Draft Greater Cambridge Planning Obligations Supplementary Planning Document ("the SPD")

Consultation Response

1. General comments

As the Councils are aware, the SPD must comply with the requirements of statute, national policy and guidance, primarily set out in sections 106-106C of the Town and Country Planning Act 1990 (as amended), Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) ("**Regulation 122**"), and paragraphs 56-59 of the National Planning Policy Framework (December 2024) ("**NPPF**"). It is therefore crucial that the SPD makes clear that no planning obligations may be sought in relation to a particular proposed development pursuant to Chapters 4-23 of the SPD unless they are fully justified in accordance with Regulation 122 and paragraph 58 of the NPPF.

By its very nature, the SPD is not development project-specific, so it must not be assumed that the framework of planning obligations set out within it will be appropriate in every case (or indeed in any case) without officers carrying out a CIL compliance assessment. That assessment is essential in order for the Councils to satisfy themselves that they are complying with their legal duties before taking a planning obligation into account as a reason for granting planning permission for a proposed development. As expressly set out in paragraph 58 of the NPPF, "*Planning obligations must only be sought where they meet all of the* [Regulation 122] *tests*" (emphasis added).

As currently drafted, the SPD does not appear to give sufficient emphasis to this requirement. To avoid the risk that the SPD is followed without proper consideration of the legal and policy tests, it would be beneficial for the SPD to state that it is not appropriate to seek any of the planning obligations referred to within it other than to the extent that they satisfy the requirements Regulation 122.

2. Detailed comments

Paragraph 2.3 – "*The main objectives are to ensure that, as far as possible: … Where approval is recommended, the planning obligation … is signed, or in the case of major applications, the detailed heads of terms have been agreed, prior to the application being considered by the Planning Committee…*"

Accelerating the planning process and the negotiation of s.106 obligations has numerous benefits, but the reference to a planning obligation being signed before Committee poses practical difficulties and rather than speeding the process up, may lead to committee meetings being delayed to meet this objective. The exception for major applications is welcomed, but the requirement should simply be that "*the detailed heads of terms have been agreed"* in all cases involving consideration by Committee. The Committee may require changes to the heads of terms, in which case it would be unhelpful for the planning obligation to have already been signed. Equally, if the Committee disagrees with the recommendation for approval and refuses planning permission, the time, cost and resources expended on progressing the s.106 agreement to completion would all be wasted. It should remain the case, as at present, that the Applicant may at its own risk and discretion progress the drafting and negotiation of a s.106 obligation with the LPAs.

Paragraph 2.19 – "*Because planning obligations run with the land, all owners, lessees and mortgagees must be signatories.*"

This is an oversimplification and often wrong. The appropriate signatories in the context of each particular case are matters for the Councils' lawyers to advise on. There are numerous exceptions to the rule depending on the circumstances, e.g. where the land is to be subject to compulsory purchase, a statutory undertaker whose interest is limited to an electricity substation, individual owner/occupiers, a former owner whose transfer is pending registration, an owner whose interest is limited to a lease of a unit or building which must be demolished before the development can proceed, a party with an interest in part of the application site against which the relevant planning obligations do not need to be enforceable for one reason or another. The statement should allow for flexibility.

Paragraph 2.39 – "*The base fee of £1,000 is payable within 30 days of completion of the s106 Agreement with the balance due upon commencement of development.*"

It is not clear why any monitoring fee is due until commencement of development. What is the £1,000 required for? Is it to be refunded in the event that the planning permission expires before implementation? This requirement should be deleted.

Paragraph 2.40 – *"…interest … at the rate of five per cent per annum above the annual Bank of England base lending rate…*"

Interest at five percent above the base rate appears excessive and disproportionate.

Paragraph 2.41 – "*where it is imperative that the relevant measure is in place prior to a development being occupied, the obligations to fund it will always become payable on commencement of the development and no variation will be possible.*"

This is a simplistic approach which ignores the statutory requirements of Regulation 122 and should be deleted.

Even in cases where an obligation to make an earlier payment can be justified, the Councils should not take a formulaic approach. They must consider the proposed development and identify what is necessary to the make the development acceptable in planning terms, and fairly and reasonably related to the proposed development in scale and kind. What if the scheme is phased and the relevant measure needs to be in place prior to occupation of one phase, but not another? What if there are significant preliminary works or a long build programme such that a payment at some point during construction would be all that is necessary/fair and reasonable? A requirement that "*the obligations … will <u>always</u> become payable on commencement … <u>and no variation will be possible</u>*" (emphasis added) is unlawful.

