

<b>Application Details</b>	
Application Reference Number:	<u>C/32/22/001</u>
Application Type:	<u>DCO requirements major</u>
Earliest decision date:	13 May 2022
Expiry Date	23 April 2022
Decision Level	Planning Committee
Description:	Modification of Schedule 17 of S106 Agreement dated 27 January 2012 in relation to planning permission 3/32/10/037
Site Address:	<u>Hinkley Point C, Hinkley Point Road, Stogursey, Bridgwater, TA5 1UF</u>
Parish:	32
Conservation Area:	
Somerset Levels and Moors RAMSAR Catchment Area:	
AONB:	Quantock Hills
Case Officer:	<u>John Burton</u>
Agent:	
Applicant:	Mr Andrew Goodchild
Committee Date:	15 September 2022
Reason for reporting application to Committee	The application is considered to be of a significant, controversial and sensitive nature.

## 1. Recommendation

- 1.1 That the application under Section 106A(3)(a) of the Town and Country Planning Act 1990 for modifications to the planning obligations contained in Schedule 17 of the s106 Agreement dated 27<sup>th</sup> January 2012 accompanying approval 3/32/10/037 (the 'Site Preparation Works permission'), should be approved.

## 2. Executive Summary of key reasons for recommendation

- 2.1 The Local Planning Authority is being asked to consider whether the planning obligations in Schedule 17 of the s106 Agreement dated 27<sup>th</sup> January 2012 in respect of potential reinstatement of the land at the Hinkley Point C site, would continue to serve their purpose equally well without the obligation to keep in place the financial security for the Council, in the event that it were to exercise its 'step-in rights'. Although the Council is extremely unlikely to exercise its 'step-in-rights' without the financial security the bonds offer, equally, it is considered extremely unlikely that the Council would exercise its 'step-in-rights' even if the financial security of the bonds was to continue. This consideration gets to the very heart of the issue and how the Council should deal with the application. Case law prescribes that Section 106A(6) does not require that the obligation continues to serve its original purpose. What matters is whether the obligation continues to serve a 'useful purpose'. The Courts have also clarified that the obligation only needs to

serve a useful purpose and does not have to serve a useful planning purpose. The critical question is whether the obligation in question serves some useful function, the absence of which makes the maintenance of the obligation pointless.

2.2 In the case of the germane considerations here, the security in the form of the bonds, could only become available to the Council:

in the event that the reinstatement requirements under Condition R1 of permission 3/32/10/037 were to be triggered; this is only potentially possible in circumstances where;

- (a)
  - a. The development authorised by the development consent order which has been granted and implemented ceases to be capable of being lawfully continued or completed (and any appeal or legal proceedings in relation to the reasons therefore have been exhausted); or
  - b. HPC is not generating electricity by 2025
- ;
- (c) if the Applicant was then to default on its obligations under the s106 Agreement to carry out those reinstatement works; and then, only if following that;
- (d) the Council was to elect to take on responsibility for reinstating the Site.

The arguments and deliberations made in this report conclude that there is now no reasonable likelihood of all of the circumstances which would allow the Council to rely on the bond occurring. In any event, it is Officers' view that the reinstatement bond(s) would only cover the works required to reinstate the landscape which are required to be carried out under conditions R1 to R6 attached to the Site Preparation Works permission and not in relation to any building or other works authorised by the Development Consent Order - in other words, the new nuclear build itself. This all leads to the conclusion that the obligations do not now serve a 'useful purpose'. On this basis, it is the view of Officer's that the Council would be unlikely to succeed in resisting any subsequent appeal if the application were to be refused.

### **3. Planning Obligations.**

3.1 This proposal seeks a modification to an existing legal agreement and is made under Section 106A(3)(a) of the Town and Country Planning Act 1990. The legal agreement concerned here was originally made in relation to planning permission reference 3/32/10/037, which was issued on 27th January 2012 and is known as the Site Preparation Works (SPW) permission. This application seeks to modify the planning obligations contained in Schedule 17 to the SPW s106 Agreement.

3.2 The SPW s106 Agreement was entered into by (1) West Somerset District Council; (2) Somerset County Council; (3) Sedgemoor District Council; (4)

Elizabeth Periam Acland Hood Gass (of the Fairfield Estate); (5) EDF Development Company Limited; (6) EDF Energy Nuclear Generation Limited; and (7) NNB Generation Company Limited. It is dated 27 January 2012 and will hereafter be referred to as the “s106 Agreement”.

- 3.3 Under the s106 Agreement, the Local Planning Authority is identified as being West Somerset District Council. Somerset West and Taunton Council is the statutory successor to West Somerset District Council and so is now the Local Planning Authority for the area in which the HPC Site is situated. It is therefore the Local Planning Authority empowered to manage and enforce the planning obligations in this s106 Agreement.
- 3.4 Section 106A(3)(a) of the 1990 Act provides that “*A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the appropriate authority for the obligation... to have effect subject to such modifications as may be specified in the application.*” The 'relevant period' referred to is 5 years from the date on which the obligation is entered into. So in this case, 'the relevant period' has expired (27 January 2017) and accordingly, this application is being made to modify Schedule 17 to have effect subject to the modifications that the applicant has specified. The Applicant submits that, in accordance with the requirements of Section 106A(6) of the 1990 Act, Schedule 17 “*continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in this application*”.
- 3.5 The Applicant’s proposed modifications to Schedule 17 are set out in Appendix 1 to the application.
- 3.6 The effect of the modifications proposed would be to remove the requirement to keep in place the financial security that would be available to the Council in the event that -
- (a) the reinstatement requirements under Condition R1 (of the SPW permission) were to be triggered;
  - (b) NNB (the applicant) were then to default on its obligations to carry out those reinstatement works; and
  - (c) following that, the Council were elect to take on responsibility itself for reinstating the site.
- The Applicant is of the opinion that there is now no reasonable likelihood of this occurring and so the obligations in Schedule 17 to keep the site reinstatement bonds in place no longer serve a useful purpose.

