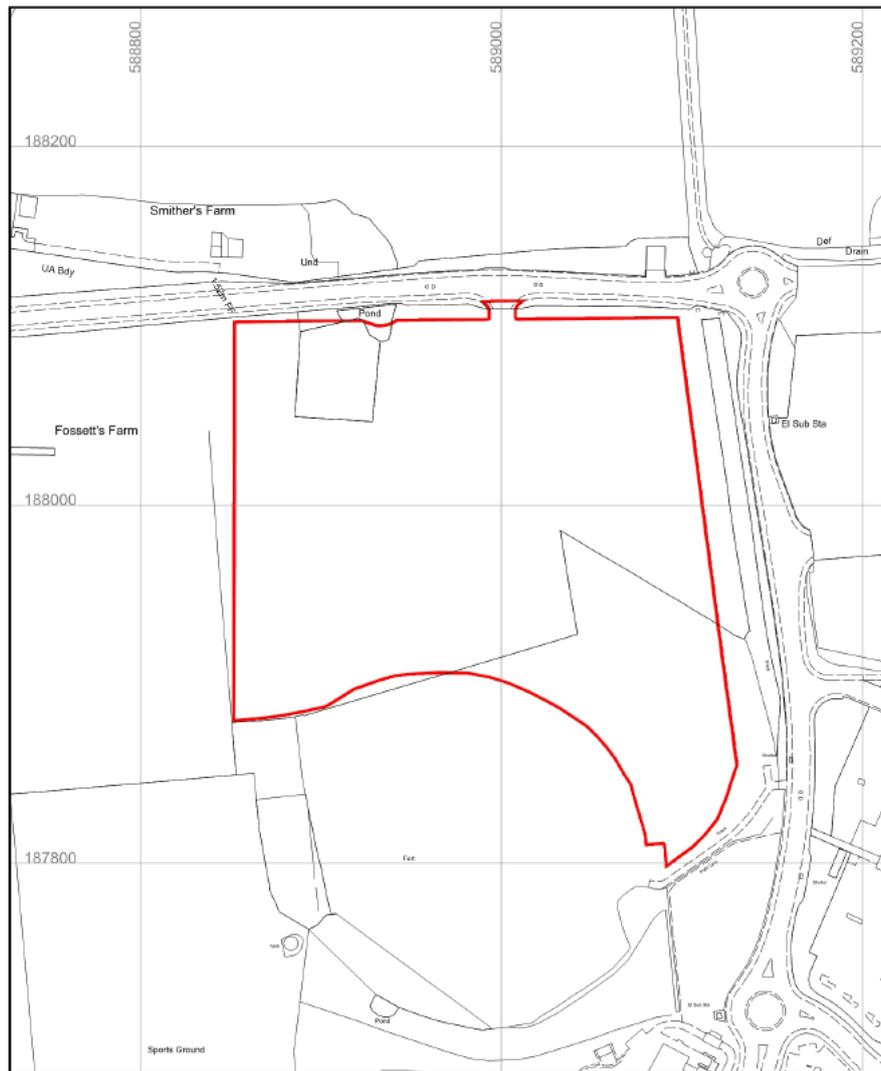


Reference:	23/01656/DOV	
Application Type:	Deed of Variation (application S106A (3))	
Ward:	St Lukes	
Proposal:	Modification of planning obligation (Section 106 agreement) dated 30th September 2022 pursuant to application 20/0337/OUTM to vary the wording of the S106 to allow a hierarchical approach to 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	
Address:	Land At Fossetts Farm, Sutton Road, Southend-on-Sea	
Applicant:	Keepmoat Homes	
Agent:	Kate Holland of Invicta Planning	
Consultation Expiry:	19 th January 2024	
Expiry Date:	5 th April 2024	
Case Officer:	Charlotte White	
Plan Nos/Submission Documents	Covering Letter dated 18th December 2023	
Recommendation:	DELEGATE to the Executive Director for Environment and Place, the Director of Planning and Economy or the Service Manager – Development Control to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 30th September 2022 pursuant to outline planning permission reference 20/0337/OUTM and enter into a Planning Obligation by Deed of variation to allow the modifications as set out in 8.1.	



