



The Sizewell C Project

8.20 Draft Deed of Obligation Explanatory Memorandum - Tracked Changes Version

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11 May 2021

EXPLANATORY MEMORANDUM
SIZEWELL C PROJECT

~~DRAFT SECTION 111 AGREEMENT AND DRAFT S106 AGREEMENT~~

~~DRAFT DEED OF OBLIGATION – DEADLINE 2~~

1. INTRODUCTION

~~1.1 In the ExA's Procedural Decision 9 [PD-009] of 22 December 2020, a number of observations were raised in relation to the draft development consent obligation ("s106 Agreement") submitted on 8 December 2020. In the same Procedural Decision, the ExA requested that a s106 Explanatory Memorandum was prepared and issued with the next draft of the s106 Agreement. The ExA requested that the s106 Explanatory Memorandum:~~

~~1.1.1 be prepared 'in a similar way to the Explanatory Memorandum for the DCO', and~~

~~1.1.2 that it includes responses and explanations of how the revised draft of the s106 Agreement addresses each of the ExA's observations as set out in Procedural Decision 9 [PD-009] of 22 December 2020 clearly referencing each of them.~~

~~1.2 This Explanatory Memorandum is set out in two parts:~~

~~1.2.1 A summary of the key provisions of the draft s106 Agreement is set out in the main body of this Explanatory Memorandum. This is intended to be a high-level summary of the intentions and legal underpinning of the key provisions; and~~

~~1.2.2 The Appendix sets out responses to each of the ExA's observations, with numbered references to the ExA's observations, and cross-refers back to the main body of the Explanatory Memorandum in cases where a full justification for the approach adopted is set out here.~~

~~1.3 The tests set by Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") do not apply to the Secretary of State's decision whether or not to grant development consent pursuant to the Planning Act 2008 ("PA 2008"), as Regulation 122(1) provides that the regulation applies to "a relevant determination" which results in "planning permission being granted for development". The definition of "relevant determination" in regulation 122(3) is limited to determinations made under certain specified sections of the Town and Country Planning Act 1990, and does not include a decision to grant development consent pursuant to the PA 2008. This issue was considered at the examination into the Northampton Gateway SRFI, and the ExA in that case reached the same conclusion (see ExAR paragraph 11.4.77).~~

~~1.4 Nevertheless, equivalent policy tests to determine when the Secretary of State will take account of obligations contained in s106 obligations relating to nationally significant infrastructure projects in the energy sector, are set out by National Policy Statement EN-1 (at paragraph 4.1.8). These tests mirror the legal requirements in Regulation 122. In~~



~~accordance with NPS EN-1, therefore, obligations which may be taken into account by the Secretary of State when deciding a DCO application must be:~~

~~1.4.1 — relevant to planning;~~

~~1.4.2 — necessary to make the proposed development acceptable in planning terms;~~

~~1.4.3 — directly related to the proposed development;~~

~~1.4.4 — fairly and reasonably related in scale and kind to the proposed development; and~~

~~1.4.5 — reasonable in all other respects.~~

~~1.5 — All of the draft obligations, in SZC Co's view, meet these tests, but we recognise that this may be tested through the examination.~~

~~1.6 — For reasons explained below under the heading 'Approach to Binding the Land', we propose that SZC Co. and the three host local planning authorities enter into an agreement pursuant to s111 of the Local Government Act 1972 (s111 Agreement), which will append the agreed form of s106 Agreement. Therefore, this Explanatory Memorandum also summarises the key provisions of the proposed draft s111 agreement.~~

~~We would like to stress that the draft s111 Agreement and draft s106 Agreement are currently at a very early stage. We expect the drafting to evolve significantly throughout the course of the examination following further engagement with the three Councils. By making these draft agreements public at this stage, we recognise that Interested Parties may have comments. However, we would like to be clear with Interested Parties that the negotiation of such agreements must take place solely between SZC Co. and the three relevant Councils, with the exception of cases where a particular Interested Party is expressly referenced in the draft s106 Agreement in relation to particular obligations. 1.7 We will therefore in general rely upon the Councils to take account of the views of wider Interested Parties, to the extent they consider them relevant, in their negotiations with SZC Co.~~

~~2. — APPROACH TO BINDING THE LAND~~

~~2.1 — Section 106 of the TCPA 1990 provides that only a 'person interested in land' may enter into a s106 agreement (s106(1)), and that a planning obligation is enforceable by the local planning authority against the person entering into the obligation and against any person deriving title from that person' (s106(3)). By virtue of s106(9) the agreement must among other things identify the land in which the person entering into the obligation is interested and what his interest in the land is.~~

~~2.2 — In the case of the Sizewell C project, SZC Co. does not expect to own all of the land within the Order limits, or even all of the land within the main development site, by the time that the Secretary of State comes to make his decision on the Application.~~

~~2.3 — We consider that the most robust and simplest way to ensure that the Secretary of State has the necessary assurance that all of the land will be bound by the necessary s106 obligations is to adopt an approach similar to that of the Thames Tideway Tunnel DCO, and the Aquind DCO application (yet to be determined). The Aquind 'Development Consent Obligation — Explanatory Note' dated 26 February 2021 (Doc Ref. 7.5.28) summarises the approach put forward in that application, drawing upon the Thames Tideway Tunnel precedent. We set out below how this would apply in the case of Sizewell C.~~

~~At the end of the Examination, SZC Co. will submit to the ExA, an agreement entered into between itself and East Suffolk Council, West Suffolk Council and Suffolk County Council, made~~



~~pursuant to s111 of the Local Government Act 1972. This s111 Agreement will append a draft s106 Agreement in a form agreed between the four parties. The s111 2.4 Agreement will commit SZC Co. and the Councils, post grant of the DCO, to enter into the s106 Agreement in this agreed form.~~

~~2.5 — A certified copy of the draft s106 Agreement (in the form agreed and appended to the s111 Agreement) will be submitted to the Examination, prior to its close.~~

~~2.6 — The DCO will contain the following provisions:~~

~~2.6.1 — An article which deems SZC Co. to be a land owner for the purpose of s106 (clearly this would only take effect once the DCO is granted). This article would be worded as follows: “For the purpose only of Section 106 (1) of the Act the undertaker shall be deemed to be a person interested in the Order land or any part of it and for the avoidance of doubt Section 106(3)(a) shall include any transferee under Article 8 of this Order”; and~~

~~2.6.2 — An article which provides that SZC Co. may not commence the authorised development until the s106 Agreement has been completed in the certified form: “The authorised development must not begin for the purposes of section 155(1) of the 2008 Act unless and until the undertaker completes the development consent obligation pursuant to section 106 of the 1990 Act”. The ‘development consent obligation’ would be defined as the form certified by article 80 and Schedule 22 of the DCO.~~

~~2.7 — In this way, SZC Co. has the legal power to enter into a s106 agreement as soon as the DCO is granted (despite not being a land owner of all of the land), and Secretary of State can be assured that SZC Co. may only lawfully commence development after having committed itself to s106 obligations binding the whole of the Order land (the intention being that the redline in the certified s106 Agreement will follow the Order limits).~~

~~2.8 — For completeness, please also note that in terms of the binding of the land in circumstances where the benefit of the DCO is transferred to another party, article 9(6)(c) of the draft DCO states that any person to whom the benefits or rights of the DCO are transferred and who exercises those powers will be “subject to the same restrictions, liabilities and obligations (including development consent obligations within the meaning of section 106 of the 1990 Act (Planning obligations) as would apply under this Order if those benefits or rights were exercised by the undertaker.” To provide even greater clarity and certainty, we propose to amend this drafting in the next version of the DCO to refer specifically to the provisions in the ‘development consent obligation’ (defined to mean the agreement in the certified form, completed by SZC Co.). By virtue of clause 5 of the s106 Agreement (Release) SZC Co. will be released from all obligations under the s106 Agreement only upon transfer of the whole benefit of the DCO to another party pursuant to article 9.~~

~~2.9 — Under the proposed approach, therefore, the identity of the owners of land within the Order limits (being the area bound by the s106 Agreement) is entirely irrelevant — both at the time of completion of the s106 Agreement, and at any time subsequently. The s106 Agreement~~



~~should, rightly, and will, only ever bind and be enforceable against SZC Co. or any person designated as the 'undertaker' in respect of all DCO powers by the Secretary of State.~~

~~2.10 The remainder of this Explanatory Memorandum explains, first, the key provisions of the draft s111 Agreement proposed to be entered into and, secondly, the key provisions of the draft s106 Agreement proposed to be appended to it.~~

~~3. SECTION 111 AGREEMENT~~

~~3.1 Section 111 LGA 1972 empowers local authorities to do anything "which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions", which would include entering into a contract committing the three Councils to entering into the s106 Agreement post-grant of the DCO.~~

~~3.2 The agreement is to have immediate operative effect (clause 3, Conditionality). The key operative provisions are contained in Clause 4 (Obligations in Relation to Execution of the Development Consent Obligation), which:~~

~~3.2.1 commits SZC Co. to executing and sending to the three Councils within 5 working days of the making of the DCO, an engrossment of the s106 Agreement (being an engrossment of the certified form of this s106 Agreement, as appended to the s111 Agreement);~~

~~3.2.2 commits the three Councils to executing the s106 Agreement within a month of receipt, after which time SZC Co. is authorised to complete it; and~~

~~3.2.3 provides a commitment by SZC Co. to all three Councils not to implement the project until the s106 Agreement has been completed.~~