#### **4. The development, site and surroundings**

- 4.1 This application relates to the 27<sup>th</sup> January 2012 permission that authorised the Site Preparation Works in and around the area proposed for the new nuclear build. The nuclear power station and its associated infrastructure was granted permission by means of a Development Consent Order, which was granted by the Secretary of State in 2013. The site is known as the Hinkley Point C (HPC) site. Work is currently progressing, with the first

Reactor (Unit 1) now due to be ready to produce electricity in the summer of 2027. The second Reactor (Unit 2) is approximately, 12 months behind.

- 4.2 The site lies to the west of and immediately adjacent to the Hinkley Point B and A stations, on the Somerset coastline, in between Watchet and the River Parrett. The nearest settlements/hamlets are those of Knighton, Burton, Shurton, Wick and Stolford, with the village of Stogursey lying slightly further away in a due southerly direction. The national trail of the south-west coastal footpath has been relocated during the course of development, but will be repositioned on top of the new sea wall defences, when it is appropriate and safe to do so.

## **5. Planning history and background to this application.**

- 5.1 The current application seeks a modification to an existing obligations under the s106 Agreement made in connection with planning permission - West Somerset reference 3/32/10/037 - referred to as the Site Preparation Works (SPW) permission for various works on land around the site proposed for the new nuclear build at Hinkley Point C. It was approved by the WSDC Planning Committee subject to the prior completion of the s106 Agreement on 28 July 2011, with the s106 Agreement being signed and the decision notice being issued on 27 January 2012.
- 5.2 In January 2012 the application for a Development Consent Order (DCO) had not been submitted (or hence approved). The SPW planning application was submitted in order to give EDF/HPC the legal right to start the required site works in advance of any approval for the DCO, in order to facilitate the early delivery of the generating station.
- 5.3 The Site Preparation Works approval granted permission for site clearance (including fencing, vegetation removal, demolition of existing structures, and creation of alternative footpaths); earthworks (including soil stripping and storage, site levelling, spoil screening/storage for re-use on-site); provision of earth retaining structures; deep excavations; provision and relocation of drainage infrastructure (including culverts, outfalls, balancing ponds); the provision and operation of plant and machinery (including concrete batching); site establishment works (including layover facilities, car parks, haulage roads, site access points and roundabouts, and laying replacement and/or diversion of apparatus); and other associated works. It also made clear by conditions and in an accompanying s106 Agreement that, in the event that Hinkley Point C was either not consented or could not legally be continued or completed, the approved site preparation works that had been implemented would be removed and the SPW application site reinstated to its pre-development state.
- 5.4 Included among the conditions attached to the SPW permission is condition R1 which provides for the following –

*“R1 Potential Site Reinstatement*

*Unless otherwise approved by the Local Planning Authority:*

*(a) in the event that development consent for a new nuclear generating station at the Site:*

*(i) has not been granted within 4 years of the date of this permission;*  
*or*

*(ii) has been granted but has not been implemented within the relevant time period specified in the development consent order,*

*then the Site shall be restored in accordance with a Detailed Landscape Mitigation and Reinstatement Strategy submitted to and approved by the Local Planning Authority before the commencement of the reinstatement works, such reinstatement works to be carried out and completed as soon as reasonably practicable and in any event within three years of such commencement unless otherwise approved by the Local Planning Authority; and*

*(b) in the event that development consent for a new nuclear generating station at the Site has been granted and has been implemented but the development authorised by such development consent to be carried out on the Site:*

*(i) ceases to be capable of being lawfully continued or completed (and any appeal or legal proceedings in relation to the reasons therefore have been exhausted); or*

*(ii) neither of the nuclear reactors authorised by the development consent has been substantially completed and is producing electricity by 31 December 2025;*

*then the Development and any other works or activities in connection with the Development shall be discontinued (if ongoing) and the Site shall be reinstated in accordance with a Detailed Landscape Mitigation and Reinstatement Strategy submitted to and approved by the Local Planning Authority before the commencement of the reinstatement works, such reinstatement works to be carried out and completed as soon as reasonably practicable and by 31 December 2028 unless otherwise agreed by the Local Planning Authority.”*

The reason for this condition was to ensure satisfactory reinstatement of the SPW site if:

- (a) development consent for a new nuclear generating station at the Site was not granted within 4 years of the date of the SPW permission; or
- (b) if granted, was not implemented within the relevant time period specified in the development consent order; or
- (c) if implemented, but then ceasing to be capable of being lawfully continued or completed; or
- (d) if neither of the nuclear reactors authorised by the development consent has been substantially completed and producing electricity by 31 December 2025.

