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The Applicant, Interested Parties and
Statutory Parties

Your Ref:

Our Ref: EN010012

Date: 22 December 2020

Dear Sir/Madam

Planning Act 2008 (as amended) and The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) – Rule 17

Application by NNB Generation Company (SZC) Limited for an Order Granting Development Consent for The Sizewell C Project

Request for further information

The purpose of this letter is to provide you with an update on the progress of the application by NNB Generation Company (SZC) Limited for The Sizewell C Project and to issue a request for further information from all Interested Parties and Statutory Parties.

The public health situation caused by the COVID-19 pandemic continues to affect social movements, public gatherings and work practices. At the same time, activity in the economy remains crucial, and businesses are adapting their procedures and ways of working to allow continued services and productivity. The Government recognises the importance of progressing the consideration and determination of applications for development, including Nationally Significant Infrastructure Projects (NSIPs), and consequently we have been exploring ways of protecting public health while allowing the examination of the project to proceed in an open, fair and impartial manner.

The Examining Authority (ExA) will continue to keep the pandemic situation under review in order to ensure that the Preliminary Meeting and other Examination events can be managed in the safest and fairest way possible. With that in mind, consistent with the [Written Ministerial Statement of 13 May 2020](#), the ExA is considering whether and how Virtual or part Virtual Events (i.e. with some people in a room together and others joining via electronic means) could proceed for this case, including the practical measures needed to ensure fair participation by all.

To this end the ExA is exploring the possibility of conducting the initial meeting, known as the Preliminary Meeting (where the ExA will consider how the application should be examined) and subsequent Examination events, either partially or wholly without the need for public gatherings. Any such changes to the established approach

will be made in the context of the Examination being principally a written process, and with full regard to the applicable legislation, Government guidance and the Inspectorate's purposes and values and its Customer Charter, available at:

<https://www.gov.uk/government/publications/planning-inspectorate-customer-charter/customer-charter>

Questionnaire

Under Rule 17 of The Infrastructure Planning (Examination Procedures) Rules 2010, in order to progress with the Examination of this application, the ExA requests information from each of you about your capability to engage with the Examination remotely, including the use of Virtual Events. Our specific questions are set out in this Questionnaire:

<https://forms.office.com/Pages/ResponsePage.aspx?id=mN94WIhvq0iTIpmM5VcIjfRylwZyV5dGsusrI9ve7z1UMVRPSFM4SFNBV0ZGU1cwRlcwQkZJMzBESS4u>

Your responses will help the ExA to decide:

- the format and arrangements for the Preliminary Meeting;
- what Hearings will be held; and
- what the arrangements and preparations for those Hearings will be.

Given current circumstances related to COVID-19, people may need to access events from their home, rather than their workplace or a public place. Please assume this to be the case. Could each person who may wish to speak at, or observe, the Preliminary Meeting and/or any of the Hearing events complete the questions and submit their responses.

We would be grateful for your response to this request by **11:59pm on Monday 18 January 2021**. The Questionnaire should take no longer than 10 minutes to complete. We consider it crucial to hear your views on the way in which the application should be examined and they will help the ExA to finalise arrangements in due course.

The Planning Inspectorate has produced Advice Note 8.6 which provides further information about Virtual Examination Events for your assistance:

<https://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/advice-note-8-6-virtual-examination-events/>

This is an information-gathering exercise only and it does not commit the ExA to any particular action. No date has yet been set for the Preliminary Meeting. The responses to the Questionnaire will not be published as they are considered to relate to practical matters around the timing and organisation of Examination events and do not constitute submissions on the merits of the Proposed Development. As such, they will not influence our Recommendation or, ultimately, the Secretary of State's decision.

Request for further clarification and documents from the Applicant

Confidential documents

<https://infrastructure.planninginspectorate.gov.uk>

The Applicant's response letter dated 16 November 2020 [[AS-006](#)] to the ExA's procedural decision [[PD-005](#)] sets out at Table 2 a summary of its reasons for redactions and confidential markings. For certain documents [APP-292 to APP-295], the Applicant states that: "As these reports are not required in order for the Examining Authority to examine the application, we therefore request that these reports are withdrawn from the application." However, the commercial sensitivity of the investigations and data set out in these Environmental Statement (ES) Appendices is not immediately apparent. Furthermore, they comprise part of the ES which was submitted as part of the application and considered as such when the decision [[PD-001](#)] to accept the application was made. The Applicant is therefore requested to provide a further explanation in relation to: (i) The extent and nature of the commercially sensitive aspect of these documents and why this could not be redacted without rendering them incomprehensible; (ii) The justification for them not being required in order for the ExA to satisfactorily examine the application and to properly assess the basis for the related conclusions and findings in the main parts of the ES.