~~3.3 The remainder of the clauses in the main body of the agreement are standard 'boilerplate' provisions. Clause 5 (Release and Expiry) provides that the Councils are released from any obligation under the s111 Agreement once SZC Co. has confirmed that the Development Consent Obligation has been completed. Clause 6 (Resolution of Disputes) makes provision for an expert to be appointed to determine any disputes between the parties. Clause 7 (Notices) makes provision in relation to the service of notices on each of the four parties. Clause 8 (No Fetter on Discretion) provides that save for the provisions of Clause 4, the terms of the agreement should not be taken to fetter the discretion of the Councils. Clause 9 (Good Faith, Good Practice and Reasonableness) provides that the parties should act reasonably and in good faith. Clause 10 (Contracts (Rights of Third Parties) Act 1999) dis-applies the rights of third parties at law to enforce the terms of the agreement. Clause 11 (Jurisdiction) provides that the laws of England and Wales apply to the agreement. Clause 12 (Counterparts) enables the agreement to be signed in counterparts. Clause 13 (Date of Delivery) confirms that the agreement is deemed to be delivered as a deed on the date it is completed.~~

~~3.4 The s111 agreement will append the certified form of the s106 Agreement (described in its current draft form below).~~

~~4. SECTION 106 AGREEMENT~~

~~The legal under-pinning of obligations~~

~~4.1 We have considered paragraphs 11.4.27 to 11.4.33 of the ExA's Report and Recommendation in relation to the Northampton Gateway DCO application. We note the ExA's concerns in the Northampton case in relation to the need to ensure that each obligation~~



~~in the draft s106 agreement fell into one of the four categories in s106(1). These being obligations:~~

~~“(a) restricting the development or use of land in any specified way;~~

~~(b) requiring specified obligations or activities to be carried out in, on, under or over land;~~

~~— (c) requiring the land to be used in any specified way; or~~

~~(d) requiring a sum or sums to be paid to the authority [...] on a specified date or dates or periodically”.~~

~~4.2 — The ExA’s concern in the Northampton case was that only obligations falling within one or more of these categories were capable of constituting ‘planning obligations’ within the meaning of s106 TCPA 1990, and thus capable of ‘running with the land’ i.e. being enforced against successors in title to the land, pursuant to s106(3) TCPA 1990.~~

~~4.3 — As explained earlier in this document, we do not intend the s106 Agreement to bind successors in title. It should be binding only upon SZC Co as the ‘undertaker’, being the only party who may lawfully implement the development authorised by the DCO, and anyone to whom the benefit of the DCO is transferred under article 9 of the DCO. 4.3As explained above, article 9(6)(c) requires that the exercise of the DCO powers by any person to whom the DCO is transferred must be subject to the same restrictions (including the completed s106 Agreement) as would apply if SZC Co were exercising the DCO powers itself. Given this, it is not necessary for each contractual obligation in the s106 Agreement to meet one or more of the tests in s106(1)(a) to (d). All obligations in the agreement will be contractually binding on SZC Co as a signatory, and will bind any future transferee by virtue of article 9(6)(c) of the DCO (which we intend to clarify to refer specifically to the s106 Agreement completed by SZC Co) without the need to depend upon the operation of section 106(3).~~

1.1 In the ExA’s Rule 17 Letter [PD-025] of 6 May 2021, the ExA stated in Question SA.1.62 :

"The ExA thanks the Applicant for providing the draft s.106EM. In relation to the legal underpinnings, the ExA is seeking a guide, much like an EM for a DCO, of the purpose, policy compliance and legal powers for each clause, schedule and paragraph. Especially given not only the limitations of s.106 TCPA 1990 but also the approach in the Sizewell Special Arrangements, the ExA would be particularly assisted by this, however the eventual s.106 agreement turns out. Please will the Applicant include the s.111 agreement in the draft s.106EM"

1.2 Following consideration of the ExA’s comments in relation to the Sizewell Special Arrangements and draft s106 agreement in the above Procedural Decision, the Applicant has developed an alternative approach to securing contractual mitigation for the project. We refer to this as the ‘Evolving Approach’, and an explanation of it is provided in the Applicant’s paper entitled ‘Explanation of the Applicant’s Evolving Approach to Contractual Commitments to Mitigation’ Appendix 26A of the Response to ExQ1, which is provided in support of a number of the responses to the ExA’s SA.1 questions.

1.3 Under the Evolving Approach, the Applicant would enter into a ‘Deed of Obligation’, which would be an ordinary contract from the Applicant’s perspective, and an agreement under s111 LGA 1972 from the perspective of the local authorities. The agreement would contain all of the same commitments to mitigation and measures to enhance the benefits of the project which were set out in the draft s106 agreement supplied at Deadline 1. The agreement would ‘run with the undertaking’, through article 9 of the dDCO, which states (Rev 4.0) that: ‘(b) save to the extent agreed by the Secretary of State, the Deed of Obligation completed pursuant to this Order, and any variations to it at the date of transfer



or grant, shall be enforceable against the transferee or lessee as they would against the transferor'.

- 1.4 In terms of enforcement, our intention is to include drafting within the dDCO which would allow the local authorities to enforce all of the obligations in the agreement against the Applicant. It would be irrelevant whether they meet the tests in s106(1)(a) to (d))TCPA 1990. Appropriate means of enforcement for the local planning authorities may be drafted into the DCO to the extent they cannot be adequately secured contractually. The nature of those enforcement measures is subject to further consideration by the Applicant, and will be the subject of engagement with East Suffolk Council and Suffolk County Council. To the extent relevant and useful, they may reflect enforcement powers under s106 TCPA 1990 - in this way dealing with one of the ExA's concerns: the enforcement powers would apply to all measures equally in the Deed of Obligation, rather than limiting enforcement to those obligations deemed to be 'planning obligations' by virtue of meeting the tests in s106(1)(a) to (d).
- 1.5 The proposed 'Evolving Approach' would not, however, obviate the need to be clear as to which contractual commitments in the Deed of Obligation may or must be taken into account by the Secretary of State in making the decision.
- 1.6 **Section 2** below therefore outlines the relevant legal and policy tests (see also the diagram in the Appendix to this note). These tests apply even if the Applicant were proposing to enter into an agreement under s106 TCPA/s111 LGA. The only difference would be that the tests in s106(1)(a) to (d) would be relevant if the Applicant were seeking to argue that some or all of the obligations amounted to 'planning obligations'.
- 1.7 **Section 3** below sets out a summary of the provisions in the Deed of Obligation in respect of all of the substantive commitments in the schedules and will in due course outline the extent to which the Applicant considers the legal and policy tests are met – recognising, of course, that ultimately this is a matter for the Secretary of State. The Applicant has not for the time being attempted to provide an analysis of compliance as this is subject to further consideration and engagement with the local authorities alongside ongoing negotiation of the Deed of Obligation.

2. **LEGAL AND POLICY TESTS**

What may the Secretary of State take into account?

- 2.1 It is important to consider what the Secretary of State may and may not take into account when making a decision on the Sizewell DCO, having regard to law and guidance.
- 2.2 The law distinguishes between considerations which are relevant, and which therefore the decision maker is empowered to take into account, and those which the decision-maker is required to take into account.
- 2.3 A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account.
- 2.4 The decision-maker is expressly or impliedly required by legislation (or by a policy which has to be applied) to take certain considerations into account. In addition, on the facts of a particular case there may be some considerations which are so “obviously material” that it would be irrational not to take them into account (see e.g. *R (ClientEarth) v. SSBEIS* [2020] 1303 (Admin) at para. 99) (**Written Submissions on matters raised orally at Preliminary Meeting Part 1, Appendix B [PDB-013]**).



- 2.5 When applying principles derived from caselaw relating to the TCPA regime, it is necessary therefore to be mindful of the differences in the statutory provisions which govern decision-making in each case and require the decision-maker to take certain matters into account.
- 2.6 In principle, any consideration which relates to the use and development of land is capable of being a material consideration. Whether a particular consideration falling within that broad class is material will depend on the circumstances (*Stringer v. Minister of Housing* [1970] 1 WLR 1281 at 1294H).
- 2.7 The approach to considering whether or not a particular planning obligation may be taken into account by the decision-maker as a material consideration is set out in *R (Wright) v. Forest of Dean DC* [2019] 1 WLR 6562. A threefold test was applied, equating the ambit of “material considerations” with the ambit of the power to impose planning conditions (derived from *Newbury DC v. SSE* [1981] AC 578), namely whether this:
- a. was for a planning purpose;
 - b. was fairly and reasonably related to the development; and
 - c. was not so unreasonable that no reasonable planning authority could have imposed it.
- 2.8 These criteria are known as the “*Newbury* criteria”, and a consequence of their application is that planning permission cannot be bought or sold. Planning obligations satisfying these criteria may be treated as material planning considerations (see *Tesco Stores Ltd. v. SSE* [1995] 1 WLR 759 at pp. 782-783 per Lord Hoffman).
- 2.9 As the Supreme Court explained in *Wright*, an obligation to pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient connection with the proposed development as to qualify as a “material consideration” in relation to it (para. 38). In that case the community benefits promised by the developer were held not to satisfy the *Newbury* criteria and hence did not qualify as a material consideration because: “*The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community. Moreover, they did not fairly and reasonably relate to the development for which permission was sought*” (para. 44)¹.
- 2.10 The decision-maker must therefore consider whether the obligations satisfy the *Newbury* criteria. If they do, they may lawfully be taken into account as material considerations. The weight that is attached to any material consideration is a separate matter, and a matter of planning judgment for the decision-maker, subject to *Wednesbury* principles (see *Tesco*).
- 2.11 Section 105 of the Planning Act, which will apply to the Secretary of State's determination of the DCO application, identifies certain considerations that the decision-maker must take into account. It states that:
- “(2) In deciding the application the Secretary of State must have regard to—
- (a) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2).
 - (b) any matters prescribed in relation to development of the description to which the application relates, and

¹ The Applicant has had regard to that case law in explaining the nature, purpose and scale of the proposed Community Fund. See section 10.5 of the Planning Statement.