5.5 As stated above the SPW permission was accompanied by s106 Agreement. Schedule 17 of the s106 Agreement placed specific obligations on the New Nuclear Build company (NNB) in relation to the reinstatement of the SPW application site in the event that the reinstatement requirements under

Condition R1 of the Site Preparation Works permission were to be engaged. Paragraph 5 of Schedule 17 imposes an obligation on NNB to comply with the reinstatement obligations set out in conditions R1 to R6 contained in SPW permission. Paragraphs 3 and 4 of Schedule 17 provide the Council with step-in rights and access licences to enable it to carry out the reinstatement works itself (or appoint a contractor to do so) in the event that NNB is in default of the reinstatement obligations. This is subject to giving NNB a minimum of 6 months' notice. The obligations also made provisions for the inclusion of a Bond, Bonds or an Escrow, for the sum of £63 million, which was an amount independently verified as being appropriate to cover the costs of any reinstatement. This money is available to be used by the Council, subject to a series of specified steps, namely -

- (a) that the reinstatement requirements under Condition R1 were to be triggered (which, now that the development consent order has been made and implemented, is only potentially possible in circumstances where HPC is not generating electricity by 2025, or if the development consent for the nuclear generating station ceases to be capable of being lawfully continued or completed (and any appeal or legal proceedings in relation to the reasons therefore have been exhausted));
- (b) NNB were then to default on its obligations under the s106 Agreement to carry out those reinstatement works; and following that,
- (c) the Council was to then elect to take on responsibility for reinstating the Site.

Whilst the exercise of these 'step-in rights' is at the Council's discretion, if the Council does exercise the rights, then under paragraph 3.1 of Schedule 17, it is under a positive obligation to use its *"best endeavours to commence, carry out and complete the Reinstatement Works itself"*. However, paragraph 3.1 of Schedule 17 contains two provisos, the first providing that the Council shall only be responsible to a limit of the current amount of the bond/s or Escrow and the second makes clear that the 'step-in rights' are not available where it would be *'clearly and manifestly incompatible with the proper planning of the area at the relevant time for the Reinstatement Works to be carried out and completed by Council'* (although the agreement does not define what exactly is meant by this phrase).

- 5.6 The security, which now takes the form of three bonds, was put in place prior to commencement of Phase 2 of the site preparation works (under the Site Preparation Works permission). It remains in place and must be renewed (and increased by including indexation) on an annual basis under the terms of the s106 Agreement. The next such renewal and increase is due in June 2023. This security has to remain in place (and continue to be increased every year) until either:
- (a) the date on which one of the nuclear reactors has been substantially completed and is producing electricity; or
  - (b) if the reinstatement works are triggered under Condition R1 (of the Site Preparation Works permission), those 'reinstatement works' have been completed.

This security was required to ensure that funding would be available to the Council in the event that it was to exercise its step-in rights under the s106

Agreement to carry out the reinstatement works. The Council would be able to draw down amounts from the bond to cover its costs (but only up to the bond amount and not exceeding its total).

- 5.7 At the time the Site Preparation Works permission was granted, the DCO for Hinkley Point C had not been issued and accordingly, there was at that time no certainty that the DCO would be secured. Therefore, the reinstatement conditions included in the Site Preparation Works permission to provide for the site to be reinstated in the event that the HPC project was not delivered (Conditions R1 to R6), were imposed in order to avoid a scenario where the SPW site was left as an open development site consisting of excavations and moved earth, but the nuclear power station, for whatever reason, failed to proceed to completion.

They would apply if

- (a) the then future Development Consent was not granted; or,
- (b) if development consent was granted but not implemented within the period specified in the DCO; or
- (c) if development consent was granted but construction of the power station could not lawfully be continued or completed; or
- (d) if neither of the proposed nuclear reactors had been substantially completed, so as to be producing electricity by 31 December 2025.

- 5.8 At the examination into the application for a Development Consent Order for Hinkley Point C Nuclear Generating Station, the applicant (NNB Generation Company Limited) put forward a draft development consent order which included a provision which would have allowed NNB to abrogate the planning obligations contained in Schedule 17 of the s106 Agreement. The Panel conducting the DCO Examination made clear that:

*"If the power station project fails to proceed to completion, we consider it important that the application site should not be left abandoned, and scarred by massive earthworks and unfinished.....it is not clear to us how funding for the restoration of the site could be guaranteed in those circumstances, were it not for Schedule 17 of the site preparation s106 agreement.....We do not consider that it would be appropriate for a DCO to interfere with the terms of a legal agreement, to the unilateral advantage of one of the parties, unless this would serve a clear public interest and be vital to the progress of the NSIP. Those circumstances do not apply in this case".*

- 5.9 The application for the Development Consent Order was formally approved by the Secretary of State on 18th March 2013 and came into force on 9 April 2013.

## **6. Environmental Impact Assessment**

- 6.1 This proposal does not require the formal submission of an Environmental Impact Assessment. The Site Preparation Works planning application included an Environmental Statement and that was supplemented by further environmental information at the time. The Council concluded that the environmental information was sufficient for it to be able to consider the

impacts of the development, including any cumulative impacts with other developments, when determining the planning application. This current proposal does not alter this.

6.2 EDF Energy will still be implementing the same development granted consent by the Secretary of State in April 2013 (the DCO). The current proposal does not involve any changes to the approved DCO that would warrant either a Material or Non-Material change to the DCO. Officers are satisfied that this application will not give rise to any new or materially different environmental effects from those considered and assessed in the original DCO Environmental Statement (ES).

6.3 It might be that, if the reinstatement works were ever invoked, then a fresh Environmental Statement could be required at that point. However, that would be a matter for future consideration and does not affect considerations of this current proposal.

## 7. Habitats Regulations Assessment

7.1 This was considered as part of the original Environmental Statements that accompanied both the Site Preparation Works permission and the Development Consent Order. The changes now sought do not impact on those original considerations. Whether this proposed modification is approved or refused, consideration would have to be given to the need for an appropriate assessment at the time the land was either restored to its original state or when the final landscaping scheme is designed after the build is completed. However, a new Habitats Regulation Assessment is not required at this stage.