The additional information that is sought in respect of these confidential documents will assist the ExA to assess the potential implications of that course of action and reach an informed decision on the question of their withdrawal.

Part 6 'Harbour Powers' of the draft Development Consent Order

Please can the Applicant provide a response to paragraphs 2.2.7 and 2.2.8 of the Marine Management Organisation's Relevant Representation [[RR-0744](#)] regarding consultation with the UK Major Ports Group, Chamber of Shipping, the British Ports Association and users of local recreational and fishing vessels in relation to Part 6 'Harbour Powers' of the draft Development Consent Order (draft DCO).

Accommodation Campus

Please can the Applicant confirm whether the proposed Accommodation Campus and land east of Eastlands Industrial Estate have been included within the soils and agriculture assessment? Please signpost to the relevant documentation.

Please can the Applicant provide detailed photomontages and wireframe imagery from local viewpoints for the Accommodation Campus and land east of Eastlands Industrial Estate. Please discuss and agree locations with East Suffolk Council and Natural England.

Project Description, Environmental Statement and draft Development Consent Order

In Annex A of its Procedural Decision dated 23 October 2020 [[PD-005](#)] the ExA asked the Applicant a number of questions regarding the relationship between the draft DCO and the ES. The Applicant responded in Appendix B of its Cover Letter dated 16 November 2020 [[AS-006](#)]. Further to the response provided the ExA have raised a number of additional clarifying points in Annex A of this letter.

The ExA requests that all the above clarification and documentation (including that requested in Annex A) is provided by **11:59pm on Friday 8 January 2021** at the latest

Observations on the draft section 106 Agreement

The Applicant submitted a draft section 106 (s.106) agreement on 8 December 2020 [[AS-040](#)] in response to the ExAs Procedural Decisions dated 23 October 2020 [[PD-005](#)] and 24 November 2020 [[PD-008](#)]. The ExA have set out a number of observations regarding the s.106 agreement in Annex B of this letter and would ask the Applicant and all parties to the s.106 agreement to note the contents.

Procedural decision regarding Additional Submissions

The Applicant submitted correspondence on 8 December 2020 in response to the ExA's Procedural Decision of 24 November 2020 [[PD-008](#)]. The ExA made a Procedural Decision on 9 December 2020 to accept the following documents:

- Cover Letter [[AS-031](#)]
- Updated Navigation Document (Rev 3) [[AS-032](#)]
- Updated 6.3 Volume 2 Main Development Site Chapter 14 Terrestrial Ecology and Ornithology (Rev 2) [[AS-033](#)]
- Updated 6.3 Volume 2 Main Development Site Chapter 21 Marine Water Quality and Sediments (Rev 2) [[AS-034](#)]
- Updated 6.3 Volume 2 Main Development Site Chapter 22 Marine Ecology and Fisheries (Rev 2) [[AS-035](#)]
- Draft Section 106 Agreement [[AS-040](#)]
- Planning Statement Appendix 8.4L Hinkley Point C Section 106 Agreement Part 1 of 2 [[AS-038](#)]
- Planning Statement Appendix 8.4L Hinkley Point C Section 106 Agreement Part 2 of 2 [[AS-039](#)]
- Additional Ecology Baseline Survey Reports Part 1 of 2 [[AS-036](#)]
- Additional Ecology Baseline Survey Reports Part 2 of 2 [[AS-037](#)]

The ExA has also made a Procedural Decision to accept Additional Submissions from the following:

- Essex County Council [[AS-042](#)]
- JNCC Offshore Industries Advice [[AS-044](#)]
- John Walton [[AS-045](#)]
- Pete Wilkinson, Chairman Together Against Sizewell C (TASC) [[AS-047](#)]
- Tom McGarry, Head of Stakeholder Engagement EDF [[AS-042](#)]
- Michael Taylor [[AS-046](#)]
- Clare Rizzo [[AS-041](#)]
- RSPB and Suffolk Wildlife Trust [[AS-048](#)]

All these Additional Submissions have been published on the project page of the National Infrastructure Planning website:

<https://infrastructure.planninginspectorate.gov.uk/projects/eastern/the-sizewell-c-project/?ipcsection=docs>

If you have any questions about any of the matters raised in this correspondence, please contact the Case Team using the details provided in this letter.