1 Site and Surroundings

- 1.1 The application site is irregular in shape and some 6.01 hectares in size and slopes down from south to north. There is a small area of woodland on the northern boundary and the majority of the site is covered in a mix of bramble, mixed small trees, mixed long grass, vegetation and saplings. A vehicular access from Fossetts Way has been constructed to the north of the site.
- 1.2 The site is to the south and west of Fossetts Way and is currently undeveloped and vacant land that was historically used for agricultural purposes. To the south of the site is a large circular enclosure known as Prittlewell Camp, a Scheduled Ancient Monument (SAM). The Historic England Listed text describes the SAM as "...a slight univallate hillfort of the later Bronze Age or Early Iron Age...The hillfort in nearly circular in plan, measuring approximately 250m in diameter. The south western third of the perimeter is defined by an earthen bank and external ditch which survive within a wooded belt...The northern and eastern sections have been reduced by ploughing..."
- 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 located 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 (the outline permission).

2.2 The outline permission was subject to a Section 106 (S106) legal agreement dated 30th September 2022. The S106 agreement secures the following summarised contributions: [Officer comments: The **emboldened** matters below are those to which the application for a deed of variation, subject of the current report, relate]

- 30% units of affordable housing provided on site with a 60/40 (social/affordable rent/shared ownership) tenure split – which based on 131 units would constitute 40 affordable units – 24 of which would be social/affordable rented and 16 shared ownership.
- A financial contribution of £368,290.33 towards secondary education at Chase High School or another secondary school within acceptable travel distance, assuming 131 dwellings are provided, to be paid prior to commencement of the development.
- Essex RAMS payment of £127.30 (index linked) per dwelling – would be £16,676.30 based on 131 units to mitigate the potential disturbance to European designated sites.
- Highways contributions to:
 - Travel Plan
 - £1,000 per year for 5 years from first occupation for the Travel Plan Monitoring.
 - Travel Packs which must include free bus tickets and free car club use for each dwelling and must be provided to residents before first occupation.
- Developer to work with a bus company to provide an enhanced bus service for a minimum of 3 years which runs at least half hourly Monday – Friday 07:00 – 20:00, at least half hourly Saturdays 07:30 – 20:00 and at least hourly Sundays 09:00 – 19:00 and which must be up and running before the first unit is occupied.
- £10,000 contribution towards investigations into and minor works to local cycleways.
- 1x Car Club Vehicle and Space which must be served by an electric charging point.
- **The applicant will transfer the Schedule Monument land within its ownership to the Council prior to the commencement of the development.**
- The applicant is required to pay a proportion of 7% of the costs required for the implementation of the SAM Archaeological Conservation Management Plan (2020) drafted by Orion or any subsequent variation of this which has been agreed with the Local Planning Authority.
- **Mitigation to be provided to ensure the net loss of biodiversity at the site, as a result of this development, is off-set within the City of Southend with a**

minimum of an overall 10% biodiversity net gain achieved within the City of Southend:

- **Prior to commencement of the development, the owner shall submit an overall strategy within a Principal Biodiversity Impact Assessment (BIA) to the Council for its written approval.**
- **Once approved, where the BIA shows a Biodiversity Loss the owner shall submit a Biodiversity Mitigation Scheme to the Council for its written approval, prior to commencement of the development, which fully details the on-site and any off-site off-setting mitigation to be used with a minimum overall 10% biodiversity net gain to be achieved within the City. The Biodiversity Scheme shall include a time frame for the implementation of the off-site minimum 10% net gain.**
- **Once approved the owner shall carry out the actions in the approved Biodiversity Mitigation Scheme to provide the overall 10% biodiversity net gain within the City of Southend, in accordance with the approved time frame.**
- Residential use through the release of restrictions imposed in the S106 agreement dated 8th January 2004.
- £10,000 for the monitoring of the S106 Agreement.

2.3 Under Section 106A of the Town and Country Planning Act 1990 (as amended) (“TCPA”) the following variations to the S106 are now sought:

Schedule 2 Part 3 which relates to Biodiversity Net Gain (BNG)

It is proposed to update the S106 Agreement 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 101 of the Environment Act 2021 and associated guidance from Central Government. This is instead of the current wording, (which was drafted prior to the current BNG legislative framework), which requires the biodiversity loss to be mitigated with on-site mitigation and/or offsetting within the City area only.