## 8. Consultation and Representations

8.1 Date of consultations: 23 March, 21 and 22 April, 2022

8.2 The following Statutory Consultees were consulted:

Consultee	Comment	Officer Comment
Sedgemoor District Council (Major Projects)	Consulted 23 March 2022. No reply received.	This is more a matter for our Council based on the analysis as to whether the bond obligations continue to serve a useful purpose. So SDC's lack of a response is not critical.
Sedgemoor District Council (Development Management)	Consulted 23 March 2022. No reply received.	This is more a matter for our Council based on the analysis as to whether the

		bond obligations continue to serve a useful purpose. . So SDC's lack of a response is not critical.
Somerset County Council (legal)	Consulted 22 April 2022. No reply received.	SCC would effectively inherit the outcome of this decision once the new unitary authority comes into place (1/4/23). However, SWaT is the current LPA and can and should determine the application accordingly, with or without the County's views.
Somerset County Council (Service Manager, Planning and Development)	Consulted 21 April 2022. No reply received.	SCC would effectively inherit the outcome of this decision once the new unitary authority comes into place (1/4/23). However, SWaT is the current LPA and can and should determine the application accordingly, with or without the County's views.
Somerset County Council (Strategic Manager – Infrastructure Programmes Group)	Consulted 21 April 2022. No reply received.	SCC would effectively inherit the outcome of this decision once the new unitary authority comes into place (1/4/23). However, SWaT is the current LPA and can and should determine the application accordingly, with or without the County's views.
Somerset County Council (Ecologist)	Consulted 21 April 2022. No reply received.	This application does not need an ecological input and so Committee can proceed to determination without an ecological view.

8.3 The following Internal Consultees were consulted:

Consultee	Comment	Officer comment
Legal		SWaT (Legal) have been consulted on all matters related to this application and their views have been incorporated into this report. Such further advice as Members may deem required will be provided at the meeting.

#### 8.4 Local representations

8.4.1 Neighbour notification letters were sent out in accordance with the Council's Adopted Statement of Community Involvement. One letter has been received making the following comments (summarised). The comments are fully reproduced on the Statutory Planning Register on the Council's website.

Material Planning Considerations	
Objections	Officer Comment
<p>Solicitors on behalf of the Fairfield Estate (owners of the land) have objected to the application on the grounds that -</p> <ol style="list-style-type: none"> <li>1. The obligation continues to serve a useful purpose.</li> <li>2. Until such time as the project has been completed and is generating electricity, there remains a prospect that the development may not be completed and that the Bond may need to be called in. If the project fails, it is not unreasonable to assume that NNB would be financially incapable of meeting its reinstatement obligations.</li> <li>3. Contrary to NNB's assertions, there is no obligation on SWaT to carry out any works in excess of those which would be funded by the Bond. This is expressly set out in the s.106 Agreement. Therefore, the Bond provides a route by which funding would be available to pay for the reinstatement of at least some of the Site.</li> <li>4. NNB significantly underestimated the quantum of the Bond that should be</li> </ol>	<p>The points made on behalf of the Fairfield Estate are relevant to the determination of the application and are all considered in the main body of this report. Consideration is given to the Fairfield Estate's position in the event of the application being approved (e.g. para. 10.9.1) so Members have all of the information required to make a balanced judgement on the concerns of the Fairfield Estate.</p> <p>The point at (3) is a reference to the first proviso in paragraph 3.1 of Schedule 17 to the Section 106 agreement and is referred to at paragraph 5.5 above. The Council's responsibility for carrying out reinstatement works is limited to the current amount of the bond/s or escrow.</p>

provided. However, this should not be used as justification to remove the Bond completely. Any contribution towards the cost of reinstatement would be welcome. Otherwise, the entire cost falls to the public purse.

5. The proposed modification is of unilateral benefit of NNB, is to the significant detriment of the Council and is not justified in the public interest.

6. NNB voluntarily entered into the s.106 Agreement in order to obtain planning permission. No justification has been given to explain why NNB should be released from its obligations in this respect.

The objections of the Estate are as follows -

1. The operative test for discharge of the obligation is whether the obligation “serves a useful purpose”
2. The High Court has held that an application to modify an obligation was an “all or nothing” decision. It was not open to the authority to accept some of the proposed modifications and not others.
3. The Court held that there are four essential questions to be considered
  - What is the current obligation?;
  - What purpose does it fulfil?;
  - Is it a useful purpose?; and
  - Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?”
4. In the event that the project fails for any reason (with the result that HPC is not completed and is not generating electricity by 2025), the land will need to be reinstated. This is clearly a useful purpose.
5. It is clear that NNB agrees that the reinstatement obligations continue to serve a useful purpose. If this is the

case, it is difficult to see how the provision of a Bond does not.

6. The Bond secures the reinstatement obligations. It ensures that not all of the cost of complying with those reinstatement obligations would fall on the public purse.

- The development is still some way from completion. Therefore, there is still a prospect that, due to unforeseen circumstances, the development may fail.
- If something happens which is of sufficient magnitude that it prevents the project from being completed, it is likely to have significant financial consequences for NNB. This is precisely the reason why a Bond is required.
- What NNB seem to be suggesting is that, if the project now fails for whatever reason, it would simply be left, half-finished, to rot on the north Somerset coastline. This suggestion simply does not withstand scrutiny. Works would have to be undertaken to try to ensure the safety of the half-finished development and to attempt to mitigate its significant adverse impacts on an important landscape (which includes views to and from the AONB).
- Without the Bond, this work would be left entirely to the public purse rather than there being a budget of £63m available which could be used to carry out at least some works to remedy the situation.
- NNB's comments misrepresent the true position by ignoring the protection contained in paragraph 3 of Schedule 17 which ensure that (i) West Somerset Council is only responsible to a limit of the current amount of the Bond or Bonds or Escrow and (ii) it is

not clearly and manifestly incompatible with the proper planning of the area at the relevant time for the

Reinstatement Works to be carried out and completed by West Somerset Council. Regardless of who the appropriate entity is, without the Bond, the entire cost of any such works would fall to the public purse.