We look forward to receiving your response to the Questionnaire and thank everybody for their patience and understanding during these difficult times.

Yours sincerely

Wendy McKay

Wendy McKay
Lead member of the Panel of Examining Inspectors

The Examining Authority's observations on the Applicant's responses [[AS-006](#)] to Annex A of its Procedural Decision dated 23 October 2020 [[PD-005](#)] and requests for clarification

Numbers in the left hand column correspond to the question numbers in Annex A of [[PD-005](#)]. If an item is not mentioned, the Examining Authority (ExA) has no observations at this stage.

The ExA would be grateful if the Applicant would address the three new questions raised and set out at Part G of this Annex below.

The ExA requests that the clarification and documentation requested below is provided by **11:59pm on Friday 8 January 2021** at the latest

Number	Applicant's response to Annex A of [PD-005]	ExA's observations
1	<p>There are proposed to be two waste storage buildings and two waste process buildings (one for each nuclear island) and one waste treatment building (as part of Unit 2) which is a shared facility.</p> <p>It is acknowledged that the two waste process buildings were omitted from Table 2.1 in error; however, they are described in ES Volume 2 Chapter 2, 2.4.8 and have the same maximum height as the waste storage buildings (27m (AOD)), and have been assessed accordingly.</p>	<p>Please consider amending the draft DCO to clarify that there will be two waste storage buildings and two waste process buildings with one waste treatment unit.</p>
2	<p>It is acknowledged that the ES notes that there are two different types of water discharge weir buildings but there is consistency between the ES and draft DCO in terms of the number of these buildings that are proposed (i.e. total of four). It is therefore not considered necessary to amend the draft DCO.</p>	<p>The ES suggests the fact they are two different types of buildings should be reflected in the draft DCO. If there is a reason not to do this, please will the Applicant explain.</p>
3	<p>Confirmed. The key plant items mentioned in 2.4.33 of the ES</p>	<p>Noted. But can the Applicant confirm that Work No.1A (b)(iii) is in fact listed at para 2.4.32, not 2.4.33?</p>

	Volume 2, Chapter 2 are listed in Work No. 1A at (b)(iii)-(vii).	
6	In relation to the 'intermediate level waste store' and 'interim spent fuel store', it is noted that there is a discrepancy between the terminology in Table 2.1 of ES Volume 2, Chapter 2 and Work No. 1A(f) and (g) (namely, the omission of reference to associated structures and plant) but Work No. 1A(f) and (g) have been assessed to include associated structures and plant in ES Volume 2, Chapter 7.	Please will the Applicant explain fully and clearly how the "structures and plant" and "associated structures and plant" which appear in Work No.1A(f) and (g) respectively after the word "including" are described in Chapter 7 and thus have been subject to assessment in the other chapters of the ES assessing the main site. Please specify the chapters, paragraphs and page numbers of the ES where this has been done. The alternative would appear to be to remove those words from the draft DCO.
8(1)	In relation to Work No. 1A(w), temporary and permanent access roads are detailed throughout ES Volume 2, Chapters 2 and 3. For example, at 3.4.194 reference is made to new vehicular accesses onto Valley Road, Lover's Lane and King George's Avenue including temporary accesses into LEEIE, and at 2.4.80 reference is made to access roads serving the ancillary buildings.	<p>Work No.1A(w). The ExA notes also the Applicant's response [AS-006] para 4.7 to the question about temporary construction works accesses in PD1 [PD-005] in particular that the temporary construction works accesses are shown on the construction parameter plans [APP-022].</p> <p>The ExA also notes that Art 19(1)(a) of the draft DCO [APP-059] allows accesses shown on the ROW plans to be created. However looking for example at the accesses to the LEEIE shown on the Access and Rights of Way Plans [APP-013] Sheet 3 of 27 there is one more access (A1/5) than is shown on sheet 3 of 4 of the construction parameters plans [APP-022]. In addition, when the Access and Rights of Way Plans [APP-013] sheet 3/27 is compared with the Works Plans [APP-011] Sheet 3 of 27 an additional access is shown on the Works Plans (A1/7) and the numbering of the other four accesses changes (A1/5 becomes A1/14; A1/6 becomes A1/8; A1/8 becomes A1/9). There are other instances of similar discrepancies on other plans. It is also not clear what role is played by the numbering; it is not used in the draft DCO so far as the ExA can see.</p>