Paragraph 2.67 – "*Variations to an existing s106 Agreement may only be done by way of a Deed (except in relation to the modification or discharge of affordable housing requirements). In determining such applications, the Local Planning Authority will have regard to whether the obligation "no longer serve a useful purpose" or whether it "continues to serve a useful purpose… equally well" as modified.*"

This is legally incorrect and jumbles together various different statutory powers and requirements.

Section 106A of the Town and Country Planning Act 1990 (as amended) provides:

> *"(1) A planning obligation may not be modified or discharged except—*
>
> *(a) <u>by agreement</u> between the appropriate authority (see subsection (11)) and the person or persons against whom the obligation is enforceable ; <u>or</u>*

> *(b) <u>in accordance with — (i) this section and section 106B, or (ii) sections 106BA and 106BC</u>."* (emphasis added)

There are two routes to 'vary' a s.106 agreement. <u>By agreement</u> under s.106A(1)(a) (which must be a deed pursuant to s.106A(2)), or (subject to meeting the statutory criteria) <u>by application</u> under s.106A(3) (with a right of appeal under s.106B) or s.106BA (with a right of appeal under s.106BC). Section 106BA relates to the modification or discharge of affordable housing requirements, but s.106A(3) relates to any planning obligations "*at any time after the expiry of the relevant period*" (currently 5 years from the date of the relevant s.106 agreement).

There are no eligibility criteria for the modification or discharge of a planning obligation by agreement under s.106A(1)(a) other than that the agreement must be a deed and made between the appropriate authority and those against whom the relevant obligation is enforceable. The criteria for the discharge of an obligation that it must *"no longer serve a useful purpose"* or for the modification of an obligation that it "*continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications*" are not relevant to the modification or discharge of a planning obligation by agreement.

Those criteria are contained in s.106A(6):

> "*(6) <u>Where an application is made</u> to an authority <u>under subsection (3)</u>, the authority may determine—*
>
> *(a) that the planning obligation shall continue to have effect without modification;*
>
> *(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or*
>
> *(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.*" (emphasis added)

Subsection (3) provides the power to <u>apply</u> for the modification or discharge of a planning obligation.

The requirement for a deed in s.106A(2) relates to "*An agreement falling within subsection (1)(a)*". No deed is required where an application is made under s.106A(3) or s.106(BA.

These inaccuracies should be addressed to ensure the SPD is legally correct and consistent with the statutory requirements.

Paragraph 2.68 – "*A person against whom an affordable housing requirement is enforceable may apply to the Council for its variation or modification pursuant to s106A.*"

This is also legally incorrect and incomplete. Section 106BA provides for modification or discharge of affordable housing requirements by application. Affordable housing requirements may also be varied by agreement under s.106A(1)(a).

Paragraph 14.27 – "*In South Cambridgeshire, it is strongly advised that in the majority of cases new open spaces and facilities should come under the freehold ownership of the Parish Council or Town Council…*"

A requirement to transfer land to a particular public body like the Parish Council is likely to contravene Regulation 122. There are generally many different options available to secure the proper long-term management and maintenance of open space or other facilities. The

Parish Council or Town Council etc have a part to play but a rigid policy of insisting that a Parish Council or Town Council be the first resort as management body is unlikely to be necessary to make a proposed development acceptable in planning terms. This 'strong advice' should be removed and instead the focus should be on the substantive criteria for appropriate long-term management and maintenance arrangements.

Chapter 18: Emergency Services and **Chapter 22: Healthcare**

The Councils will need to demonstrate how these obligations satisfy Regulation 122 with particular regard to the judgement in *R (on the application of the University Hospitals of Leicester NHS Trust) v Harborough District Council* (2023). The SPD should make explicit reference to the need for a Regulation 122 compliance assessment.

Paragraph 19.13 – "*They must use their <u>best endeavours</u> to meet their employment and skills obligations on-site.*" (emphasis added)

A best endeavours obligation is highly onerous and normally commercially unacceptable. It would provide a significant disincentive to prospective developers, investors and commercial occupiers which could be obstructive to economic growth in the region and undermine the availability of skills, training and supply chain opportunities. A reasonable endeavours obligation would be sufficient and could result in <u>greater</u> availability of skills, training and supply chain opportunities.

Paragraph 19.14 – "*For commercial developments, the occupation phase will require developers to use reasonable endeavours to agree internal protocols/agreements with new occupier(s) that cover the targets, measures and monitoring laid out within the plan.*"

In a similar vein to the comments on paragraph 19.13, these requirements are likely to be viewed as onerous by some commercial occupiers and flexibility is needed.