KIRKLEES METROPOLITAN COUNCIL
INVESTMENT & REGENERATION SERVICE

DEVELOPMENT MANAGEMENT

Town and Country Planning Act 1990 (as amended) Section 106A & 106BA

DELEGATED DECISION FOR APPLICATION FOR DISCHARGE OR MODIFICATION OF SECTION 106 AGREEMENT

Reference no. : 2024/54/93054/W

Site : Clough Lee Mills/off, Manchester Road, Marsden, Huddersfield.

Description : Discharge of Section 106 obligation relating to previous permission 2001/91271 for erection of four detached dwellings with integral garages, one block of six flats and one block of 12 apartments (part within a Conservation Area)

Case Officer : Kevin Walton

Decision: Discharge Section 106 Agreement – Approve

I hereby authorise the approval of this application for the reasons set out in the officer's report and recommendation annexed below in respect of the above matter.

Nicholas Hirst

AUTHORISED OFFICER

Date 03-Jun-2025

OFFICER REPORT – 2024/93054

1. Summary

1.1 This application seeks the discharge of a legal agreement entered into under the provisions of section 106 of the Town and Country Planning Act 1990 [“the Act”]. The section 106 agreement [“s.106”] provided by the applicant relates to an outline planning permission for residential development at Clough Lee Mill, off Manchester Road, Marsden, Huddersfield. The s.106 required several obligations be met before the implementation of the planning permission.

1.2 The applicant argues the s.106 does not serve any further useful purpose and as such should be fully discharged.

2. The Site

2.1 The site is located on a former historic industrial mill site at Clough Lee Mills which was accessed from Manchester Road and via Church Lane, Marsden. The site was re-development through the demolition of the mill buildings, other than the chimney stack, and the erection of 34 single dwellings and 18 apartments.

2.2 The development of the site was carried out in phases corresponding to the full planning permissions as listed below.

3. Planning Applications

3.1 Planning History:

- 99/91517 – Outline Application for Residential Development (within a Conservation Area) – Granted – 22 January 2000
- 2000/90912 – Erection of 2 Detached Dwellings, 4 Semi- Detached Dwellings and 4 Terraced Dwellings – Granted – 27 September 2000
- 2000/93234 – Erection of 2 Detached Dwellings (Amended house type) – Granted – 15 December 2000
- 2000/93153 – Erection of 5 Detached Dwellings and 9 Linked Dwellings – Granted – 9 March 2001
- 2002/90793 – Erection of 5 Detached Dwellings – Granted – 09 May 2002
- 2001/91271 – Erection of 4 Detached Dwellings, One Block of 6 Flats and One Block of 12 Apartments – Granted – 5 February 2002

3.2 Current Application:

- 2024/91271 – Discharge of s.106 agreement relating to 2001/91271
- Publicity via site notice.
- No representations received.

4. The Section 106 Agreement

4.1 The section 106 agreement dated 5 February 2002 is the s.106 agreement referred to by the applicant. The s.106 is bound to planning permission 2001/91271 for the development of dwellings addressed 32-52 Clough Lea. The applicant does not refer to a section 106 dated 28 September 2000, as replaced by deed dated 23 June 2003, which affects the wider development site including land at planning permission reference 2001/91271 but is solely bound to planning permission 2000/90912. This section 106 agreement required an off-site public open space contribution of £37,000 to be paid to the Council. The requirement to pay a contribution under this section 106 does not form part of the assessment of this application or affect the Local Planning Authority taking any enforcement action in the event the contribution was not paid.

4.2 In summary the s.106 relating to this application obligates the owner of the land to the following covenants:

- Deposit a £12,000 bond for the obligations in Clauses 4 & 7 (Clause 3)
- Deposit a £11,500 bond for the obligations in Clause 6(a)
- Complete River Wall, Concrete Platform and Landscaping Works (Clause 4)
- Provide a timber gate across the Riverside Walk (Clause 4)
- Surface the Riverside Walk if considered necessary by the Council (Clause 4)
- Transfer the landscaped area to the Council along with a maintenance sum of £11,500 upon completion of the Landscape Works (Clause 6a)

4.3 Clause 7 provides for the Council to undertake the above works in default of the owner carrying out the above works. By virtue of the agreement and Clause 5 the owner agrees to the riverside walk and concrete platform to be dedicated as public highway with footpath status being thereafter publicly maintained.

4.4 The River Wall works are set out in the agreement but essentially require the retaining wall to the River Colne running along the northern boundary to the site adjacent to a riverside walk to be repaired and strengthened where necessary including the repair and painting of the timber railings atop the retaining wall. The agreement also required the retention and incorporation of the original “Bailey Ancion” sign into the new railings.

4.5 The Concrete Platform is an area of concreted land to the west of the riverside walk approximately behind no. 52 Clough Lea. The s.106 requires this area to be repaired and assessed for structural capability and then surfaces with a “Tarspray/chip finish” should the Council require it.

4.6 The Landscaping Works require the planting to trees specified in the s.106 within an area of land to the west of the concrete platform.

4.7 The detail of the timber gate is specified within the s.106 and requires a 1100mm high gate to be erected between the concrete platform and landscaped area.

5. The Applicant's Case

5.1 The applicant provides a reasoned argument why it is not possible to fully confirm whether or not the works required by the s.106 had been carried out. It is claimed there is visual evidence that Bailey Ancion sign and sealed riverside walk had been carried out although given the length of time since the development was undertaken it is not possible to see any visual evidence that the vegetation on the retaining wall, backfilling, fence treatment or drainage matters had been addressed.

5.2 With regard to the concrete platform, the applicant claims that some of the works were done although not all. The applicant does not expand on which works were done and those that were not.