	<p>The ExA also notes that the Applicant's response in para 4.7 of [AS-006] referred to above that it recognises that construction accesses are not yet confirmed for the associated development sites.</p> <p>The Applicant's response to question 8 in Annex A of [PD-005] is also noted in relation to Work No. 1A(w).</p> <p>Please will the Applicant submit a list of all the accesses and access roads comprised in Work No 1A(w) with, for each of them, the paragraphs in the chapters of the ES which show how they have been listed in the Project Description and assessed.</p> <p>Please will the Applicant also submit a list of all other accesses and access roads comprised in the "authorised development " (as defined in Article 2 of the draft DCO) with, for each of them, the paragraphs in the chapters of the ES which show how they have been listed in the Project Description and assessed.</p> <p>Please will the Applicant submit a set of plans showing each and every temporary construction access and each and every permanent access. The planned accesses should be referenced clearly in the list requested above.</p> <p>The ExA seeks clarity and consistency on these matters as between plans, descriptions, the draft DCO and what has been assessed in the ES.</p> <p>The ExA suggests that the effect of Article 19 of the DCO is that the accesses shown could be permitted under it without further consent. They should only be accesses which have been assessed and are in accordance with the parameters plans. For associated development sites where there are no parameters</p>
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		<p>plans, the range of locations or areas assessed should be shown. For such accesses, the approval of the street authority after consultation with the highway authority would be necessary. Article 19 would appear to require some redrafting.</p> <p>The Applicant's attention is drawn to Article 15 of the draft DCO for the Southampton – London Pipeline NSIP which may be a useful example.</p>
8(2)	<p>Work No. 1A(x) is referred to in ES Volume 2 Chapter 3, 3.4.155 under the sub-heading 'Phase 2'.</p>	<p>The Applicant's response at [AS-006] to question 8 in Annex A of [PD-005] is also noted in relation to Work No. 1A(x) and also its response to questions 9 – 12 on where various parking facilities are assessed.</p> <p>Please will the Applicant supply a list of the vehicle parks it lists in its response to show which park listed is which Work No in the draft DCO.</p> <p>In the interest of clarity of what has been assessed and simpler enforcement of the DCO would it not be helpful to have in the draft DCO a list of all the parking facilities which are listed, with their Work No., location, a name, number of spaces to be provided for different modes of transport and the triggers by when they are to be operational? A Requirement would secure compliance with the capacity and triggers.</p>
8(3)	<p>Work No 1A(aa) is referred to in ES Volume 2 Chapter 3, 3.4.133.</p>	<p>The Examining Authority is not clear where the ES states the location of the temporary water resource storage it has assessed.</p> <p>Please will the Applicant indicate where to find this, and also where to find it in any change to its location in the material change proposal currently out for consultation?</p> <p>Please will the Applicant also point to where the parameters for this facility are to be found in the application</p>

		documents and, in due course, in the material change request?
9, 10, 11 and 12		Please see question 8(2) above
18	The list of works in Work No. 1D includes "administrative buildings" (jj) and "welfare facilities" (kk) – the workshop, civils store and general store are considered to fall under the broad category of "administrative buildings" and the changing facilities are considered to fall under the broad category of "welfare facilities".	Is there any reason why the description in Work No 1D (kk) should not be aligned with the list in para 2.5.5. of the description of the permanent development [APP-180]?
21	The 'western access road' is included in the description of Work No. 1D(gg). As stated above, the Applicant agrees to review and update the draft DCO in relation to the car parking numbers and will more generally review Work No 1D to ensure consistency in use of terminology and use of categories of sub-works between the draft DCO and the ES description of development.	Noted. The Examining Authority's current thinking is that Work No. 1D(gg) is somewhat imprecise as it refers to "roads". The ExA welcomes the Applicant's commitment to review Work No 1D for consistency with the ES.
Parts B to F		The ExA welcomes the Applicant's commitments to review Works 9-13 in the draft DCO.
Part G		
Q 1		<p>CHP and back-up plant</p> <p>The documentation appears to refer to a series of alternatives,</p> <p>1 Combined Heat and Power Plant, draft DCO description "Work No. 3 I (vi) combined heat and power plant".</p> <p>2 Emergency Equipment Store back up generator, draft DCO description "Work No. 1A (i) emergency equipment store, associated structures, back up generator and other plant".</p> <p>3 Emergency response energy centre, draft DCO description "Work</p>