~~4.4 When making a decision whether to grant or refuse the DCO, the Secretary of State must take into account, among other things, "any [...] (c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision" (s105(2)(c) PA 2008). Nothing limits the Secretary of State to taking into account only 'planning obligations' i.e. contractual obligations meeting the tests in s106(1)(a) to (d). It will, however, of course, be important for the Secretary of State to be sure that all obligations necessary to mitigate the impacts of the proposed development are: (i) enforceable against SZC Co, and (ii) capable of being enforced against transferees of the DCO powers in future. This will be the case."~~

2.12 The text underlined (s105(2)(c)), obliges the Secretary of State to take into account any planning obligations committed to if they are considered by the Secretary of State not only to be relevant (i.e. to be a material consideration), but also to be important. The judgment as to importance is anticipated to reflect the weight that the decision-maker chooses to ascribe to the matter in question.

2.13 As a matter of policy, NPS EN-1, para 4.1.8 states:

~~4.5 — A separate question is whether all of the obligations in the s106 Agreement meet the tests in paragraph 4.1.8 of NPS EN-1. The policy position of the Government as set out in that paragraph of the NPS is that only obligations which meet these tests will be taken into account by the Secretary of State when deciding a DCO application. As stated earlier, the requirement in paragraph 4.1.8 is that in order to be taken into account, obligations must be:~~

~~4.5.1 — relevant to planning;~~

~~"The [Secretary of State] may take into account any development consent obligations that an applicant agrees with local authorities. These must be relevant to planning, 4.5.2 necessary to make the proposed development acceptable in planning terms; 4.5.3 directly related to the proposed development, 4.5.4 fairly and reasonably related in scale and kind to the proposed development, and 4.5.5 reasonable in all other respects".²~~

2.14 This is a statement of policy, and not law. Policy cannot make a matter which is otherwise a material consideration an irrelevant consideration (*Gransden & Co. Ltd. v. SoS* (1987) 54 P&CR 86 at p. 94). Its legal effect is different, therefore, from that of Regulation 122 of the Community Infrastructure Regulations 2010, which do not apply to decision-making under the PA 2008. The NPS policy is not only relevant, but also important in this case. It must therefore be taken into account by the decision-maker when determining the weight to be attached to any obligation and would apply equally to a development consent obligation or some other contractual obligation offered by the Applicant.

² This NPS policy mirrors the equivalent legal requirement under Reg. 122 CIL Regulations 2010, which applies to determination of planning applications under TCPA: " a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—(a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development." This does not apply to determination of DCOs, since they fall outside the definition of a 'planning permission' under the Regs.



- 2.15 If the Secretary of State takes into account an obligation that is a material consideration (i.e. it satisfies the *Newbury* criteria) but which does not satisfy an element of the policy test in para. 4.1.8 that goes beyond those criteria (e.g. the requirement that the obligation is necessary to make the development acceptable in planning terms), it would be a departure from policy. The fact that the decision-maker has to have regard to the policy does not mean that it needs necessarily to follow the policy. However, if the decision-maker is going to depart from policy it must give clear reasons for doing so in order that the recipient of the decision will know why the decision is being made as an exception to the policy and the grounds upon which the decision was taken (*Gransden* at p. 94).
- 2.16 The scope for departing from the policy set out in EN-1 will be limited by the fact that some elements of the policy effectively reproduce the *Newbury* criteria.
- 2.17 The Secretary of State will therefore need to consider:
- a. whether the obligations satisfy the *Newbury* criteria so that they may be regarded as relevant;
 - b. if relevant, whether the obligations meet the tests set by policy in the NPS (where these tests go beyond the *Newbury* criteria); and
 - c. if not, whether there are reasons for nevertheless taking the obligation into account as a departure from policy.
- 2.18 If the Secretary of State concludes that an obligation is relevant and that it should be taken into account, the weight that is attached to it (and accordingly whether it is not only relevant, but also important) will be a matter for his or her planning judgment.
- 2.19 In this case the Applicant does not propose to make any of the obligations conditional upon a positive decision being reached by the Secretary of State as to their relevance, accordance with policy, weight or importance. Thus the obligations will be offered, secured and honoured whatever conclusion is reached by the Secretary of State as to the role (if any) which a particular obligation should play in the decision.
- 2.20 For ease of reference, the diagram in the Appendix to this note shows in diagrammatic form the analysis which must be undertaken by the ExA on the Secretary of State's behalf as set out above. It is this analysis which we have applied to the provisions in each of the Schedules to the Deed of Obligation in section 3.
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Requirement vs Contractual Obligation

~~4.5.3 directly related to the proposed development;~~

~~4.5.4 fairly and reasonably related in scale and kind to the proposed development; and~~

~~4.5.5 reasonable in all other respects.~~

~~4.6 As the ExA would expect, many of the substantive obligations in the draft s106 Agreement, set out in the themed Schedules, provide for payments to be made. The scale of these payments has yet to be agreed with the relevant Councils. However, all payments and other commitments relate to impacts identified and assessed in the DCO application or otherwise identified by Interested Parties through engagement and considered by SZC Co to reasonably meet the above tests.~~

~~4.7 As the ExA will be aware, of course, paragraph 4.1.8 (like Regulation 122 of the CIL Regulations) does not go so far as to preclude contractual commitments made by an applicant which do not meet these tests. Any commitments which fail to meet these tests simply will not be taken into account by the decision-maker.~~

2.21 ~~4.8~~We are aware also of paragraph 54 of the National Planning Policy Framework, which provides that: “*Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition*”. While it may be possible, in principle, for elements of the ~~s106 Agreement~~ Deed of Obligation as drafted to be pulled out into requirements, we consider that in most, if not all, cases there is considerable practical advantage and merit in placing the commitments to plans etc together with the governance arrangements for approvals or amendments, and procedures for resolution of disagreements, which relate to them and which it would not be appropriate to draft into the DCO. The draft ~~s106 Agreement~~ Deed of Obligation largely follows the form and approach in the Hinkley Point C s106 agreement, taking into account learnings from that project. Nuclear projects of the scale of Hinkley C and Sizewell C have few precedents in terms of their size, the length of their construction period and their complexity. We would be grateful if the ExA would consider this when having regard to paragraph 54 of the NPPF and considering the obligations which it is and is not appropriate to secure contractually. If after such consideration, the ExA wishes SZC Co to further justify the securing of any particular commitments by way of the ~~s106 Agreement~~ Deed of Obligation rather than requirement, we would be pleased to respond.

~~4.9 We summarise below the provisions of the working draft of the s106 Agreement as currently formulated, subject to further negotiations.~~

3. SUMMARY OF THE DEED OF OBLIGATION AND LEGAL UNDER-PINNING

3.1 We summarise below the content of the draft Deed of Obligation. This agreement would be entered into by the Applicant as a deed (under the ordinary provisions of contract law), and by the local authorities as a contract made pursuant to s111 LGA 1972. Section 111 LGA 1972 empowers local authorities to do anything “which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions”. This would include entering into a contract which secured mitigation measures and benefits relating to the Sizewell project, where these are incidental to the function of East Suffolk Council and Suffolk County Council in their capacity as local planning authorities, and incidental to the functions of Suffolk County Council as highway authority, fire and rescue authority, waste planning authority, lead flood authority and education authority.

Recitals



- 3.2 ~~4.10~~ The Recitals confirm the status of the Councils as planning authorities (in the case of East Suffolk Council, ~~West Suffolk Council~~ and Suffolk County Council) and highway authority, fire and rescue authority, waste planning authority, lead flood authority and education authority (in the case of Suffolk County Council only). ~~They confirm that SZC Co. is deemed to be a person with an interest in the land bound by the s106 Agreement by virtue of the relevant article of the DCO which will provide for this (see explanation in section 2 above).~~

Definitions and interpretation (Clause 1)

- 3.3 ~~4.11~~ Relevant definitions are set out in Clause 1.

Legal effect (Clause 2)

- ~~4.12~~ Provides that the planning obligations contained in the agreement are enforceable against SZC Co. in respect of its Qualifying Interest in the Sites. 'Qualifying Interest' is defined by reference to the article of the DCO which will provide that SZC Co. is deemed to be a person with an interest in all of the Order land for the purpose of s106(1) of the TCPA 1990⁴.

- 3.4 Provides that the obligations in the ~~s106~~ Deed of Obligation are entered into pursuant to section 111 agreement of the Local Government Act 1972.

- 3.5 ~~4.13~~ Provides that the obligations in the agreement pursuant to s.106 of the Town and Country Planning Act 1990 previously executed in connection with the relocated facilities planning permission will continue to apply as if such works were being carried out under that planning permission, even where the equivalent works are carried out under the DCO.

Conditionality (Clause 3)

- 3.6 ~~4.14~~ Provides that save for in respect of obligations which expressly require compliance prior to Commencement, the provisions in the Schedules of the ~~s106 Agreement~~ have Deed of Obligation has operative effect from the "Commencement Date", which is defined to mean "the date of Commencement of works pursuant to the Development Consent Order", subject to exceptions provided for in circumstances where legal challenges are brought.

Development Consent Obligations (Clause 4)

- 3.7 ~~4.15~~ Provides that ~~the obligations contained in the Schedules bind the Sites and that SZC Co. covenants to comply with them, including any obligations which may not constitute development consent obligations but would nevertheless be enforceable as contractual commitments under s111 LGA 1972~~ the obligations contained in the Schedules. Further, it provides that the three Councils will perform their obligations provided for in the ~~s106 Agreement~~ Deed of Obligation.

- 3.8 Provides that where any payment is expressed to be payable on or before an event or activity, SZC Co covenants that it shall not commence that event or activity until the relevant payment has been made.

Provides that where an obligation requires SZC Co to undertake an action "on or before Commencement", then SZC Co covenants that it shall not commence that event or activity until the relevant obligation is satisfied.