Schedule 2 Part 9 which requires the Owner to transfer land within the Scheduled Ancient Monument to Southend-on-Sea City Council prior to the commencement of the development (‘SAM Land Transfer’)

Once the SAM land has been transferred the currently worded S106 agreement does not enable any right of access for the future developer to go onto that land to implement the planning permission or to allow access to undertake works within the SAM Buffer area. The proposed amendment to the S106 Agreement therefore seeks to include an additional clause that the future developer would have a right of access onto the SAM transfer land once the transfer has occurred for the purposes of implementation of the planning permission or to undertake works within the SAM Buffer area.

3 Relevant Planning History

3.1 The site has a fairly extensive planning history, the most relevant of which is included below:

3.2 20/00337/OUTM – Erect up to 131 residential units with associated car parking, landscaping and ancillary works at land on Fossetts Way (Outline Application) – Outline

permission granted.

- 3.3 19/01171/RSE - Development of site and erect up to 145 residential units, landscaping, open space and ancillary works (Request for Screening Opinion) – issued, not EIA development.

4 Representation Summary

4.1 Public Consultation

A site notice was displayed. One (1) letter of representation has been received which makes the following summarised comments:

- Wildlife at site includes pheasants, birds, rabbits, foxes and queries what will happen to the wildlife, that wildlife will be trapped by development and will be killed and query what provision will be made to protect wildlife.
- Shocked planning permission has been granted for housing at the site.
- Object to the development.
- Concerns that representations are until 16th November 2023, but the area has already been cleared and piping put in, and concerns that this is against the law.
- Queries relating to the housing crisis when people are being allowed to come from abroad and queries relating to who will live in the houses.
- Developer greed.
- Concerns that objectors' opinions do not matter.
- Concerns that the site is being used for racing scramblers.

Officer comment: The agent requested sight of the points of representation and has stated that they have not cleared any land at the site, so query if the objection may not relate to this site. All relevant, material planning considerations have been assessed within the appraisal section of the report. These concerns are noted, and where relevant, they have been taken into account in the assessment of the application, but do not form a reason for refusing this application for a variation to the S106 agreement. It should also be noted that outline planning permission for the development has already been granted.

4.2 Natural England

No comments.

4.3 Planning Policy

The proposed hierarchical approach to delivery of biodiversity net gain proposed in the Deed of Variation broadly accords with the requirements of the Regulations, which note that in relation to all onsite habitats which are adversely affected by development, the adverse effect should be compensated by prioritising in order, where possible, the enhancement of existing onsite habitats, creation of new onsite habitats, allocation of registered offsite gains, and finally the purchase of biodiversity credits.

4.4 Procedural Matter

This application is presented to the Development Control Committee as it relates to an application for a Deed of Variation to a S106 Agreement and a third party objection has been received.

5 Planning Policy Summary

- 5.1 Schedule 7A (Biodiversity Gain in England) of the Town and Country Planning Act 1990

(inserted by Schedule 14 of the Environment Act 2021 and amended by the Levelling Up and Regeneration Act 2023).

- 5.2 The Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024)
- 5.3 The National Planning Policy Framework (NPPF) (2023)
- 5.4 Planning Practice Guidance (PPG) (2023)
- 5.5 National Design Guide (2021)
- 5.6 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).
- 5.7 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 (RAMS), DM7 (Dwelling Mix, Size and Type), DM8 (Residential Standards), DM10 (Employment Sectors), DM11 (Employment Areas) DM14 (Environmental Protection) and DM15 (Sustainable Transport Management).
- 5.8 Southend-on-Sea Design & Townscape Guide (2009)
- 5.9 Land at Fossetts Way Informal Development Brief. 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.
- 5.10 Planning Obligations – A Guide to Section 106 and Developer Contributions (2015)

6 Appraisal

- 6.1 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.
- 6.2 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).
- 6.3 The key material planning considerations in respect of this application relate to two factors, 1. Biodiversity Net Gain and 2. SAM Land Transfer, as set out in paragraph 2.3 above.