		<p>No. 1A (h) (v) emergency response centre”</p> <p>Please will the Applicant clarify for the ExA where the ES has assessed these elements of the draft DCO in respect of noise, air quality and landscape effects for both the construction and subsequent operational periods and how each element is intended to function.</p> <p>Please will the Applicant also clarify the flue heights and their relation to the parameters plans.</p>
Q 2		<p>Alde Valley Academy Leiston</p> <p>The draft DCO describes the Sports facilities at Work No. 5 as <i>“Landscape works including open space, sports facilities and associated structures and plant. The location of the above works is shown on sheet no. 11 of the Works Plans.”</i></p> <p>However, this does not appear to correspond with either of the descriptions in the ES Vol 2 Ch 2 [APP-180] Description of permanent development para 2.9.1 or ES Vol 2 Ch 3 [APP-184] Description of Construction para 3.4.222.</p> <p>Please clarify what has been assessed in the ES and make clear where the details of the floodlights, illumination plans, and acoustic barriers can be found.</p>
Q 3		<p>In Part 3 of the Design and Access Statement [APP-587] there are several references to a former sand pit, its ecological interest and survey (e.g. paras A.14.2 and following, and A.23.5). Please will the Applicant point the ExA to where this is addressed in the ES.</p>

Observations on the draft section 106 agreement

The Examining Authority (ExA) makes the following observations on the first draft section 106 (s.106) agreement submitted by the Applicant on 8 December 2020 [[AS-040](#)] in response to the ExAs Procedural Decisions dated 23 October 2020 [[PD-005](#)] and 24 November 2020 [[PD-008](#)].

The ExA notes that the draft was sent to the Host Authorities on that date. The observations which follow are intended to assist all parties to the document. They are questions or issues which currently concern the ExA. It is not the intention of the ExA to negotiate the agreement itself. The observations made are not intended to be a full list of all issues on the document and the Applicant and Host Authorities must bring their own judgment and legal advice to bear on the drafting.

In line with that, the ExA is not at this stage asking for a separate response to these observations. It requests instead that the s.106 Explanatory Memorandum requested at observation 1 includes the responses and explanations of how the draft s.106 agreement addresses these observations, clearly referencing each one of them. The ExA notes from the Applicant's reply [[AS-031](#)] to its Procedural Decisions 24 November 2020 [[PD-008](#)] that the Applicant expects to send the next draft of the s.106 agreement, following negotiations, to the ExA in early March 2021. The ExA would be grateful if this could be achieved and these observations are prepared in that expectation.

In this note, "DCObligation" means development consent obligation within s.106 of the Town and Country Planning Act 1990 (TCPA 1990)

No.	Clause / Recital	Observation
1.		The ExA would be assisted by an Explanatory Memorandum (s.106 EM) prepared by the Applicant, in a similar way to the Explanatory Memorandum for the DCO. Please will the Applicant submit such a document with the next draft of the s.106 agreement. The ExA notes from [AS-031] that the Applicant expects to submit the next draft to the ExA in early March 2021.
2.	(D)	Section 106(9) of TCPA 1990 requires all planning obligations to be entered into by a deed which identifies the land in which the person entering into the obligation is interested, and states what is the interest of the person entering into the obligation in the land. The ExA is unable to find any such statement in the December 2020 draft [AS-040]. Please either direct the ExA to where the statement may be found or ensure there is a clear statement meeting s.106(9) in the next draft.
3.	1.1 – definition of Preparatory Works and its interaction with the definition of	This includes, at (g) " <i>remedial work in respect of any contamination or adverse ground conditions</i> ". That appears to be a very wide definition which might include for example the cut-off wall and the entire platform. Please consider if this exception from Commencement is appropriate.