Release (Clause 5)

⁴ ~~Note that by virtue of article 9(6)(c) of the draft DCO, any person to whom the benefits or rights of the DCO are transferred and who exercises those powers will be subject to the same restrictions, liabilities and obligations (including development consent obligations within the meaning of section 106 of the 1990 Act (Planning obligations) as would apply under this Order if those benefits or rights were exercised by the undertaker.~~



[3.9](#) ~~4.16~~ Provides that SZC Co. will be released from all obligations under the ~~s106 Agreement~~ [Deed of Obligation](#) upon transfer of the whole of the benefit of the DCO to another party pursuant to article 9, save in respect of antecedent breaches.

Expiry (Clause 6)

[3.10](#) ~~4.17~~ Provides that if the DCO expires or is revoked before the Commencement Date then the ~~s106 Agreement~~ [Deed of Obligation](#) will determine and cease to have effect.

Certificates of Compliance (Clause 7)

[3.11](#) ~~4.18~~ Makes provision for the three Councils to provide certificates of compliance upon request by SZC Co. where obligations have been discharged.

Resolution of Disputes (Clause 8)

[3.12](#) ~~4.19~~ Makes provision for expert determination in relation to disputes between the Parties.

Notices (Clause 9)

[3.13](#) ~~4.20~~ Sets out the means of service and addresses to which notices may be served on the Parties.

Indexation (Clause 10)

[3.14](#) ~~4.21~~ Provides for the sums specified in ~~s106 Agreement~~ [the Deed of Obligation](#) to be index-linked to date of payment.

Interest (Clause 11)

[3.15](#) ~~4.22~~ Provides for interest to be paid on late payments.

Notice of Phases, payments and Dispositions (Clause 12)

[3.16](#) ~~4.23~~ Requires SZC Co. to:

[3.16.1](#) ~~4.23.1~~ notify the Councils of the anticipated and actual Commencement Date and Transitional Date; ~~and~~

~~4.23.2 — notify ESC and SCC of any disposal of its interests in the Sites, and to notify WSC of any disposal of the Pakenham Site.~~

[3.17](#) ~~4.24~~ Empowers the Parties to agree variations to the triggers for fulfilment of obligations in the ~~s106 Agreement~~ [Deed of Obligation](#), but only where the Councils consider this would not give rise to materially new or materially different environmental effects to those assessed.

Communications (Clause 13)

[3.18](#) ~~4.25~~ Requires ESC and SCC to coordinate external communications with SZC Co.'s communications team in accordance with a protocol to be agreed. It also provides that where particular mitigation works, projects or benefits are funded from any contributions secured through the ~~s106 Agreement~~ [Deed of Obligation](#), SZC Co. will be acknowledged as having funded such works and able to publicise such funding through the means described.

National Policy Statement EN-1 (Clause 14)

[3.19](#) ~~4.26~~ Confirms that the Parties agree that the obligations contained in the Schedules are necessary to make the Development acceptable in planning terms, are directly related to the Development and are fairly and reasonably related in scale and kind to the Development and thus satisfy the tests in paragraph 4.1.7 of National Policy Statement EN-1.



Payments to Third Parties (Clause 15)

[3.20](#) ~~4.27~~ Provides that where any payments are stated to be payable by SZC Co to ESC, WSC and SCC for onward transfer to a person who is not a party to the ~~s106 Agreement~~ [Deed of Obligation](#) (a “third party”), the relevant Council and SZC Co will use reasonable endeavours to enter into an agreement with the third party substantially in the form attached to the ~~s106 Agreement~~ [Deed of Obligation](#) at Annex [●] (a “Deed of Covenant”). If no Deed of Covenant has been entered into within [●] Working Days of the date when the payment was due to be paid, SZC Co and the relevant Council will meet to determine either alternative delivery of the relevant mitigation or an alternative form of mitigation.

[3.21](#) Provides that where the Deed of Obligation grants a third party a right to be represented on a governance group, that the relevant Council and SZC Co will use reasonable endeavours to enter into a Deed of Covenant in respect of this provision. If no Deed of Obligation is entered into prior to the date of the [second] meeting of the relevant governance group, SZC Co and the Councils will meet to determine whether it is necessary to appoint an alternative third party.

VAT (Clause 16)

[3.22](#) ~~4.28~~ Makes provision in relation to the payment of VAT on contributions paid pursuant to the ~~s106 Agreement~~ [Deed of Obligation](#).

Legal Compliance (Clause 17)

[3.23](#) ~~4.29~~ Provides that nothing in the ~~s106 Agreement~~ [Deed of Obligation](#) requires the Parties to do anything which would be contrary to data protection, confidentiality or other legal requirements.

Councils’ Powers (Clause 18)

[3.24](#) ~~4.30~~ Provides that nothing in the ~~s106 Agreement~~ [Deed of Obligation](#) will fetter the statutory rights, powers or duties of the Councils.

Good Faith (Clause 19)

[3.25](#) ~~4.31~~ The Parties agree with each other to act reasonably and in good faith in the discharge of the obligations.

Rights of Third Parties (Clause 20)

[3.26](#) ~~4.32~~ Provides that the Contracts (Rights of Third Parties) Act 1999 does not apply.

Jurisdiction (Clause 21)

[3.27](#) ~~4.33~~ Applies the laws of England and Wales to the ~~s106 Agreement~~ [Deed of Obligation](#).

Counterparts (Clause 22) and Date of Delivery (Clause 23)

[3.28](#) ~~4.34~~ Provides that the ~~s106 Agreement~~ [Deed of Obligation](#) may be executed in counterparts, and will be deemed to be delivered as a deed on the date it is completed.

5. SCHEDULE 1 – COUNCILS’ GENERAL OBLIGATIONS



3.29 ~~5.4~~ Provides that the Councils will keep all payments made under the ~~s106 Agreement Deed of Obligation~~ in interest bearing accounts, that the monies received will be used only for the purpose for which they are paid, that monies unspent within 5 years of payment to the Council will be returned to SZC Co, ³[that the ~~s106 Agreement Deed of Obligation~~ will be registered as a local land charge], and that where agreement, consent or approval is required from the Councils it will not be unreasonably withheld and will be provided in writing within a specified period.

3.30 [Compliance with Newbury criteria?](#)

3.31 [Compliance with NPS policy test?](#)

3.32 [Any other reason for the Secretary of State to take it into account?](#)

3.33 [Could it be dealt with by way of requirement?](#)

3.34 [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~6.~~ SCHEDULE 2 – COUNCILS' RESOURCING

3.35 ~~6.4~~ Provides for payments to the Councils to fund additional dedicated Council staff to fulfil the additional duties imposed on the Council by the Project.

3.36 [Compliance with Newbury criteria?](#)

3.37 [Compliance with NPS policy test?](#)

3.38 [Any other reason for the Secretary of State to take it into account?](#)

3.39 [Could it be dealt with by way of requirement?](#)

3.40 [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~7.~~ SCHEDULE 3 – HOUSING

3.41 ~~7.4~~ Provides for the establishment of a Housing Fund which will fund initiatives to increase the supply of bedspaces in private housing and tourist accommodation, and support East Suffolk Council's housing advice and homelessness prevention service. A Private Housing Supply Plan, and a Tourist Accommodation Plan will be submitted for approval to the Accommodation Working Group, and the funds applied for the purposes agreed in those approved plans. Provision is made for the delivery of the Accommodation Campus for use by construction workers, as well as the appointment of one or more Accommodation Co-ordinators, and an Accommodation Management System. Provision is made in relation to the membership of the Accommodation Working Group and its working practices and administration, including its reporting and referral of decisions (in case of failure to agree) to the Social Review Group. An obligation is placed on SZC Co to conduct regular workforce surveys in order to provide information to the Accommodation Working Group in relation to the estimated number of home-based and non-home based workers, their use of accommodation of different types and the location of their accommodation.

³ [Note: The approach to registration of the Deed of Obligation as a land charge under the Evolving Approach set out in Appendix 26A to the Responses to ExQ1 is subject to further consideration.](#)



- [3.42 Compliance with Newbury criteria?](#)
- [3.43 Compliance with NPS policy test?](#)
- [3.44 Any other reason for the Secretary of State to take it into account?](#)
- [3.45 Could it be dealt with by way of requirement?](#)
- [3.46 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

8.SCHEDULE 4 – EMERGENCY SERVICES

- [3.47 ~~8.4~~Provision is made for payment of sums from the Emergency Services Contribution to Suffolk County Council for onward payment to the Suffolk Constabulary, the Suffolk Fire and Rescue Service and the East of England Ambulance Service Trust. Provision is also made for \(additional\) contingency payments in circumstances where additional resources become necessary due to protests, demonstrations, evacuations or public safety initiatives. Provision is made in relation to the membership of the Community Safety Working Group and its working practices and administration, including its reporting and referral of some decisions \(in case of failure to agree\) to the Social Review Group.](#)
- [3.48 Compliance with Newbury criteria?](#)
- [3.49 Compliance with NPS policy test?](#)
- [3.50 Any other reason for the Secretary of State to take it into account?](#)
- [3.51 Could it be dealt with by way of requirement?](#)
- [3.52 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

9.SCHEDULE 5 - PUBLIC SERVICES AND COMMUNITY SAFETY

- [3.53 ~~9.4~~Provision is made for the payment of the Public Services Resilience Fund, to be used for new or enhanced Local Community Safety and Community Health Measures, Social Care Resilience Measures, and School and Early Years Resilience Measures. In addition, a payment is to be made for School and Early Years Capacity Measures. Provision is made for the roles of the Community Safety Working Group and the Social Review Group in the approval of measures to be funded through such payments.](#)
- [3.54 Compliance with Newbury criteria?](#)
- [3.55 Compliance with NPS policy test?](#)
- [3.56 Any other reason for the Secretary of State to take it into account?](#)
- [3.57 Could it be dealt with by way of requirement?](#)
- [3.58 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

10.SCHEDULE 6 – HEALTH



[3.59](#) ~~40.4~~ Provision is made for the establishment of Sizewell Health (a private occupational healthcare service to be located on the SZC Development Site to be used by SZC construction workers). The Residual Healthcare Contribution is to be paid in instalments during the Construction Period and applied towards the cost to clinical commissioning groups of providing healthcare. A Health Working Group is to be established. Provision is made in relation to its membership, decision-making and administration. In the case of failure to reach agreement, a reference will be made from the Health Working Group to the Social Review Group.