6.4 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.

Biodiversity Net Gain Considerations

6.5 Since the signing of the S106 agreement in September 2022, Biodiversity Net Gain legislation and guidance has evolved significantly and came into force on 12th February 2024.

6.6 The NPPF states at Paragraph 185 that “To protect and enhance biodiversity...plans should...(b)...identify and pursue opportunities for securing measurable net gains for biodiversity.”

6.7 The PPG states “Biodiversity net gain is a way of creating and improving biodiversity by requiring development to have a positive impact (‘net gain’) on biodiversity...This objective is for development to deliver at least a 10% increase in biodiversity value relative to the pre-development biodiversity value of the onsite habitat. This increase can be achieved through onsite biodiversity gains, registered offsite biodiversity gains or statutory biodiversity credits.”

6.8 As set out in the PPG, “The Biodiversity Gain Hierarchy...sets out a list of priority actions:

- “...in relation to all onsite habitats which are adversely affected by the development, the adverse effect should be compensated by prioritising in order, where possible, the enhancement of existing onsite habitats, creation of new onsite habitats, allocation of registered offsite gains and finally the purchase of biodiversity credits.”

6.9 “The Biodiversity Gain Hierarchy has been designed for the purpose of the statutory framework for discharge of the Biodiversity Gain condition to reflect the habitat categories in the biodiversity metric and the type of ways that the objective of at least 10% gain can be achieved.”

6.10 The information submitted by the Agent with the Deed of Variation application outlines that the S106 Agreement requires submission of a Biodiversity Impact Assessment (BIA) to the Council for approval. The BIA should include an assessment of Biodiversity Net Gain/Loss and where there is a loss the developer is required to submit a Biodiversity Scheme for approval which sets out actions to compensate for the biodiversity loss by way of on-site mitigation and/or by off-site offsetting within the City Area.

6.11 It is stated that the BIA submitted at outline application stage showed a biodiversity net loss of 41.29% and the agent therefore confirms that it will not be possible to obtain BNG on the site. It is outlined that the developer has engaged with Southend-on-Sea City Council to seek to establish potential sites within the City for offsite mitigation. It is stated that it is unlikely that there would be suitable land available on Council owned sites to provide this mitigation and as the City is very constrained there are limited options to provide the requisite offsite mitigation on privately owned land within the City area. As such, the applicant’s agent concludes that it will be very difficult or impossible

to comply with this requirement of the S106 as it is currently worded.

- 6.12 The submission goes on to recognise that BNG legislation has advanced since the determination of the outline application and the Environment Act sets out that BNG can be delivered on-site, off-site or via a statutory biodiversity credits scheme. This is a spatial hierarchy of habitat delivery, with a preference for on-site enhancement, with incentives for habitat delivery on or close to the development site.
- 6.13 As set out above, legislation and guidance is now clear that BNG can be provided by prioritising in order, where possible the enhancement of existing on-site habitats, creation of new on-site habitats, off-site gain and finally with the purchase of biodiversity credits with incentives for BNG close to the site.
- 6.14 The original S106 sought to ensure that the biodiversity enhancements were secured within the SCC area. However, the applicant has demonstrated in this submission that this may not be possible. Staff continue to have a preference for the BNG to be provided as close to the site as possible, and this is reflected in the wording of the legislation which includes a “Biodiversity Gain Hierarchy”. The Biodiversity Gain Hierarchy has been designed to reflect the type of ways that the objective of at least 10% gain can be achieved. The Biodiversity Gain Hierarchy requires the adverse effect should be compensated for by prioritising in order, 1. The enhancement of existing onsite habitats, 2. Creation of new onsite habitats, 3. Allocation of registered offsite gains and finally, 4. The purchase of biodiversity credits.
- 6.15 In determining a Biodiversity Gain Plan (which within this S106 is akin to the requirement to submit a “Biodiversity Scheme”), government guidance makes it clear that Local Planning Authorities must take into account how the Biodiversity Gain Hierarchy has been applied.
- 6.16 As such, the changes proposed to the S106 would continue to favour BNG provision, as close to the site as possible and this LPA retains the ability to refuse the proposed BNG scheme if it is not satisfied that all avenues have been reasonably considered and discounted to provide the necessary BNG on site, or close to site in the first instances. 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 definition of words 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. This approach is provided for through the wording of the recommendation at Section 8 of this report.
- 6.17 As such, and on the above basis, it is considered that the change proposed to the S106 is in accordance with national legislation and guidance that has been made since the original S106 was completed. The change proposed is therefore acceptable and reasonable in all respects and should therefore be approved.

