- 6.8 Land at Fossetts Way Informal Development Brief. [**Officer comment:** The development brief has been adopted as Corporate Policy – it does not form part of the development plan for Southend-on-Sea, rather it compliments existing planning policy and should be regarded as guidance which will be a material consideration during the assessment of any applications for this site.]
- 6.9 Planning Obligations: A Guide to Section 106 and Developer Contributions (2015)
- 6.10 Southend-on-Sea Parks and Green Spaces Strategy 2015-2020
- 6.11 Southend-on-Sea Tree Policy 2020-2030

7 Appraisal

- 7.1 Section 106A of the TCPA allows for an application to be made to a Local Authority to consider a proposed modification or discharge of a planning obligation.
- 7.2 Planning obligations can be renegotiated at any point, where the Local Planning Authority and developer wish to do so. A planning obligation is enforceable as a contract and whether it is varied or not is at the Local Authority's discretion. Where there is no agreement to voluntarily renegotiate, and the planning obligation is over 5 years old, an application may be made to the Local Planning Authority to change the obligation where it '*no longer serves a useful purpose*' or '*if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications*' (see Section 106A of the TCPA).
- 7.3 The key material planning consideration in respect of this application relates to Biodiversity Net Gain, as set out above.
- 7.4 The affordable housing, secondary education contributions, RAMS payment, highways contributions, enhanced bus service requirement, cycleways contributions, car club requirement, apportioned cost towards the Archaeological Construction Management Plan, release of the residential restriction and monitoring fee requirements remain unchanged from the original S106 agreement and the SAM Land Transfer remain unchanged from the previous Deed of Variation ref 23/01656/DOV which allowed the transferee the right of access onto the Property for the purposes of implementing the Development or to undertake works in association with the implement of the planning permission within the SM buffer area.

Biodiversity Net Gain (BNG) Considerations

- 7.5 As set out in Section 2 of this report in more detail, this proposal seeks to alter the wording of the S106 Legal Agreement in relation to Biodiversity Net Gain to ensure that the benefits of the biodiversity enhancements are achieved within the Southend-on-Sea City area, rather than further afield.

The outline planning permission (the Outline Permission):

- 7.6 The outline planning permission ref. 20/00337/OUTM was granted subject to a S106 Legal Agreement which, as set out above, included a requirement for biodiversity enhancements.

When the outline application was submitted and determined, the BNG requirements were not then statutory requirements as they are today as a result of the Town and Country Planning Act 1990 (as amended): Section 90A, Schedule 7A (Biodiversity Net Gain). However, at that time the NPPF and PPG both encouraged opportunities to improve biodiversity and encouraged net gain for biodiversity (leaving the natural environments in a measurably better state than it was beforehand) to be sought through planning policies and decisions and that in appropriate circumstances, planning conditions or obligations could be used to require works that will increase biodiversity.

- 7.7 The information submitted with the Outline application stated that it was unlikely that the development could achieve a biodiversity net gain within the red line boundary as approximately 60% of the existing habitats on site (of local value) would be lost. As such to deliver a biodiversity net gain, opportunities would be needed to be sought from outside the site. Overall, at outline stage it was established that the development would result in a net loss in biodiversity of 41.29% and that off-site net gain would be required.
- 7.8 As such the application was approved subject to a S106 legal agreement which required the following in terms of BNG:
- Mitigation to be provided to ensure the net loss of biodiversity at the site, as a result of the development, is off-set within the city with a minimum of an overall 10% biodiversity net gain achieved in the city.
 - Prior to commencement of the development a Principle Biodiversity Impact Assessment (BIA) (overall strategy) shall be submitted to the Council for approval.
 - If BIA shows a biodiversity loss, a Biodiversity Mitigation Scheme (BMS) which details on-site and off-site mitigation to a minimum 10% net gain within the city.
 - Approved BMS completed and 10% biodiversity net gain provided in the city.

The previous Deed of Variation (DOV) in relation to BNG (the 2023 DOV):

- 7.9 Following the grant of the Outline Permission, an application was submitted to modify the S106 agreement to (in addition to the change in terms of access over the transferred land) allow a hierarchical approach to the Biodiversity Net Gain requirements (to allow the BNG to be provided in an ordered sequence of priorities: on site, or if not, within the city area, or if not then within the wider region or if not by then finally using the Biodiversity Credits Scheme). This was in line with the now mandatory and statutory BNG legislation. That application was approved and the change to the S106 made to reflect the legislation rather than the original wording which required the biodiversity loss to be mitigated with on-site and/or off-site mitigation/offsetting within the city area only.
- 7.10 The original S106 was signed in September 2022 and the BNG legislation came into force on 12th February 2024.
- 7.11 The reason for the change to the BNG in the 2023 DOV included that it is not possible to provide the necessary Biodiversity Net Gain on site. The developer had engaged with Southend-on-Sea City Council to seek to establish any potential sites within the city for off-site mitigation, but that it was unlikely that there was suitable land available on Council owned sites to provide this mitigation and due to its constrained nature there were limited options to provide the requisite off-site mitigation on privately owner land within the City. Therefore, the applicant concluded that it would be very difficult to comply with the S106 as it was originally worded.
- 7.12 As such, these changes to the wording, which reflected the Legislation were deemed acceptable albeit, within the Officer's Report, it was made clear that staff continue to have a preference for the BNG to be provided as close to the site as possible. However, the

legislation and the BNG hierarchy similarly has a priority order, so it was determined that this was acceptable, noting that a Biodiversity Gain Plan would still need to be submitted and could still be refused if the Council was not satisfied that all avenues had been reasonably considered and discounted to provide the necessary BNG on site, or close to site in the first instance. The S106 was modified accordingly.