[3.60](#) [Compliance with Newbury criteria?](#)

[3.61](#) [Compliance with NPS policy test?](#)

[3.62](#) [Any other reason for the Secretary of State to take it into account?](#)

[3.63](#) [Could it be dealt with by way of requirement?](#)

[3.64](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~41.~~ SCHEDULE 7 – EMPLOYMENT, SKILLS, EDUCATION AND SUPPLY CHAIN

[3.65](#) ~~41.4~~ Provision is made for a number of measures to ensure a strategic approach to developing the workforce requirements for the Project and shaping a legacy for the region. These include putting in place Workforce Delivery Strategy Strategies for each phase of the Project, producing a Sizewell C Skills Prospectus, putting in place a Sizewell C Apprenticeship Strategy, funding a Regional Skills Co-ordination Function, providing the Sizewell C Employment Outreach Fund and Asset Skills Enhancement and Capability Fund, establishing a Sizewell C Bursary Scheme, creating the Sizewell C Jobs Service, and providing the Young Sizewell C programme. The membership and administration of the Economic Review Group, and the Employment, Skills and Education Working Group is provided for. SZC Co is also required to implement the Supply Chain Strategy, which will be overseen by the Supply Chain Working Group, whose membership and administration is provided for. SZC Co is obliged to monitor the Project's supply chain as specified in the Schedule.

[3.66](#) [Compliance with Newbury criteria?](#)

[3.67](#) [Compliance with NPS policy test?](#)

[3.68](#) [Any other reason for the Secretary of State to take it into account?](#)

[3.69](#) [Could it be dealt with by way of requirement?](#)

[3.70](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~42.~~ SCHEDULE 8 – HERITAGE



[3.71](#) ~~42.4~~ Provision is made for the payment of money for the purpose of the First Leiston Abbey Enhancement Scheme and the Second Leiston Abbey Enhancement Scheme, which will fund heritage works on two scheduled monument sites connected with Leiston Abbey. Provision is also made for the payment of the SCC Archaeological Monitoring Contribution for the purpose of archaeological monitoring and mitigation, and review of SZC Co's archaeological reports, across all of sites on which works are being carried out for the purpose of the Project.

[3.72](#) [Compliance with Newbury criteria?](#)

[3.73](#) [Compliance with NPS policy test?](#)

[3.74](#) [Any other reason for the Secretary of State to take it into account?](#)

[3.75](#) [Could it be dealt with by way of requirement?](#)

[3.76](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~43.~~ SCHEDULE 9 – IMPLEMENTATION PLAN

[3.77](#) ~~43.4~~ Provision is made for the carrying out of the key elements of the Project's physical development in accordance with the timings set out in the Implementation Plan, in order to ensure the proper mitigation of Project impacts. Adherence to the Implementation Plan and addressing any delays as against the Implementation Plan is to be managed in accordance with the Schedule.

[3.78](#) [Compliance with Newbury criteria?](#)

[3.79](#) [Compliance with NPS policy test?](#)

[3.80](#) [Any other reason for the Secretary of State to take it into account?](#)

[3.81](#) [Could it be dealt with by way of requirement?](#)

[3.82](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~44.~~ SCHEDULE 10 – LEISURE, PUBLIC RIGHTS OF WAY AND AMENITY

[3.83](#) ~~44.1~~ Provision is made for payment of the Sports Facilities Design Payment, to be used to design the Leiston Sports Facilities Works (a 3G pitch and two multi-use games areas in Leiston) in consultation with Alde Valley Academy, and thereafter the payment of the Sports Facilities Works Payment to fund the carrying out of these works. East Suffolk Council is to manage the Leiston Sports Facilities, in accordance with a management plan approved by SZC Co. Payments are to be made annually by SZC Co during the Construction Period towards the maintenance of the Leiston Sports Facility. Provision is also made for the payment of the PROW Fund to mitigate and enhance and create rights of way in East Suffolk, which will be managed by the Rights of Way Working Group established under this Schedule.

[3.84](#) [Compliance with Newbury criteria?](#)

[3.85](#) [Compliance with NPS policy test?](#)

[3.86](#) [Any other reason for the Secretary of State to take it into account?](#)



[3.87](#) [Could it be dealt with by way of requirement?](#)

[3.88](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

45.SCHEDULE 11 – NATURAL ENVIRONMENT

[3.89](#) ~~45.1~~ Provision is made for the establishment of a Natural Environment Improvement Fund, with a specified minimum amount to be allocated to projects within the part of the Suffolk Coast and Heaths AONB and Suffolk Heritage Coast located within East Suffolk. Applications will be invited for funding for projects meeting the objectives of this Fund. Decisions on applications made to the Fund will be determined by the Natural Environment Awards Panel established under the Schedule, in accordance with the criteria specified in the Schedule. Provision is also made for payment of sums to establish and run the Land Management and Skills Scheme, which will be paid to East Suffolk Council and ~~(onward to) the Suffolk Coast and Heaths Area of Outstanding Natural Beauty~~ [Suffolk County Council](#) to carry out the scheme within East Suffolk and the part of the Suffolk Coast and Heaths AONB located within East Suffolk respectively.

[3.90](#) ~~45.2~~ The Schedule provides for payment of the European Sites Access Contingency Fund to fund European Sites Mitigation Measures, and the Minsmere and Sandlings (north) Contingency Fund to pay for the Minsmere and Sandlings (north) Mitigation Measures, as well as sums for the monitoring of certain protected European sites (SPA and SACs). Provision is made for payment of the Recreational Avoidance Mitigation Contribution (towards mitigating the in-combination recreational disturbance impacts of the Project on the Suffolk Coast RAMS Zone of Influence Zone B). In the event that the Ecology Working Group determines that the Fen Meadow Target Quantum has not been achieved, some or all of the Fen Meadow Contingency Fund must also be paid, in accordance with the table set out in the Schedule. Such payments are to be used for the creation of new fen meadow habitat in Suffolk or the improvement of existing fen meadow habitats in Suffolk.

[3.91](#) ~~45.3~~ Provision is made in relation to establishment, purpose and operation of the Environment Review Group, the Marine Technical Forum, the Ecology Working Group and the Natural Environment Awards Panel.

46.SCHEDULE 12 – NOISE

[To be drafted]

[3.92](#) [Compliance with Newbury criteria?](#)

[3.93](#) [Compliance with NPS policy test?](#)

[3.94](#) [Any other reason for the Secretary of State to take it into account?](#)

[3.95](#) [Could it be dealt with by way of requirement?](#)

[3.96](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

47.SCHEDULE 13 – THIRD PARTY RESILIENCE FUNDS

[3.97](#) ~~47.1~~ Provision is made for the payment of monies to the National Trust, Pro Corda and the RSPB to mitigate the impacts of the Project.

[3.98](#) [Compliance with Newbury criteria?](#)



[3.99 Compliance with NPS policy test?](#)

[3.100 Any other reason for the Secretary of State to take it into account?](#)

[3.101 Could it be dealt with by way of requirement?](#)

[3.102 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

18.SCHEDULE 14 – SIZEWELL C COMMUNITY FUND

[3.103](#) ~~18.1~~Provision is made for the establishment of the Sizewell C Community Fund in order to mitigate the intangible and residual impacts of the Project on the communities within the administrative boundary of East Suffolk through providing grants for schemes, measures and projects which promote the economic, social or environmental well-being of those communities and enhance their quality of life. SZC Co is to enter into arrangements with the Suffolk Community Foundation in relation to the establishment and administration of this fund, and the making of awards via a panel established for this purpose.

[3.104 Compliance with Newbury criteria?](#)

[3.105 Compliance with NPS policy test?](#)

[3.106 Any other reason for the Secretary of State to take it into account?](#)

[3.107 Could it be dealt with by way of requirement?](#)

[3.108 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

19.SCHEDULE 15 – TOURISM

[3.109](#) ~~19.1~~Provision is made for payment of a contribution to East Suffolk Council towards the cost of employing a Tourism Programme Manager, and for the administration of the Tourism Fund and Tourism Working Group. During the Construction Period, SZC Co will pay East Suffolk Council sums from the Tourism Fund towards the development of an Annual Tourism Fund Implementation Plan and the carrying out of plans, projects and programmes promoting local tourism, as well as monitoring the effects of the Project on tourism. Governance arrangements for the Tourism Working Group are specified, and in cases of failure to agree the group will refer matters to the Social Review Group.