- NNB appears to be suggesting that the reinstatement Bond provisions serve no useful purpose because the Bond figure is too low and as a result, the Bond would not “scratch the surface’ of the current reinstatement costs”. We would suggest that, should NNB fail in its reinstatement obligations, even if the Bond is inadequate to fund the full cost of reinstatement, a £63m contribution towards the cost would be a very welcome contribution to the public body who will be left trying to remedy NNB’s failure.
- Varying the s.106 to remove the reinstatement bond obligations on the grounds that NNB under-estimated the likely cost of reinstatement would be wholly inappropriate.
- It should be noted that NNB has attempted to release itself from the obligations to provide a Bond at other points of this process. For example, NNB attempted to run a similar argument at the Development Consent Order (“DCO”) Examination. The Estate successfully argued that the reinstatement provisions should be retained.
- If the power station project fails to proceed to completion, we consider it important that the application site should not be left abandoned, and scarred by massive earthworks and unfinished buildings.
- Schedule 17 of that agreement

<p>provides some assurance about the means by which the site could be restored if unsightly development took place, but the scheme failed to proceed to completion.</p> <ul style="list-style-type: none"> <li>• We do not consider that it would be appropriate for a DCO to interfere with the terms of a legal agreement, to the unilateral advantage of one of the parties, unless this would serve a clear public interest and be vital to the progress of the NSIP. Those circumstances do not apply in this case.</li> <li>• NNB makes the point that it is now only seeking to delete the requirement for the Bond and not abrogate all of the reinstatement obligations. If the reinstatement of the site is important, then securing that reinstatement by way of a Bond is also important. Both elements of the obligation perform a useful purpose.</li> <li>• There has not been a material change in factual matrix that underpinned the DCO Panel's reasoning to uphold the reinstatement bond.</li> </ul> <p>This application should be refused.</p>	
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## 9.0 Relevant planning policies and Guidance

9.1 This report does not relate to the determination of a planning application, so this section is not relevant to the considerations set out in this report.

## 10.0 Material Planning Considerations

10.1 Legal considerations and clarifications.

10.1.1 An all or nothing decision is required on the application. The application must be approved or refused.

Case law (in *R [oao Garden and Leisure Group] v. North Somerset*

**Council**), has held that when considering an application for judicial review of a decision made by a local planning authority on a Section 106A application, there are four essential questions to be considered:

- (1) What is the current obligation?
- (2) What purpose does it fulfil?
- (3) Is it a useful purpose? and if so,
- (4) Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?

The Judge in that case concluded that Section 106A(6) did not require that the obligation continues to serve its original purpose, but what matters is whether the obligation continues to serve a 'useful purpose'. The courts have also held that the question should be whether the obligation served any useful purpose, not any useful planning purpose. The critical question is whether the obligation serves some useful function, the absence of which makes the maintenance of the obligation pointless. The four essential questions referenced above are crucial to the consideration of this application and will be explored in detail below.

10.1.2 The SPW permission planning conditions and accompanying s106 obligations excavation that might have been implemented by virtue of the SPW consent. They do not relate to the works approved by the DCO, because these had not been consented at the time of the SPW approval. Although the DCO rightly refers to the potential requirement for reinstatement, the s106 Agreement attached to the SPW cannot be construed as also include reinstatement of the works approved and now partly implemented as a result of the DCO, because it was agreed before the DCO was considered and granted. This is important because it significantly reduces the extent and cost of any reinstatement works that might be authorised by the legal agreement. Following on from this, Members will also need to consider that if the surrounding landscape was reinstated, but a 'half-built' nuclear site was still left standing, what would really be achieved anyway.

## 10.2 Q1 - What is the current obligation?

10.2.1 This is the first of the essential questions identified in paragraph 10.1.1 above. The current planning obligation contains a range of obligations set out in the schedules; a copy of the section 106 agreement is attached to this report. The application relates to one schedule only, schedule 17. As referred to elsewhere in this report, the current S106 obligations in Schedule 17 to the s. 106 agreement allow the Council 'step-in rights' to arrange and complete reinstatement of the SPW application site, if certain circumstances prevail. In such an instance, the Council can draw upon money from the reinstatement bonds to cover its costs, up to the maximum amount of the bonds. These circumstances will arise if neither of the nuclear reactors authorised by the DCO have been substantially completed and are producing electricity by 31st December 2025 (as referred to in Condition R1

of the 2012 Permission). It is highly likely that the reactors will not be producing electricity by 31<sup>st</sup> December 2025, given that EDF have now recalculated the date of Reactor 1 being finished and producing electricity as being June 2027. However, the chances of either nuclear reactor never being substantially completed and producing electricity could rightly be considered to be very small, given the current Government's pledges in relation to nuclear energy as part of the Country's energy supply mix. The Developer has announced a new date for completion of Reactor 1 as being June 2027. On this basis, Officers therefore perceive the likelihood that the Council would wish to take action under the terms of the s106 Agreement on 1st January 2026 or at anytime afterwards up to the new date of June 2027, as being very remote. If the Council can see that the development is on track to achieve the identified completion by a specific date, then it is deemed highly unlikely the Council would invoke the need for the reinstatement of the land, even though technically it could anytime after 31st December 2025.