	Commencement	
4.	1.1 – definition of Preparatory Works and its interaction with the definition of Commencement	At (j) it includes " <i>erection of temporary buildings and structures</i> ". The construction workers accommodation for example is temporary. Please will the parties consider what is appropriate across the entire authorised development.
5.	1.1 – definition of the Relocated Facilities Section 106 Agreement	Please will the Applicant submit a copy of this document with the next draft s.106 agreement.
6.	1.1 – definition of SZC Development Site	<p>Please will the Applicant provide this plan as soon as possible and no later than with the next draft s.106 agreement. As the Applicant and Host Authorities will be aware, the norm is for a s.106 agreement to bind all of the land within the "red line" of a planning application.</p> <p>In the event that the plan of the land to be bound will not outline all the land within the totality of the Order limits please will the Applicant explain (i) why and (ii) how that will not prejudice the appropriate delivery and enforcement of the promises, mitigation and other matters to be addressed by the s.106 agreement.</p> <p>In this connection, the ExA considers it important that the substantive provisions of the s.106 agreement need to be progressed rapidly by the Applicant as the appropriateness of excluding land over which development may be carried out will be very dependent on what are the obligations.</p>
7.	1.2.4 and 2.2.2	<p>Functions of the successors to the County Council.</p> <p>Given the terms of s.106(3) and (9)(d) should not the function of local planning authority also be included?</p>
8.	1.2.5	<p>References to SZC Co to include its "successors in title".</p> <p>Section 106(3)(b) refers to persons deriving title. The phrase "successors in title" may be less wide. Should not the references to SZC Co therefore include persons deriving title rather than successors in title?</p>
9.	1.2.11	It is stated that amongst other things, the recitals shall not have legal effect. Given that the custom and practice of drafting to comply with s.106(9) is to use the recitals which therefore have legal effect, should

		not recitals which are there to fulfil s.106(9) be excepted from this clause?
10.	1.2.12	<p>Annexes and similar documents to be subordinate to the "Deed".</p> <p>This suggests that the annexes are not part of the "Deed". Is it necessary for a distinction to be drawn? One consequence will surely be the need for vigilance on the part of the drafters to ensure there are no DCObbligations in the annexures. Would it not be better to redraft this to avoid that extra level of complexity? It would also be preferable for the drafters to check annexes to ensure there are no conflicts between the annexes and the rest of the s.106 agreement. The ExA expects the Applicant to proceed on that basis.</p>
11.	1.2.18	<p>This would appear to be a helpful shorthand provision. Please confirm that it is intended to act (inter alia) as a restriction within s.106(1)(a). But should it not apply to sums payable <u>on</u> or before an event or activity and should not "date" be added to event and activity?</p>
12.	3.1	<p>Conditionality of the Deed.</p> <p>The effect of this clause appears to be make the entire s.106 agreement conditional on (1) either (a) a notice that the Sizewell B relocated facilities works under the SZB relocated facilities permissions are not going to be continued under them which also states that only the DCO will be used, or (b) if the DCO does not provide for such a notice the date of Commencement of Relocated Facilities Works under the DCO; and (2) the making of the DCO.</p> <p>This means that everything in the DCO apart from the Relocated Facilities can be done without triggering the s.106. To accept that would not the Host Authorities at least need to be convinced nothing under the DCO apart from the Relocated Facilities can be commenced until the Relocated Facilities are commenced? The ExA and the Secretary of State may take the same view.</p> <p>Is Clause 3.1 really what is intended? Normally, Commencement anywhere on the Order lands would be the trigger. Indeed the definition of Commencement with its exclusion of Preparatory Works appears to be on the expectation that Commencement is to be the trigger.</p>
13.	3.2.2	<p>What will happen if that refusal is successfully challenged – for example by the Applicant - and the DCO is confirmed on redetermination (or on any other subsequent redetermination)? Please spell out how this clause 3.2 and clause 3 as a whole will operate in such</p>

		a case? Will the s.106 agreement be operative in such an eventuality??
14.	4.1.1 and 2.1	<p>It is essential that the promises made in this deed run with the land. Any doubt about this will be serious. The attention of the Applicant and the Host Authorities is drawn to this. It should be noted also that so far as the ExA is aware promises made under s.111 of the Local Government Act 1972, whether by deed or otherwise, do not thereby run with the land. If there are promises made in this deed which do not fall within s.106 it will be difficult to see how the ExA and the Secretary of State can take them into account.</p> <p>The ExA does not at present see any objection to including s.111 and all other powers enabling, but that alone is not considered a remedy for any failure to make all obligations under s.106. Section 111 is of course a helpful power for the commitments made by the Host Authorities.</p> <p>The attention of the Applicant and Host Authorities is also drawn to the forms of the s.106 agreement and DCO at the Northampton Gateway Strategic Railfreight Interchange NSIP where provisions which did not meet s.106 were moved into the DCO. See documents [REP1-003] compared with [REP6-009] (the s.106 agreement) and [APP-070] compared with the DCO made by the Secretary of State [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR050006/TR050006-001344-191009%20Northampton%20Gateway%20Rail%20Freight%20Interchange%20Order%20-%20PINS.pdf]. Obviously, the tests for inclusion in a DCO must be met for transferred provisions.</p> <p>The Applicant and the Host Authorities are also referred to paragraphs 11.4.28 – 11.4.33 of the recommendation report [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR050006/TR050006-001291-Northampton%20Gateway%20RFI%20Recommendation%20Report%20.pdf]. Attention is also drawn to paragraph 54 of the NPPF.</p> <p>It is likely also to be helpful to refer to R v. South Northamptonshire DC ex p Crest Homes [1994] 3 P.L.R. 47 and to R v. Somerset County Council and ARC Southern ex p Dixon [1997] JPL 1030.</p> <p>Breaches of Requirements are enforceable under the criminal law as well as by injunction and that is another</p>