[3.110 Compliance with Newbury criteria?](#)

[3.111 Compliance with NPS policy test?](#)

[3.112 Any other reason for the Secretary of State to take it into account?](#)

[3.113 Could it be dealt with by way of requirement?](#)

[3.114 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

20.SCHEDULE 16 – TRANSPORT



- [3.115](#) ~~20.1~~ SZC Co commits to implementing the Construction Traffic Management Plan ~~[APP-608]~~, the Construction Worker Travel Plan ~~[APP-609]~~, the Traffic Incident Management Plan ~~[APP-607]~~, and the Operational Travel Plan, subject to any changes which may be approved to these plans from time to time by the Transport Review Group, provided that no changes may be made which give rise to materially new or materially different environmental effects to those assessed.
- [3.116](#) ~~20.2~~ The purpose, membership, administration and governance arrangements for the Transport Review Group are specified. An obligation is placed on SZC Co to appoint a Transport Co-ordinator, whose duties will include ensuring compliance with all of the transport plans, liaising with the relevant Working Groups in relation to transport matters, and gathering and reporting information to the Transport Review Group. The Working Groups with whom the Transport Co-ordinator will liaise are: the Community Safety Working Group, the Parish Councils, the Rights of Way Working Group, the Wickham Market Working Group, the Leiston Working Group, and the Marlesford and Little Glemham Working Group. The purpose of the latter three of these Working Groups is to design highway improvements schemes in their locality using funds provided by SZC Co.
- [3.117](#) ~~20.3~~ A number of specific highway safety measures relating to the B1078 are to be funded by SZC Co, and highway conditions surveys in relation to the B1122 are to be carried out before and after the opening of the Sizewell Link Road, with SZC Co funding works to improve the condition of this road before and after the opening of the Sizewell Link Road. A Cycle Connectivity Fund is to be provided, as well as the payment of sums to Suffolk County Council to audit and supervise the various road schemes which form part of the Project. [Surveys are to be carried out on the AIL Routes to assess the highway structures and street furniture. SZC Co shall carry out any necessary changes to the street furniture approved by Suffolk County Council prior to delivering abnormal indivisible loads by road on the AIL Routes.](#)
- [3.118](#) ~~20.4~~ Two Contingency Funds are provided for, to cover the mitigation of specific additional transport effects of the Project in the event that they arise.
- [3.119](#) [Compliance with Newbury criteria?](#)
- [3.120](#) [Compliance with NPS policy test?](#)
- [3.121](#) [Any other reason for the Secretary of State to take it into account?](#)
- [3.122](#) [Could it be dealt with by way of requirement?](#)
- [3.123](#) [Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

~~21.~~ SCHEDULE 17 – GOVERNANCE

- [3.124](#) ~~21.1~~ Details of the governance arrangements applicable to the Delivery Steering Group, Planning Working Group and the Social Review Group are provided for. This Schedule includes a visual representation of the governance structure which is provided for in the ~~s106-Agreement~~ [Deed of Obligation](#).
- [3.125](#) [Compliance with Newbury criteria?](#)
- [3.126](#) [Compliance with NPS policy test?](#)
- [3.127](#) [Any other reason for the Secretary of State to take it into account?](#)



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[3.128 Could it be dealt with by way of requirement?](#)

[3.129 Compliance with s106\(1\)? Not relevant under the Evolving Approach.](#)

Herbert Smith Freehills LLP



APPENDIX

**RESPONSE TO THE EXA'S OBSERVATIONS ON THE DRAFT S106 AGREEMENT
DATED 8 DECEMBER 2020**

No	Clause or Recital	Content of Clause (as drafted in version of the s106 agreement submitted on 8 December 2020)	ExA's Observation	SZC Co.'s Comment
1.			<p>The ExA would be assisted by an Explanatory Memorandum (s.106-EM) prepared by SZC Co., in a similar way to the Explanatory Memorandum for the DCO.</p> <p>Please will SZC Co. submit such a document with the next draft of the s.106 agreement.</p> <p>The ExA notes from [AS-031] that SZC Co. expects to submit the next draft to the ExA in early March 2021.</p>	<p>This table forms part of the Explanatory Memorandum submitted alongside an updated version of the s106 Agreement at Procedural Deadline B.</p>
2.	(D)	<p>It is intended that SZC Co will be the undertaker for the purposes of the Development Consent Order. SZC Co intends to construct, operate and maintain the Project as authorised by the Development Consent Order.</p>	<p>Section 106(9) of the 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].</p> <p>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.</p>	<p>Please see the amended draft s106 Agreement (Doc-Ref. 8.17(A)) and the main body of this Explanatory Memorandum. In particular see Recital E which sets out that SZC Co. will be deemed to have an interest in the land within the Order limits through an amendment to section 106 of the TCPA 1990 to be made via an article in the DCO.</p>



3.	1.1— definition of Preparatory Works and its interaction with the definition of Commencement	<p>“Preparatory Works” means operations consisting of:</p> <ul style="list-style-type: none"> (a) site preparation and clearance works; (b) pre-construction archaeological works; (c) environmental surveys and monitoring; (d) removal of hedgerows, trees and shrubs; (e) investigations for the purpose of assessing ground conditions; (f) diversion or laying of services; (g) remedial work in respect of any contamination or adverse ground conditions; (h) receipt and erection of construction plant and equipment; (i) the temporary display of site notices and advertisements; and (j) erection of temporary buildings and structures. 	<p>This includes, at (g) “<i>remedial work in respect of any contamination or adverse ground conditions</i>”.</p> <p>That appears to be a very wide definition which might include for example the cut-off wall and the entire platform.</p> <p>Please consider if this exception from Commencement is appropriate.</p>	<p>Please see the amended draft s106 Agreement (Doc Ref. 8.17(A)) which expressly excludes dewatering works such as those required for the platform from (g).</p>
4.	1.1— definition of Preparatory Works and its interaction with the definition of Commencement	As above.	<p>At (j) it includes “<i>erection of temporary buildings and structures</i>”.</p> <p>The construction workers accommodation for example is temporary.</p> <p>Please will the parties consider what is appropriate across the entire authorised development.</p>	<p>Please see the amended draft s106 Agreement (Doc Ref. 8.17(A)) which expressly excludes the erection of the temporary buildings forming Work No. 9(a)(v), Work No. 10(a)(vi) or Work No. 13(d) from (j).</p>



5.	1.1— definition of the Relocated Facilities Section 106 Agreement	"Relocated Facilities Section 106 Agreement" means the agreement under section 106 of the 1990 Act and other relevant powers dated 13 November 2019 and made between East Suffolk Council and EDF Energy Nuclear Generation Limited (as varied from time to time);	Please will SZC Co. submit a copy of this document with the next draft s.106 agreement.	Please see the copies of these documents submitted (Doc Ref. 8.17(A)B and C)
6.	1.1— definition of SZC Development Site	"SZC Development Site" means the land at Sizewell, Suffolk shown [edged in red] on Plan [●] annexed to this Deed;	<p>Please will SZC Co. provide this plan as soon as possible and no later than with the next draft s.106 agreement.</p> <p>As SZC Co. 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 SZC Co. 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 SZC Co. as the appropriateness of excluding land over which development may be carried out will be very dependent on what are the obligations.</p>	<p>Please see the plans appended to the draft s106 Agreement (Doc Ref. 8.17(A)).</p> <p>SZC Co has noted the ExA's preference that all of the Order land is bound by the development consent obligations related to the construction of the Project and the updated draft s106 Agreement reflects this, as explained in the main body of this Explanatory Memorandum.</p>



7.	1.2.4 and 2.2.2	<p>1.2.4 references to the County Council shall include the successors to the County Council's statutory and other functions as local education authority, the lead flood authority, local highway authority and local authority;</p> <p>2.2.2 by the County Council as local highway authority, lead flood authority, local education authority, and as a party to this Deed.</p>	<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>	<p>This function has been added to the draft s106 Agreement (Doc Ref. 8.17(A)).</p>
8.	1.2.5	<p>references to SZC Co shall include references to the successors in title to its interests in the SZC Development Site and persons deriving title therefrom (except where the contrary is expressly provided);</p>	<p>References to SZC Co to include its "successors in title".</p> <p>Section 106(3)(b) refers to persons deriving title.</p> <p>The phrase "successors in title" may be less wide.</p> <p>Should not the references to SZC Co therefore include persons deriving title rather than successors in title?</p>	<p>-Please see the amended draft s106 Agreement (Doc Ref. 8.17(A)) which no longer includes this clause. As explained in the main body of this Explanatory Memorandum, the binding of successors to SZC Co's 'undertaking' is dealt with by art 9(6)(b) of the DCO. Land ownership and derivation of title to land will not be relevant to the binding or enforcement of the s106 Agreement under the proposed approach.</p>
9.	1.2.11	<p>the recitals, table of contents and headings in this Deed are for ease of reference only and shall not affect its construction, interpretation or otherwise have any binding legal effect;</p>	<p>It is stated that amongst other things, the recitals shall not have legal effect.</p> <p>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?</p>	<p>Amended in draft s106 Agreement (Doc Ref. 8.17(A)) as requested. See also change to clause 1.2.7.</p>



40.	1.2.12	<p>in the event of any conflict between the provisions of this Deed and of any document annexed hereto or referred to herein, the provisions of this Deed shall prevail;</p>	<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?</p> <p>One consequence will surely be the need for vigilance on the part of the drafters to ensure there are no DC Obligations in the annexures.</p> <p>Would it not be better to redraft this to avoid that extra level of complexity?</p> <p>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.</p> <p>The ExA expects SZC Co. to proceed on that basis.</p>	<p>Amended in draft s106 Agreement (Doc Ref. 8.17(A)) as requested.</p>
11.	1.2.18	<p>“where any payment in this Deed is expressed to be payable before an event or activity that event or activity shall not commence until the relevant payment has been made.”</p>	<p>This would appear to be a helpful shorthand provision.</p> <p>Please confirm that it is intended to act (inter alia) as a restriction within s.106(1)(a).</p> <p>But should it not apply to sums payable on or before an event or activity and should not “date” be added to event and activity?</p>	<p>See amended drafting. It is confirmed that this is intended to act as a restriction within s.106(1)(a).</p> <p>As the passage of dates, such as anniversaries of Commencement, are not within SZC Co.’s control it is not appropriate to include a restriction in respect of these obligations. Where a date is linked to an activity or event within SZC Co.’s control — e.g. the Commencement Date — this is already caught by the drafting.</p>