- 10.2.2 The scenario described in the preceding paragraph is not though the only circumstance that could give rise to a breach of the Applicant's obligations. NNB could also breach its obligations to carry out the reinstatement works, if the development authorised by the DCO ceases to be capable of being lawfully continued or completed. Whilst it is quite unlikely that such circumstances will arise, they may arise if, for example, there are legislative changes following a change in Government policy by some future central government. However, in Officers' judgement, this is also extremely unlikely because such a change would (currently) lead a significant 'hole' in the Country's energy supply, particularly in view of the current difficulties with the supply and cost of oil and gas. It would also damage the U.K.'s carbon emissions targets and the need for energy security from different clean, renewable and low carbon sources, which includes nuclear.
- 10.2.3 It is not difficult to imagine circumstances whereby finances, or lack of funding, could disrupt the development of the power station, particularly in view of current international tensions (e.g. China and the West). However, this would not necessarily mean that the development could not lawfully be continued or completed. Other financial arrangements could be made by either EDF or the British Government.
- 10.2.4 So on balance, Officer's professional judgement is to agree with the Applicant that the reinstatement requirements under Condition R1 of the SPW permission and by virtue of the s106 Agreement, are now most unlikely to ever be triggered.

### 10.3 Q2 - What purpose does the s106 obligation fulfil?

- 10.3.1 This is the second question that case law tells us needs to be examined in applications under s106A of the Town and Country Planning Act 1990. The purpose of the obligations in Schedule 17 of the s.106 agreement is to provide for reinstatement works and to provide for financial security to

enable the Council to call upon appropriate funds to ensure that the Council can carry out the works, if they are required to be undertaken by them. The primary obligation imposed on NNB at paragraph 5 of Schedule 17 is to comply with reinstatement obligations as set out in conditions R1 to R6 of the SPW permission; that element of Schedule 17 continues to serve the useful purpose of imposing an obligation on NNB to carry out reinstatement works. The Council's rights to 'step in' and carry out the works themselves could arise if neither of the nuclear reactors have been substantially completed and are producing electricity by 31st December 2025, or if the development cannot lawfully be continued or completed. In either event, if NNB (the Applicant) did not comply with its obligations to carry out the reinstatement works, the Council could give not less than six months' notice of its intention to carry out the works itself and then complete the reinstatement works itself, so long as NNB does not provide the Council with written notice of its intention to undertake the works and does not actually start those works itself. The provisions give the Council the right to do so, and to recover the cost of the works (up to the maximum amount of the bonds), if it is unable to recover its reinstatement costs from NNB directly.

10.3.2 It is important to bear in mind here that the reinstatement bond cannot be used unless all of these requirements apply and so Members will need to judge the likelihood of all of these circumstances occurring.

10.3.2 It is also worthy of note here that the Applicant (in paragraph 2.6 of their Appendix 2 to the application) acknowledges that the site reinstatement bond obligations serve a purpose. The Applicant does qualify this by stating that (in their opinion) it would be "*an extremely narrow*" purpose. However, there is agreement that the obligations do serve a 'purpose'.

#### 10.4 Q3 - Is it a useful purpose?

10.4.1 Having established what the purpose of the obligation is, the third factor that case law tells us must be taken into account when determining applications under s106A of the Town and Country Planning Act, is to consider whether the purpose of the obligation is a 'useful purpose'. This distinction between 'purpose' and 'useful purpose' is important. Case law tells us to consider whether the obligation serves some useful function, the absence of which would make the maintenance of the obligation 'pointless'. This approach was referred to in the case of **R. (on the application of Mansfield DC) v Secretary of State for Housing, Communities and Local Government [2018] EWHC 1794**.

10.4.2 As noted above, Schedule 17, in particular paragraph 5, continues to serve a useful purpose.

It is for the Planning Committee to form a view on the likelihood of the Council serving a notice if Reactor 1 is not producing electricity by 31st December 2025 or sometime thereafter. This is the crucial consideration Members will need to weigh up. If there is a likelihood of the Council serving

such a notice, the provisions relating to the bond cannot be said to be pointless or to serve no useful purpose. However, Members may decide that the opposite applies and that the chances of the Council deciding to serve such a notice are so infinitesimally small, that the bond and proviso serve no useful purpose. If the Council can see that the development is on track to achieve the identified completion by a specific date, then it is highly unlikely to invoke the need for the reinstatement of the land, even though technically it could do so at any time after 31 December 2025. In addition, the Council could only carry out the works themselves if they were to determine that it is not clearly and manifestly incompatible with the proper planning of the area for the Reinstatement Works to be carried out and completed by them.