This BNG DOV proposal:

- 7.13 This current deed of variation application seeks to amend the wording of the S106 BNG requirement from the original and from the 2023 DOV. As set out in more detail in Section 2 of the report above, as there is a shortage of BNG sites within Essex, and no available sites close to Southend-on-Sea it is now sought to provide the Council with a financial contribution to ensure that the biodiversity enhancements are provided within the city, with direct benefit to the community, in accordance with the original findings, recommendations and requirements of the original S106. The applicant has indicated that otherwise, the BNG credits will be a significant distance from the site, possibly in Kent.
- 7.14 Given that the original S106 was signed prior to the mandatory BNG legislation coming into force and given that this proposal seeks to ensure that the enhancements are secured within the city, which was the original intention of the S106 and which was the continued aim when the previous 2023 DOV was signed, the proposed change is acceptable in principle.
- 7.15 In this respect, this Council's Strategic Planning service confirm in relation to this proposal, that there are difficulties in securing appropriate sites within or close to Southend to achieve local benefits for biodiversity and these were not fully understood at outline stage, given that the S106 was signed before the legislation came into effect. Strategic Planning Policy confirm that in 2023 surveys were undertaken of several public open spaces in the city which identified considerable potential for biodiversity enhancements, but there is currently no legal mechanism in place to secured the mandatory BNG enhancement on Council owned sites and there is a lack of other suitable site within Essex for the applicant to purchase off-site biodiversity units, and the purchase of National Credits would mean the money is directed to sites remote from Southend, which is not what was sought from the original S106 agreement, which was secured prior to the current Legislation. As such Strategic Planning Policy consider that the proposed financial contribution to allow enhancement to Council owned land is a reasonable solution to offset the loss of biodiversity and improve biodiversity across Southend.
- 7.16 The Council's Park's Team are also satisfied with the proposed changes and have helped modify and shape what the contribution could and should be spent on within the city. The proposed list of what the contribution could be spent on is broad and will provide direct benefit to Southend-on-Sea which was the original intention. As set out above, and as confirmed by Strategic Planning, there is no legal mechanism in place currently to secure mandatory BNG enhancements on Council owned sites and there is a lack of suitable sites in Essex. As such, the alternative financial contribution, which is now proposed, is a suitable alternative to provide direct biodiversity benefits to the city of Southend-on-Sea itself, which is positive. Parks have confirmed that the contributions will make a significant contribution to improvement to the number and quality of habitats across the city.
- 7.17 The £400,000 financial contribution will be paid to the Council in phases, with the first £150,000 provided prior to the commencement of the development (phase 1), the next £125,000 paid to the Council prior to the commencement of the 47th dwelling (phase 2) and the final part of the contributions (£125,000) paid prior to the commencement of the 81st dwelling. [**Officer Comment:** Commencement of the development is already defined in the S106 agreement, as "the date on which any material operation (as defined in Section 56(A) of the Act) forming part of the Development begins to be carried out other than...operations

consisting of site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, erection of any temporary means of enclosure, the temporary display of site notices or advertisements...”] This is considered reasonable in this instance, ensuring that the contribution offsets biodiversity loss from the start of the development. The phasing is reasonable noting that if BNG was to be delivered on site it would be highly unlikely to be fully provided prior to the commencement of the development.

- 7.18 The £400,000 is to be retained by the Council for a 30-year period (with the standard S106 wording altered so that the financial contribution, if not spent, can only be sought to be returned after 30 years, not the standard 5 years). The Applicant has agreed to this. This is necessary and reasonable in the particular circumstances of the site and case given that the BNG Legislation requires BNG to be monitored and maintained for 30 years. This timeframe will allow the Council adequate flexibility to ensure the contribution is used in the overall spirit of the legislation and to the direct benefit of the community of Southend-on-Sea.