<p>12.</p>	<p>3.1</p>	<p>Subject to clauses 3.2 and 3.3, the parties agree that none of the terms or provisions in this Deed shall have operative effect unless and until:</p> <p>3.1.1 — the Development Consent Order has been duly made; and</p> <p>3.1.2 — the Transitional Date has occurred.</p>	<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.</p> <p>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?</p> <p>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>	<p>See amended drafting in draft s106 Agreement (Doc Ref. 8.17(A)). As set out in the main body of this Explanatory Memorandum, it is now intended that the s106 Agreement will be entered into following the grant of the DCO.</p>
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13-	3.2.2	<p>if following the final determination of such proceedings the Development Consent Order is quashed and, in the event that the court orders the Application to be remitted to the Secretary of State, the Application is subsequently refused, this Deed will cease to have any further effect and any money paid to the Councils pursuant to the Schedules and not spent or committed by the Councils (or such other person as the money has been paid to under this Deed) shall be repaid in full within [•] days of the final determination of such proceedings; and</p>	<p>What will happen if that refusal is successfully challenged—for example by SZC Co.—and the DCO is confirmed on redetermination (or on any other subsequent redetermination)?</p> <p>Please spell out how this clause 3.2 and clause 3 as a whole will operate in such a case?</p> <p>Will the s.106 agreement be operative in such an eventuality??</p>	<p>Clause 3.2.3 has been amended, and a new clause 3.3 added, to address the ExA's concerns:</p> <p>“3.2.3 [In the event the Development Consent Order is granted], if following the final determination of such proceedings (and, any redetermination of the Application by the Secretary of State in the event of quashing) the Development Consent Order is capable of being Commenced, then this Deed will take effect in accordance with its terms subject to any variations to its terms necessitated through the redetermination process.”</p> <p>“ 3.3 Where the Application is refused, but the Development Consent Order is granted following redetermination by the Secretary of State following the final determination of judicial review proceedings under section 118 of the 2008 Act, this Deed will, upon granting of the Development Consent Order, take effect in accordance with its terms subject to any variations to its terms necessitated through the redetermination process.”</p>
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<p>14.</p>	<p>4.1.1 and 2.1</p>	<p>2.1 This Deed is made pursuant to section 106 of the 1990 Act, section 1 of the Localism Act 2011, section 111 of the Local Government Act 1972 and all other powers so enabling.</p> <p>4.1 SZC Co covenants with the Councils to perform:</p> <p>4.1.1—the development consent obligations contained in the Schedules; and</p> <p>4.1.2—any other obligations which are not development consent obligations contained in the Schedules pursuant to section 111 of the Local Government Act 1972 and all other powers so enabling,</p> <p>in each case so far as they relate to SZC Co's land interests in the SZC Development Site from time to time.</p>	<p>It is essential that the promises made in this deed run with the land. Any doubt about this will be serious.</p> <p>The attention of SZC Co. and the Host Authorities is drawn to this.</p> <p>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.</p> <p>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 SZC Co. 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/uploads/projects/TR050006/TR050</p>	<p>The non-financial draft obligations relating to the works to Upper Abbey Farm have been moved into the draft DCO.</p> <p>See amended drafting clarifying the interest bound and the further details in the main body of this Explanatory Memorandum, including the section entitled 'Legal under-pinning of obligations' which addresses compliance with s.106(1) TCPA 1990 and the issues raised by the Northampton Gateway SRFI recommendation report.</p>
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			<p>006-001344-191009%20Northampton%20Gateway%20Rail%20Freight%20Interchange%20Order%20-%20PINS.pdf.</p> <p>Obviously, the tests for inclusion in a DCO must be met for transferred provisions.</p> <p>SZC Co. 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/uploads/projects/TR050006/TR050006-001291-Northampton%20Gateway%20RF1%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 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 DC Obligation.</p>	
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15.	4.3	<p>The parties agree that the development consent obligations contained in this Deed will not be enforceable against any other owner of any land interest in the Sites who is not a party to this Deed nor against any successors in title to or any person claiming through or under the other such owner's interest in the Sites (save for SZC Co) unless that person itself undertakes any part of the Project.</p>	<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.</p> <p>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>	<p>This was included to provide express comfort to existing landowners, and HPC is a precedent. However, is not required legally and so has been deleted.</p>
16.	4.4	<p>The obligations contained in this Agreement shall not be enforceable against any mortgagee or chargee of the whole or any part of the SZC Development Site from time to time or any person deriving title from such mortgagee or chargee unless and until any such party takes possession of the SZC Development Site (or any part thereof to which such obligation relates) in which case it will be bound by the obligations as a person deriving title from the Owner: PROVIDED THAT neither any mortgagee or chargee or person deriving title through such mortgagee or chargee will be liable for any breach of the obligations contained in this Deed unless committed at a time when that person is in possession of the SZC Development Site (or any</p>	<p>The whole of this clause from the words "or any person deriving title from such chargee" 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 SZC Co. and Host Authorities on it, to be clear.)</p> <p>Consider also the position in the case of foreclosure and on sale following foreclosure.</p>	<p>This clause has been deleted, as in practice a mortgagee will never be bound unless the benefit of the DCO is transferred to them by the Secretary of State (which in any event is highly unlikely). They would not be bound simply by deriving title. The drafting is therefore redundant.</p>



		<p>part thereof to which such obligation relates).</p>	<p>(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 except the mortgagee from liability even where it takes possession — the words “such party” in the third and fourth lines refer back to persons deriving title from the mortgagee / chargee 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</p>	
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			<p>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>SZC Co. and its successors in title and those deriving title from them shall, upon disposing of the whole or any part of their respective interests in the Sites, be released from all obligations in this Deed in relation to that interest or the relevant part thereof (as the case may be) but without prejudice to the rights of the parties in relation to any antecedent breach of those obligations.</p>	<p>This clause purports to release a person disposing of part of the site from all obligations relating to the part disposed.</p> <p>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 "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".</p> <p>Please consider whether this clause would be a fetter on the planning authority's discretion to enforce or creates a legitimate expectation.</p>	<p>This clause has been revised to provide simply that SZC Co. will be released from the obligations in the s106 Agreement at such time as the DCO powers have been transferred in their entirety to another party (which would require Secretary of State consent under article 9 of the DCO), but that SZC Co. will remain liable for antecedent breaches. The concept of 'successors in title' is, for reasons explained in the main body of this Explanatory Memorandum, irrelevant.</p>
18.	6	<p>Nothing in this Deed shall prohibit or limit the right to use or develop any part of the Sites in accordance with and to the extent permitted by a [certificate of lawful use], planning permission, harbour empowerment order, Transport and Works Act order, development consent order or other statutory authority other than the Development Consent Order granted (whether or not on appeal) [either before or] after the</p>	<p>Further planning permissions and DCOs.</p> <p>Is it appropriate to include certificates of lawful use in this exclusion?</p> <p>Would not the whole development be eligible for a CLEUD or CLOPUD (ss.101 and 102 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</p>	<p>We are content to delete this drafting as we agree it is not legally necessary.</p>



		<p>date of this Deed and this Deed shall not apply to development carried out under any planning permission, development consent order, marine licence or other statutory authority (other than the Development Consent Order).</p>	<p>by the DCO or planning permission to which it relates. If that is done, is this provision needed?</p>	
19.	9	<p>9.1 In the event of any Dispute arising between the parties then the parties will attempt to resolve that Dispute amicably including holding a meeting attended by at least [●] representative[s] from each party.</p> <p>9.2 If the parties are unable to resolve the Dispute amicably pursuant to clause 10.1, one party may by serving notice on all the other parties (the "Notice") refer the Dispute to an Expert for determination.</p> <p>9.3 The Notice must specify:</p> <p>9.3.1 the nature, basis and brief description of the Dispute;</p> <p>9.3.2 the clause or paragraph of this Deed pursuant to which the Dispute has arisen; and</p>	<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 sums due but unpaid.</p> <p>Could this clause interfere with that straightforward process?</p> <p>Please will SZC Co. explain the reasons for the inclusion of this clause and how the result of the Expert determination would then be enforced?</p>	<p>Clause 9.1 (now 8.1) of the draft s106 Agreement requires the parties to hold at least one meeting in the event of a dispute (other than in respect of a matter of law). SZC Co. considers that making a provision for an amicable method of resolving Disputes is important given the length of the Construction Period and the governance structures provided in the draft s106 Agreement which require the ongoing cooperation of SZC Co. and the Councils.</p> <p>SZC Co. does not consider that compliance with this Clause 9.1 would interfere with the Council's ability to enforce the obligations in the s106 Agreement by injunction or a claim for payment, nor has this been raised in negotiations with the Councils.</p> <p>Clauses 9.2 onwards are permissive and provides an alternative method of resolving Disputes. SZC Co. considers that the inclusion of an alternative</p>