		<p>reason why they may be preferable to planning obligations.</p> <p>These comments are also relevant to clause 2.2 of this draft s.106. In relation to that clause the ExA questions whether such a clause is capable of turning a provision which does not meet the s.106(1) tests into a DCObligation.</p>
15.	4.3	<p>This clause appears to suppose that a person can be bound by this s.106 agreement by undertaking the project or part of it despite not being a party to the deed or a person deriving title from a party. The ExA's understanding is that a planning obligation only binds those who derive title from the original covenantors (and the original covenantors of course) – see s.106(3). It is important that this is understood by those drafting this deed.</p> <p>What is the purpose of this clause? How can a person deriving title from a person who is not a party to this deed be bound by it?</p>
16.	4.4	<p>The whole of this clause from the words "<i>or any person deriving title from such chargee</i>" onwards raises difficulties.</p> <p>1. The chargee's powers under a mortgage will normally include a power of sale, powers to appoint receivers and the power to foreclose, amongst others. Imagine that the chargee exercises its power of sale. Is it intended that the purchaser should be free of the s.106 obligations, which may have been broken by that time, unless it "takes possession of the SZC Development Site"? What does "take possession mean" where a purchaser is concerned? (The ExA recognises that it has some meaning in the case of a chargee but would welcome an agreed position on that from the Applicant and Host Authorities on it, to be clear.)</p> <p>Consider also the position in the case of foreclosure and on sale following foreclosure. (The ExA is aware that foreclosure is a relatively rarely used remedy today, but it remains as a legal possibility.)</p> <p>Consider also the position where a receiver is appointed.</p> <p>2. The ExA observes that the drafting appears to exempt the mortgagee from liability even where it takes possession – the words "<i>such party</i>" in the third and fourth lines refer back to persons deriving title from the mortgagee / charge but not to the mortgagee / chargee. The ExA doubts that this is the intention and a small change to the drafting would deal with that.</p>

		<p>3. The proviso is also difficult. Take an obligation to do something, perhaps to install a mitigation measure, which is breached before the person deriving title from the chargee takes possession. The clear intention of the drafting appears to be that the breach will not be enforceable against the person deriving title until they take possession. But that would not be the position in the case of a purchaser from the owner.</p> <p>4. The clause also proceeds on the assumption that it is possible to contract out of s.106(3). It is clear that one cannot. To contract out would be a fetter on the planning authority's discretion to enforce. There is only one release from a s.106 planning obligation, namely s.106(4).</p> <p>5. Enforcement of this s.106 agreement should be a simple matter. It is not fair to expect the planning authority to have to wade through complex exceptions and the ups and downs of arguments on insolvency and property law. It is likely to be a time of crisis if chargees are involved. It needs to be straightforward.</p> <p>In short, this clause creates a number of highly undesirable problems and difficulties.</p>
17.	5.1	<p>This clause purports to release a person disposing of part of the site from all obligations relating to the part disposed. To obtain the release in s.106(4) requires the disposal of the totality of the owner's land bound by the obligation. It states that the deed "<i>may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land</i>". Please consider whether this clause would be a fetter on the planning authority's discretion to enforce or creates a legitimate expectation.</p>
18.	6	<p>Further planning permissions and DCOs.</p> <p>Is it appropriate to include certificates of lawful use in this exclusion? Would not the whole development be eligible for a CLEUD or CLOPUD (ss.191 and 192 TCPA) if a DCO is granted? Does the timing or stage at which the application for a certificate is made make a difference?</p> <p>Normally the s.106 would surely be drafted so as only to apply to the development permitted by the DCO or planning permission to which it relates. If that is done, is this provision needed?</p>
19.	9	<p>Dispute resolution.</p> <p>The normal way to resolve disputes and enforce a s.106 agreement is by injunction or claim for payment of</p>