Summary

- 7.19 The reasoning for the proposed change to the S106 is noted and overall it is clear that the financial contribution to biodiversity enhancements within Council owned sites in the city would be more beneficial locally compared to the alternative of enhancement as far away as Kent or enhancements nationwide (via the Government credits). As such, in this particular instance and given that the BNG requirement was sought before the mandatory BNG requirements and legislation took effect, it is considered appropriate in this case, to apply a more flexible approach. Whilst the change will mean that it is not possible to quantify the exact uplift compared to the biodiversity lost on the site, as the financial contribution will be able to be spent on a number of different enhancements in different amounts, overall it is positive that this change would see the benefits and biodiversity enhancement being provided locally to the benefit of the City’s community, biodiversity and ecology which is in accordance with the original requirements of the S106.
- 7.20 At the time of report preparation legal background work is continuing and it is possible that there may be some further small adjustments to the exact wording used within the Deed of Variation. If that happens and any such changes are material this Committee will receive an update through the supplementary agenda and any subsequent material departure from the principles outlined in this report would result in the scheme and changes being re-presented to the Planning Committee. This approach is provided for through the wording of the recommendation at Section 8 of this report.

Equality and Diversity Issues

- 7.21 The Equality Act 2010 (as amended) imposes important duties on public authorities in the exercise of their functions and specifically introduced a Public Sector Equality Duty. Under this duty, public organisations are required to have due regard for the need to eliminate unlawful discrimination, harassment and victimisation, and must advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. Officers have in considering this application and preparing this report had careful regard to the requirements of the Equality Act 2010 (as amended). They have concluded that the decision recommended will not conflict with the Council's statutory duties under this legislation.

Conclusion

- 7.22 Taking into account all material planning considerations it is recommended that the S106 agreement is modified. The changes to the Biodiversity Net Gain (BNG) requirements are

acceptable and will ensure that the biodiversity enhancements will be a direct benefit to Southend-on-Sea itself which is positive and aligns with the original intention of this part of the S106 agreement, which predates the mandatory BNG now required by developments of this nature.

7.23 There is sufficient justification to allow the modification to the S106 agreement dated 30th September 2022 and subsequent Deed of Variation ref. 23/01656/DOV dated 10th July 2024 pursuant to outline planning permission ref. 20/00337/OUT.

7.24 The application is therefore recommended for approval, subject to the completion of a Deed of Variation to secure the modifications set out in paragraph 8.1 below.

8 Recommendation

8.1 It is recommended:

a) That the Council enters into a Planning Obligation by Deed of Variation under Section 106 of the Town and Country Planning Act 1990 (as amended) to allow the following modifications to the Deed of Agreement dated 30th September 2022 pursuant to outline planning permission 20/00337/OUTM and as amended by Deed of Variation ref. 23/01656/DOV dated 10th July 2024.

i) The Biodiversity Net Gain (BNG) requirement is changed to require a financial contribution of £400,000 to be paid to the Local Planning Authority, with £150,000 paid prior to the commencement of the development on the site, £125,000 paid prior to the commencement of the 47th dwelling on the site and £125,000 paid prior to the commencement of the 81st dwelling on the site. [Commencement of the development is defined in the S106 agreement, as “the date on which any material operation (as defined in Section 56(A) of the Act) forming part of the Development begins to be carried out other than...operations consisting of site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, erection of any temporary means of enclosure, the temporary display of site notices or advertisements...”] **The £400,000 is to be retained by the Council for a period of up to 30 years, from its receipt and is to be spent on any of the following biodiversity enhancements within the City of Southend-on-Sea:**

- Improve biodiversity by continuing to implement wildlife friendly schemes and management within the city’s parks and green spaces.
- Improve the existing number of Green Corridors within the city.
- Continue to deliver subsidised donated tree scheme.
- Create a network of community orchards.
- Creation of wildflower grassland and bulb planting.
- Planting of native and / or wildlife friendly scrub, shrubs and perennials.
- Planting of native and / or wildlife friendly trees including flowering orchard species.
- Planting of native and / or wildlife friendly climbers.
- Native woodland creation and / or enhancement.
- Enhancement of blue corridors through pond or scrape creation.
- Creation of reptile refuges and hibernacula within open green spaces and parkland.
- Nesting enhancement for invertebrates through measures such as installation of bee bricks, insect nesting aids and bug hotels.

- Enhancements for nesting birds through installation of nest boxes within new and existing buildings and onto suitable trees within parkland and open green spaces. Both generalist and priority species should be targeted such as swifts, house martins and house sparrows.
- Enhancements for roosting bats through installation of bat boxes within new and existing buildings and onto suitable trees within parkland and open green spaces.
- To fund or part fund an Ecologist or Biodiversity Net Gain Officer and/or associated ecological resources.

b) That the Director of Planning and Economy or Service Manager – Development Management and Enforcement BE DELEGATED to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 30th September 2022 and previously signed pursuant to outline planning permission reference 20/00337/OUTM and as amended by previously signed Deed of Variation ref. 23/01656/DOV dated 10th July 2024. The relevant officer will have delegated powers to agree further modifications to the wording, provided that they do not comprise a material departure from the principles outlined within this report.

c) In the event that the Deed of Variation referred to in part (a) above has not been completed before 7th March 2025, or an extension of this time as may be agreed by the Director of Planning and Economy or Service Manager – Development Management and Enforcement, authority is delegated to refuse the application on the grounds that development would not secure the necessary Biodiversity Net Gain enhancements, in accordance with the requirements of the original permission and as the development would otherwise be contrary to National and Local Planning Policy.