- 10.4.2 The Applicant has made the case that all of the necessary licences and environmental permits have been secured; the final investment decision was made in 2016 and so the project is fully funded; there is now strong political support from the UK government; and the construction is now significantly advanced. On this basis, the Applicant concludes that there is no reasonable prospect of the development not being lawfully continued and completed.
- 10.4.3 It should be noted again that the SPW planning conditions and Schedule 17 of the s106 Agreement only relates to any structure, infrastructure, work and/or excavation that might have been implemented by virtue of the SPW consent. It is the officers' opinion that the s 106 agreement does not relate to the works approved by the DCO because it relates to the works required by the conditions attached to the SPW permission . Although the DCO rightly refers to the potential requirement for reinstatement, the s106 Agreement attached to the SPW permission defines the reinstatement works by reference to the conditions attached to the SPW permission. This is important because firstly, it would significantly reduce the extent and cost of any reinstatement works (albeit that they would still be quite large) and secondly, if the surrounding landscape was reinstated, but 'a 'half-built' nuclear site was still left standing, what would really be achieved anyway?
- 10.4.4 Having regard to the information set out above, the prospect of the Council serving a notice under paragraph 3.1 of Schedule 17 appears to be so low that it is highly unlikely that the Council would require remediation work to be carried out, or consider carrying it out itself. On this ground, it would be reasonable to conclude that the provisions relating to the bond no longer serve any useful purpose.
- 10.4.5 Members should also consider whether the retention of the bond provisions would serve a useful purpose on the basis of any alternative trigger event, namely that through some unforeseen change in political, legislative or other circumstances, the development authorised by the DCO ceased to be capable of being lawfully continued or completed. In that event it would still be for the LPA to consider whether to give notice and it would need to take into account the first limb of the proviso, which limits the responsibility. In other words, the LPA, at that time, could form the view that the combination of the bond, and the proviso serves a useful purpose, as it would ensure that

provision was made to both fund works, and to limit the extent of the Council's responsibility. However, it is considered that this circumstance is extremely unlikely to ever come to fruition because such a change would, lead a significant 'hole' in the Country's energy supply, particularly in view of the current difficulties with the supply and cost of oil and gas. It would also damage the U.K.'s carbon emissions targets and the need for energy security from different clean and renewable sources, including nuclear. Therefore, such a circumstance is most unlikely to occur."

- 10.4.6 Members could also consider circumstances whereby finances, or lack of funding, could disrupt the development of the power station. This is not so hard to envisage given the degree of stake China has in the finances of this project and the current international tensions (e.g. China and the West). However, importantly, this would not necessarily mean that the development could not lawfully be continued or completed. Other financial arrangements could be made by either EDF or the British Government in order to ensure a successful continuation of the project. Therefore, this should not be considered as an occurrence that would stop the project from being lawfully continued and completed, leading to a need to trigger the obligations in the s106 Agreement
- 10.4.7. Fairfield Estate, who own the land (EDF are currently effectively renting the land from them), have made representations through their solicitors, as part of this application process, contending that the bond provisions continue to serve a useful purpose. The matters raised by the Fairfield Estate are set out earlier in this report and should be taken into account. That said, the primary consideration for Members here, should be to consider the likelihood that they would authorise the serving of the notice under paragraph 3.1 of Schedule 17 in order to trigger the reinstatement obligations. If Members reach the conclusion that it would be most unlikely that the Council would trigger the works of reinstatement, then this is a powerful factor to consider when determining whether the bond provisions of the obligation continue to serve a useful purpose. . The reverse would apply as well, in as much as, if Members reach the conclusion that it would be likely that the Council to trigger the works of reinstatement in any defined circumstance, then the conclusion is likely to be that the bond provisions of the obligation continue to serve a useful purpose as it makes provision to secure the carrying out of reinstatement works in accordance with the conditions attached to the SPW permission .
- 10.4.8. Members are being asked to consider a range of realistic scenarios which could prevent lawful continuation or completion of the works. These have been defined above. The balance of consideration is as follows. So long as there is a realistic scenario (or scenarios) in which the Council would serve a notice under paragraph 3.1 of Schedule 17, Members could legitimately form the view that the bond provisions continue to serve a useful purpose. However, if having considered all those factors, Members were to conclude that the prospects of giving notice under paragraph 3.1 of Schedule 17 were extremely low, they can conclude that the provisions relating to the bond serve no useful purpose. This is the very nub of what Members need to

address. To help Members, it should be noted that Officers are of the opinion that it appears most unlikely now that the Council will seek to trigger the reinstatement works and therefore, the s106 obligations relating to the bond could now reasonably be said to serve no useful purpose.

10.5. -4 - Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?

10.5.1

The fourth and final matter to be considered is if the obligation continues to serve a useful purpose, will it serve that purpose equally well if it had effect subject to the modifications specified in the application. The Applicant maintains that Schedule 17 continues to serve a useful purpose but would serve that purpose equally well if the bond provisions were removed as proposed in the application. Officers agree that Schedule 17 serves a useful purpose, in particular the obligation imposed by paragraph 5 of Schedule 17 requires NNB to comply with the reinstatement obligations set out in the conditions attached to the SPW permission. The effect of the modifications would be to remove all references to the bond, bonds or escrow. On this basis, if Members agreed that the obligations should be modified as requested in the application, then Schedule 17 of the s106 Agreement would be re-worded to have the following effect: -

- (a) In the event of a breach of NNB's obligation to carry out the reinstatement works, the Council could, in the exercise of their discretion, give six months' notice of their intention to carry out the reinstatement works themselves.
- (b) If NNB did not carry out the reinstatement works, the Council would have the right to carry out and complete the works themselves, and would have an obligation to use best endeavours to carry out and complete the reinstatement works subject to a single proviso, namely that is not clearly and manifestly incompatible with the proper planning of the area at the relevant time for the Reinstatement Works to be carried out and completed by the Council.

The first proviso in paragraph 3.1 of Schedule 17 would also be removed. The first proviso provides that the Council shall only be responsible to a limit of the current amount of the Bond, Bonds or Escrow for such purposes in place at the time. The purpose of the first proviso is to limit the obligation placed on the Council to incurring expenditure up to the limit of the amount of the bonded security.

- 10.5.2 If the view is taken that the provisions relating to the bond/escrow in Schedule 17 serve a useful purpose, then the view of officers is if they were removed from Schedule 17 without replacement, Schedule 17 would not serve that purpose equally well and so the application should be considered for refusal. However, the reverse also applies, in as much as, if the view is taken that the prospects of relying on the bond provisions of Schedule 17 is so low that they do not serve a useful purpose, then their removal without replacement would allow Schedule 17 to serve its purpose equally well.