		<p>9.3.3 — the proposed Expert.</p> <p>9.4 In the event that the parties are unable to agree whom should be appointed as the Expert within [●] Working Days after the date of the Notice then any party may request the President of the Law Society to nominate the Expert at their joint expense, and the parties shall request that such nomination shall be made within [●] Working Days of the request, and any failure for such nomination to be made within [●] Working Days shall entitle any party to withdraw from the process of appointing an Expert and to refer the Dispute to the courts of England and Wales instead.</p> <p>9.5 If the appointed Expert is or becomes unable or unwilling to act, any party may within [●] Working Days of the Expert being or becoming unable or unwilling to act, serve a notice on all the other parties proposing a replacement Expert and the parties will follow the process at Clause</p>		<p>dispute resolution clause is beneficial given the speed with which a dispute may be finally resolved and the ability to appoint an agreed decision maker (such as an expert) suited to the technical nature of the matters which may be involved. SZC Co. also considers that the use of an alternative dispute resolution process may limit the costs of the dispute, thereby providing better value for money.</p> <p>In accordance with Clause 9.6 (now 8.6), the current draft s106 Agreement provides that the result of the expert determination would be final and binding. Failure to abide by the result of the expert determination would therefore a breach of the s106 Agreement enforceable by the courts.</p> <p>SZC Co. intends to consider the appropriate process for the resolution of disputes further.</p>
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		<p>9.4 to settle the appointment of the replacement Expert.</p> <p>9.6 The Expert shall act as an expert and not as an arbitrator and his decision will (in the absence of manifest error) be final and binding on the parties hereto and at whose cost shall be at his discretion or in the event that he makes no determination, such costs will be borne by the parties to the Dispute in equal shares.</p> <p>9.7 The Expert will be appointed subject to an express requirement that he reaches his decision and communicates it to the parties within the minimum practicable timescale allowing for the nature and complexity of the dispute and in any event not more than [•] Working Days from the date of his appointment to act.</p> <p>9.8 The Expert will be required to give notice to each of the said parties inviting each of them to submit to him within [•] Working Days written submissions and supporting</p>		
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		<p>material and will afford to each of the said parties an opportunity to make counter submissions within a further [●] Working Days in respect of any such submission and material.</p>		
20.	13.4	<p>Where in this Deed an obligation is required to be performed by a specified point such as “Commencement” the Parties agree that such trigger may be varied if agreed in advance with the Councils (in consultation with any relevant third party identified in the obligation or directly affected by such proposed variation) in writing.</p>	<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>	<p>PINS’ concern in Advice Note 15 is that the statutory process for amendments would be circumvented and the scope of the ‘authorised development’ could be changed.</p> <p>The inclusion of this clause provides some flexibility in the timing of the delivery of the obligations which is considered necessary by SZC Co. in light of the length of the Construction Period. The change to a trigger in accordance with this clause would not be a variation to the obligations (as set out in s.106A TCPA 1990) as the flexibility and mechanism for the amendment would form part of the obligation as agreed.</p> <p>Any change to a trigger requires the agreement of the Councils. Any proposed change which would undermine the delivery of mitigation required by the Environmental Statement would not be reasonable and thus should be refused by the Councils, as provided for by the drafting.</p>



21.	15	<p>15.1 If after the date of this Deed any tax, levy, tariff, charge or similar relating to the grant of planning permission or development consent is enacted or brought into force (either through CIL or otherwise) and the terms of the law as enacted mean that such tax, levy, tariff, charge or similar applies to the Project such that additional financial payments will be required in respect of the Project then the Councils and SZC Co agree that they shall consult with each other as to the effect of the tax, levy, tariff, charge or similar.</p> <p>15.2 In consulting with each other under clause 15.1, SZC Co and the Councils shall discuss whether it would be appropriate, reasonable and financially viable to impose any additional financial burden on the Project and whether it would be appropriate to modify this Deed in consequence of any such tax, levy, tariff, charge or similar and in discussing the matter the SZC Co and the Councils shall take into consideration that the Councils and SZC Co agree and acknowledge that the development consent obligations in this Deed appropriately mitigate the effects of the Project and that the parties wish to see the Project completed.</p>	<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>	<p>This clause has been deleted.</p>
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22.	16	<p>16.1 The Schedules to this Deed are subject to this clause 16.</p> <p>16.2 Save for the Sizewell C Community Fund, no sums of money expressed in this Deed to be payable to a person who is not a party to this Deed shall be payable to such person unless and until that person has entered into an agreement with SZC Co substantially in the form attached to this Deed at Annex [●].</p>	<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 SZC Co. 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—SZC Co. 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>	<p>SZC Co. considers that third parties can have an important and beneficial role in the delivery of certain elements of mitigation and is engaging with such third parties directly to secure this where possible. SZC Co. intends to negotiate the deeds of covenant with the relevant third parties during the Examination period in order to provide comfort to the ExA and Councils.</p> <p>Please see the amended clause 15, pursuant to which SZC Co. shall pay sums through the Councils to ensure certainty of payments and enforcement. Clause 15 also makes provision for circumstances in which it does not prove possible to reach agreement with individual third parties.</p>
23.	23	<p>This Deed may be executed in any number of counterparts, each of which is an original and all of which may together evidence the same agreement.</p>	<p>The ExA notes that the deed may be executed in counterparts.</p> <p>Will SZC Co. 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.</p> <p>SZC Co. 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.</p> <p>At this stage, the ExA would simply observe that</p>	<p>It is proposed that the deed will be executed and delivered following the grant of the DCO in accordance with the mechanism set out in the submitted draft section 111 agreement to be entered into between the Councils and SZC Co.</p> <p>SZC Co. notes the Inspectorate's preference for the deed to be entered into as one document executed by all of the parties and this preference is catered for in the mechanism set out in the submitted</p>



			<p>the document has only three (or possibly four) parties, all with a registered office or legal headquarters in the case of the Host Authorities in England. So recourse to counterparts would not seem to be imperative.</p>	<p>draft section 111 agreement.</p> <p>However, it should be noted that clause 22 (Counterparts) is permissive only and has been included to provide for unforeseen circumstances where execution in counterparts is required. Similar drafting may be found in the Hinkley Point C DCO s106 agreement and the Wylfa s106 agreement.</p>
24.	Sch 1, para 5	<p>Where in this agreement it is stated that the East Suffolk Council's or the County Council's consent approval or agreement is required, the relevant Council agrees not to unreasonably withhold its consent approval or agreement and to confirm in writing its consent approval or agreement or otherwise of the relevant matter, scheme or measure within [•] days of the date of receipt of such [schemes and or measures], or such longer period as may be agreed in writing between SZC Co and the relevant Council, and in the event of it failing to respond within the said [•] days that SZC Co may proceed with the Project on the basis that such scheme and or measures have been approved by the relevant Council.</p>	<p>Approvals and consents.</p> <p>The draft already addresses consents at Cl 18(1). Why is it duplicated here, with differences?</p>	<p>This inconsistency has now been removed by the deletion of clause 18.—</p>



25.	Sch 2		<p>Council's resourcing.</p> <p>This provision is obviously of practical help. The ExA expects that SZC Co. and its legal advisors are well aware of the decision in <i>Oxfordshire CC v. SoS for CLG</i> [2015] EWHC 3808. Please will SZC Co. set out in the s.106 EM how the judgment and effect of that case is addressed.</p>	<p>We believe that there was a typographical error in the citation provided by the ExA, which we consider should instead be "[2015] EWHC 186 (Admin)". In that case, Mrs Justice Lang held that the administration and monitoring fees claimed by the local planning authority through a planning obligation for a "routine planning application for a relatively small development" did not comply with the tests in Reg 122 of the CIL Regs, as such fees would be included in the authority's resources and budget for the discharge of its statutory functions. It was noted that administration and monitoring fees might in exceptional circumstances satisfy the Reg 122 tests, with "a nationally significant...energy infrastructure" project being one such example mentioned. Mrs Justice Lang relied on the fact that, at that date (February 2015), there was no express provision in Reg 122 to permit an authority to recover such fees.</p> <p>Following that judgment, Reg 122 was amended in September 2019 to provide that the limitations on the use of planning obligations in that regulation do not apply to an obligation which requires a sum to be paid to an authority in respect of the cost of monitoring in relation to</p>
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				<p>the delivery of planning obligations in the authority's area, provided that the sum to be paid:</p> <p>(a) fairly and reasonably relates in scale and kind to the development; and</p> <p>(b) does not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development (Reg 122(2A)). This is reflected in the Planning Practice Guidance (Para. 036 Reference ID: 23b-036-20190901).</p> <p>Schedule 2 of the draft agreement provides that the sums paid under that schedule must be applied towards the provision of additional staff resources to fulfil the additional duties imposed on the Councils over and above their normal statutory duties and to ensure the efficient operation and management of the Project (in particular in managing the discharge of requirements pursuant to the DCO and the discharge and monitoring of obligations set out within the Deed).</p> <p>These provisions are not inconsistent with the principles established in the <i>Oxfordshire</i> case. The Sizewell C Project is not a "routine planning application for a relatively small development" but</p>
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				<p>rather a nationally significant energy infrastructure project involving exceptional circumstances by virtue (amongst other things) of the scope and nature of the planning obligations being committed to. Further, unlike the offending provision in the <i>Oxfordshire</i> case, Schedule 2 does not provide for the payment of fees to cover the Councils' discharge of their statutory functions but rather additional duties over and above their normal statutory duties, which are to be expected due to the exceptional nature of the project. Negotiations between the parties are ongoing regarding the extent of any sums that will be payable under Schedule 2. However, with regard to any fees payable towards the costs of monitoring the development, the parties are aware of the requirement in Reg 122(2A) for these fees to relate fairly and reasonably in scale and kind to the Sizewell C Project and not to exceed the Councils' estimate of such costs. While Reg 122(2A) does not apply to DCO projects, for reasons explained in the main body of this Explanatory Memorandum, the substance of that provision is embraced by para 4.1.8 of NPS EN-1 and therefore we recognise the relevance of these considerations to the Sizewell C DCO application.</p>
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26.	The Schedules generally		<p>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.</p>	<p>SZC Co. has continued to negotiate the substantive provisions with the Councils and other Interested Parties where appropriate and the updated draft s106 Agreement includes further details of the proposals. These will be subject to further negotiation and more detailed drafting consideration by SZC Co. during the examination.</p>
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>SZC Co. 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. SZC Co. 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>Please see the amended draft s106 Agreement (Doc Ref. 8.17(A)) which removes the additional execution block previously included in error.</p> <p>SZC Co.'s solicitors note the ExA's request for a confirmation as to the execution and enforceability of the s106 Agreement and are willing, subject to internal approval, to submit the form of this confirmation as an examination document in due course. Given the early stage in the negotiation of the draft s106 Agreement and the new (albeit precedent at Thames Tideway Tunnel and Aquind Interconnector) approach to binding the land described in the main body of this Explanatory Memorandum, it is considered premature to provide such a document at this stage.</p> <p>Please see the explanation in the main body of this Explanatory Memorandum as to the approach to the ownership of the land within the</p>



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			<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>	<p>Order Limits. Given this revised approach, SZC Co. considers that it will not be necessary for the Councils to undertake title investigations in respect of the land within the Order limits.</p>
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ANNEX

WHICH OBLIGATIONS MAY THE SECRETARY OF STATE TAKE INTO ACCOUNT?