SAM (Scheduled Ancient Monument) Land Transfer

- 6.18 The existing S106 Agreement requires the owner to transfer the land within the SAM to Southend City Council prior to commencement of the development.
- 6.19 However, the applicant highlights that, once transferred there is no right of access for the developer to go onto the SAM transferred land to implement the planning permission or to allow access to undertake any works with the SAM buffer area.

- 6.20 This DOV therefore seeks to include a clause that the future developer has a right of access onto the SAM transfer land once the transfer has occurred for the purposes of implementing the planning permission or to undertake works within the SAM buffer area.
- 6.21 This proposed change to the S106 Agreement represents a logical reflection on the practical effects of how it was worded in good faith at the time and is acceptable and reasonable in all regards so is recommended for approval.

7 Conclusion

- 7.1 Taking into account all material planning consideration it is recommended that the S106 agreement is modified. The changes to the Biodiversity Net Gain (BNG) requirements are acceptable, align with legislation and guidance now in force and enable this LPA to review at the appropriate future stage the acceptability or otherwise of the biodiversity scheme which is required to be submitted. The practical alteration to the wording to allow the developer a right of access to the SAM transferred land for the purposes of implementing the planning permission and to undertake works within the Scheduled Ancient Monument (SAM) buffer area is reasonable and acceptable in all relevant regards.
- 7.2 There is sufficient justification to allow the modifications to the S106 agreement dated 30th September 2022 pursuant to outline planning permission ref. 20/00337/OUTM.
- 7.3 The application is recommended for approval, subject to completion of a Deed of Variation to secure the modifications set out in paragraph 8.1 below.

8 Recommendation

8.1 It is recommended that Members authorise:

- 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.**
- i) **At the time of writing this report, the definitions altered and added to Clause 1 of the Original Agreement are as follows:**

The definition of “Biodiversity Scheme” in the S106 is updated:

From:

~~“Biodiversity Scheme – a scheme setting out actions to compensate for Biodiversity Loss by way of on-site mitigation and/or off-site offsetting within the City area.”~~

To:

“Biodiversity Scheme – a scheme setting out actions to compensate for Biodiversity Loss and to achieve at least a 10% net gain over the pre-development biodiversity value of the site by way of on-site mitigation

and/or off-site offsetting within the City Area, within the wider region or utilising the Biodiversity Credits Scheme.”

A definition of “Biodiversity Credits Scheme” to be added as follows:

“Biodiversity Credits Scheme – the scheme enabling the Owner to buy statutory biodiversity credits to compensate for Biodiversity Loss in line with section 101 of the Environment Act 2021 and associated guidance from central government.

- ii) An additional paragraph to be added to Appendix 2, Schedule 1 of the Original Agreement, as follows:**

“3. The Transferee will have a right of access onto the Property for the purposes of implementing the Development or to undertake works in association with the implementation of planning permission, within SAM buffer area.”

A map of the SAM buffer area is to be included in this respect.

- b) That the Executive Director for Environment and Place, the Director of Planning and Economy or the Service Manager – Development Control BE DELEGATED to AGREE A MODIFICATION OF THE PLANNING OBLIGATION dated 30th September 2022 pursuant to outline planning permission reference 20/0337/OUTM.**
- c) In the event that the Deed of Variation referred to in part (a) above has not been completed before 5th April 2024, or an extension of this time as may be agreed by the Executive Director for Environment and Place, the Director of Planning and Economy or the Service Manager – Development Control, authority is delegated to refuse the application on the grounds that development would not secure the necessary Biodiversity Net Gain and to ensure the SAM land transfer continues to be secured, in accordance with the requirements of the original permission and as the development would otherwise be contrary to National and Local Planning Policy.**