If the members form the view that Schedule 17 continues to serve a useful purpose, and that the prospect of the Council relying on the obligations relating to the bond is so low that those specific provisions no longer serve a useful purpose, and that with the modifications proposed, Schedule 17 would serve its useful purpose equally well, the application should be approved, and the S106 agreement modified in the way proposed in the application.

## 10.6 Consequences of refusing the Application

10.6.1 If Committee made the decision to refuse the Application the s106 Agreement would remain unaltered and the bonding provisions would remain in place.

10.6.2 However, the applicant would have a right of appeal to the Secretary of State against a refusal. An appointed Inspector would have to consider the same essential questions, namely the four tests identified above (in para. 10.1.1). The Inspector would judge whether the existing bonding provisions serve a useful purpose. The resolution of that issue will turn on matters of judgement and therefore it is difficult to predict, with any degree of certainty, the outcome of such deliberations.

10.6.3 If an Inspector considers the question of whether the retention of the bond and the proviso is 'pointless', the answer is most likely to be not so, if there is a prospect that a reinstatement obligation maybe triggered and the Council serves the notice. However, if there is no prospect, or very limited prospect, of the reinstatement obligation being triggered, an Inspector is likely to consider it pointless to retain the bond and the proviso. So the chances on appeal would hinge on whether the Council would be likely to serve the notice. For the reasons set out above, it is judged by Officers more likely than not that an Inspector would find retention of the bond and the proviso to be unnecessary and would therefore hold that the provisions which NNB seek to delete serve no useful purpose. This would result in the appeal being allowed.

## 10.7. Consequences of approving the Application

10.7.1 If Members resolved to approve the application to modify the s106 Agreement as specified, then any third party could decide to seek Judicial Review in the High Court on the basis that the decision is legally flawed e.g. not take in to account relevant considerations or has taken into account irrelevant considerations or has acted irrationally.

10.7.2 To minimise the risk of such a challenge, it is critical that Members consider and come to a view on each of the four essential questions set out above. Provided the tests are considered and applied correctly in reaching a decision, it is considered unlikely that a court would interfere with the LPA's planning judgement.

## 11.0 Conclusion

- 11.1 It is judged that the Council is extremely unlikely to exercise its 'step-in-rights' without the financial security the bonds offer, but equally, it is considered extremely unlikely that the Council would exercise its 'step-in-rights' even if the financial security of the bonds was to continue.
- 11.2 The security, in the form of the bonds, could only become available to the Council in very narrow, tightly defined circumstances, which upon examination appear extremely unlikely to occur. The arguments and deliberations made in this report conclude that there is now no reasonable likelihood of the relevant circumstances occurring.
- 11.3 It is also stated in this report that the reinstatement bond(s) would in any event only cover the cost of works required to reinstate the landscape that was disrupted under the Site Preparation Works permission and not any building or other works authorised by the Development Consent Order itself - in other words, the new nuclear build. Although the DCO rightly refers to the potential requirement for reinstatement, the s106 Agreement attached to the SPW permission does not relate to reinstatement of the works approved and now partly implemented as a result of the DCO. Therefore, if the Council did decide to utilise the provisions of the s106 Agreement and seek the reinstatement of the land, this would still leave a 'half-built' nuclear site.
- 11.4 The chances of the Council deciding to serve a notice requiring reinstatement of the SPW land back to its original agricultural state in the absence of one of the reactors becoming operational, are now considered by Officers to be so low that it is highly unlikely that the Council would consider carrying out the remediation work out itself. There are no other readily identifiable circumstances under which the new nuclear power station would be rendered incapable of being lawfully continued or completed. Therefore, the requirement to keep in place the site reinstatement bonds cannot be said to serve a useful purpose, and therefore the planning obligation, in particular Schedule 17, would serve its purposes equally well with the modification proposed in the application .
- 11.5 The construction of Hinkley Point C nuclear power station has been in progress for many years now and the development is nearing as much as 50% complete; a nuclear site licence has been granted (November 2012); guaranteed funding is in place; the generic design assessment has been approved (December 2012); the relevant Electricity Market Reform and the Contract for Difference has been secured; marine licences have been granted, as have environmental permits; the U.K. Government needs this nuclear power station to assist with a more balanced, low carbon, reliable energy supply and to help reduce carbon emissions; and it is anticipated that the first Reactor will now begin generating in June 2027, with Reactor 2 being operational in June 2028.

- 11.6 The critical question for Members of the Planning Committee to consider when dealing with this Section 106A Application, is whether the provisions of the Planning Obligation relating to reinstatement works, in particular the bond and paragraph 3 of Schedule 17, serves a useful purpose. If there is almost no prospect that the Council would give notice under paragraph 3.1 of Schedule 17, this report has already explained that an Inspector on appeal is likely to take the view that those provisions do not serve a useful purpose, and that Schedule 17 as proposed to be modified would serve its purpose equally well with the proposed modifications. Officers consider this is a compelling argument.
- 11.7 Therefore, for the reasons set out above and having regard to all the matters raised, it is recommended that the provisions of Schedule 17 do not serve a useful purpose and their removal without replacement would serve that purpose equally as well. On this basis, the application for a modification to the planning obligations contained in Schedule 17 to the Section 106 is recommended for **Approval**.

In preparing this report the planning officer has considered fully the implications and requirements of the Human Rights Act 1998 and the Equality Act 2010.