		sums due but unpaid. Could this clause interfere with that straightforward process? Please will the Applicant explain the reasons for the inclusion of this clause and how the result of the Expert determination would then be enforced?
20.	13.4	<p>Variation of triggers for the performance of an obligation.</p> <p>This clause is a tailpiece and subject to all the issues which go with that. Please see the comments on tailpieces in DCOs in Advice Note 15 which presumably reads across to s.106 agreements. The triggers in the DCObligations are likely to relate to what mitigation is required at what point. Will not the ability to change the triggers risk undermining the delivery of that mitigation and thus what is required by the Environmental Statement. In addition, DCObligations can only be varied under s.106A.</p>
21.	15	<p>Planning gain – or the interaction with Community Infrastructure Levy or similar taxes.</p> <p>It appears to the ExA that this clause undermines the promises to deliver the mitigation. Mitigation should be included if it is necessary. And if it is necessary it should be delivered whatever the taxes which are levied. Please explain how this clause is justified.</p>
22.	16	<p>Payments to third parties.</p> <p>This clause makes receipt of the payment conditional on the recipient entering into a deed, details of which are not included in the current draft.</p> <p>1 The ExA reminds the Applicant and Host Authorities that a promise to pay a person who is not a planning authority for the land is not a planning obligation – see s.106(1)(d). However the ExA does note clause 1.2.18.</p> <p>2 Nonetheless, the deed may for good reasons be unacceptable to a payee. Could this clause undermine the delivery of mitigation?</p> <p>3 The Applicant should bear in mind that the provision would require the ExA to come to a view on the suitability of the deed for all and any recipients in all and any circumstances and should reflect on this point.</p>
23.	23	<p>The ExA notes that the deed may be executed in counterparts. Will the Applicant and Host Authorities note that the ExA expects the deed to have been executed and delivered before the end of the Examination and evidence of that supplied. The Applicant will be aware that the Inspectorate’s policy does not favour execution in counterparts, though it is open to Inspectors to take a different view. At this stage, the ExA would simply observe that the document has only three (or possibly four) parties, all with a</p>

		registered office or legal headquarters in the case of the Host Authorities in England. So recourse to counterparts would not seem to be imperative.
24.	Sch 1, para 5	<p>Approvals and consents.</p> <p>The draft already addresses consents at Cl 18(1). Why is it duplicated here, with differences?</p>
25.	Sch 2	<p>Council's resourcing.</p> <p>This provision is obviously of practical help. The ExA expects that the Applicant and its legal advisors are well aware of the decision in Oxfordshire CC v. SoS for CLG [2015] EWHC 3808. Please will the Applicant set out in the s.106 EM how the judgment and effect of that case is addressed.</p>
26.	The Schedules generally	These, which are to contain the substantive provisions, are blank. The ExA is concerned about this, given that the s.106 agreement is a regulatory document of similar importance to the DCO.
27.	The parties, seals and signatures, and evidence of proper execution	<p>The execution details on page 27 have four parties, whereas there are three in the parties on page 1.</p> <p>The Applicant should note that the ExA will require confirmation that any s.106 agreements and any similar documents have been properly executed in accordance with the constitutions of the parties entering into them and all other legal requirements, and that they are enforceable against them. This confirmation will need to be issued by the solicitors for the relevant parties. The form of the confirmation should be submitted in draft as an Examination document in due course, preferably at Deadline 1, and should be for the benefit of the local planning authorities and Secretary of State. The Applicant should refer to the recommendation report of the ExA into the Northampton Gateway Strategic Rail Freight Interchange NSIP, available on the Planning Inspectorate's National Infrastructure Planning Website, paragraphs 11.4.52 – 11.4.55, and 11.4.57, together with documents [REP6-048] and [REP5-018] in that case for an example of what is sought. The ExA requests a document which fulfils the functions of both [REP6-048] and [REP5-018].</p> <p>The Host Authorities should please note that notwithstanding the above, the ExA will expect them to have done appropriate title investigations, to ensure that all the right persons and interests in land have been joined in to the s.106 agreement as parties and that they do all necessary searches and registrations, remembering that the entry into a s.106 agreement is not a conveyance on sale and that therefore there is no priority period, and to confirm that this has been done.</p>