5.3 The applicant states that the landscaped area is now overgrown and thus not possible to clarify whether or not the planting had been carried out.

5.4 The applicant also references Clause 5 of the s.106 which provides that the riverside walk and concrete platform be dedicated for public use and be maintained publicly although makes no suggestion that this is the case.

5.5 Overall, the applicant concludes that it can only be evidenced that some of the required works have been completed and in light of the length of time since the s.106 required the works to be carried out, the s.106 has been rendered unless.

6. The Law

6.1 Section 106A (3) of the Act provides that a s.106 agreement can be modified or discharged upon application to the Local Planning Authority. The application can be submitted following the expiry of the relevant period as provided by s.106A (4) which is currently 5 years beginning with the date on which the obligation is entered into. In this respect the application is valid.

6.2 S.106A (6) provides:

> *(6) Where an application is made to an authority under subsection (3), the authority may determine –*
>
> *(a) That the planning obligation shall continue to have effect without modification;*

(b) If the obligation no longer serves a useful purpose, that it shall be discharged; or
(c) if the obligation continues to serve a useful purpose, but would serve purpose equally well if it had effect subject to the modification specified in the application, that it shall have effect subject to those modifications.

7. Assessment

7.1 The applicant submits in this instance that the s.106 agreement no longer serves a useful purpose essentially on the basis it is an old agreement where the obligations cannot be fully confirmed as being discharged. They essentially seek to discharge the liability of an owner of part of the land affected by the s.106 agreement. It should be noted that application to discharge s.106 agreements need to be determined as an "all or nothing" consideration (*R (Garden and Leisure Group Limited) v North Somerset Council [2004] 1 P&CR*) and that it is not open to the Local Planning Authority to accept an alternative. The simple question is therefore does the s.106 agreement in its entirety continue to serve a useful purpose.

7.2 "Useful purpose" is not defined in the Act although some guidance can be taken from several Court judgements. It is widely established that the purpose in question does not need to relate back to the original reasons for entering into the s.106 and neither does section 38(6) of the Planning Act 2004 apply in such applications (*R.(Millgate Developments Limited) v Wokingham BC [2012] JPL 258*). While the obligation was originally entered into in the interest of making the development acceptable on policy grounds and in this case the provision of a riverside walk and landscaped amenity area, it cannot be said that the s.106 must still serve a purpose if those or subsequent public open space planning policies still exist. Planning matters are considered only relevant in so far as being in the public interest and the s.106 must, within its four corners, continue to serve a useful purpose if refusal is to be justified.

Evidence held by the Council

7.3 A site visit has been carried out to assess the current condition of the retaining wall, riverside walk, concrete platform and landscaped area. Upon visual inspection, the riverside walks as edged yellow on plan 2 annexed to the s.106 and landscaped area edged green, had been provided and was open without obstruction.

Clause 4

River Wall Works

7.4 The river wall retaining the riverside walk and landscape area was intact with no significant signs of failure although there were no visible signs of any repair work that may have been undertaken in 2002. Schedule 1 of

the s.106 by virtue of clause 4 required the drainage or the wall to be carefully investigated before the removal of existing outlets to ensure there is no build up of water behind the wall. The drainage outlets are still present although it is not possible on visual inspection to confirm these perform as required and drain the water from behind the wall. However, there is no sign of failure due to water build up or discharge of water from other areas. The s.106 also required vegetation and trees to be "dealt with" and localised repairs carried out. It was noted there are a significant number of trees growing from the retaining wall although it appears these would have grown and matured over the period of twenty-three years since trees and vegetation should have been "dealt with". There is no evidence held by the Council to suggest the original vegetation was "dealt with". Notwithstanding this, it is considered the s.106 is vague in so far as it does not clarify what the owner is required to be done to comply with the s.106 or define what is meant by "dealt with" or carry out localised repairs. The s.106 also required mass concrete to be placed to fill the rear of any rebuilt section of wall. There is no visual evidence to show that any part of the wall was re-built and thus the mass infill of concrete would not need to be carried out. The s.106 also required the shot blast of the retaining wall fence and re-paint, re-set and repair any damaged rails. The site visit showed the railings atop of the retaining top to be intact and continuous along the length of the riverside walk. Whilst a re-paint would now be advised, any works to the railings, including the retention of the Bailey Ancion sign, were in accordance with the s.106 agreement.

7.5 Overall, it cannot be demonstrated that the drainage works were investigated or that the trees and vegetation at the time the works were undertaken were dealt with. However, it is clear from the stability of the wall over the last twenty-three years that the function as a retaining wall has not failed suggesting the aims of the s.106 have, in substance, been satisfied.

Concrete Platform

7.6 Schedule 2 of the s.106 by virtue of clause 4 `required "Beam A" to be investigated to ensure it is structurally sound before attempting a concrete repair. From a visual inspection it is not possible to demonstrate that any concrete repairs were undertaken or from any information held by the Council that beam A had been investigated. The s.106 required the surface of the concrete platform to be restored or replaced with a "tarspray/chip finish" but only if required by the Council. 4 seats and a litter bin were also required to be provided. From visual inspection it is clear the concrete platform had been adequately surfaced although there is no evidence to show any seats or litter bin had been provided.

7.7 As above, there is no evidence to show concrete repairs were either required or undertaken. However, the s.106 does not require concrete repairs to be provided or a structural inspection to be carried out on beam A but simply required an investigation on the beam to be

undertaken in the event concrete repairs are made. If no concrete repairs were deemed necessary then no further action would be required under the terms of the s.106. As there is no clear evidence of concrete repairs, it cannot be said the owners were required to undertake the investigation to beam A. Moreover, while there are no seats or litter bin, this does not mean the seat and litter bin were not originally provided given the s.106 at no point requires the seats and bin to the retained thereafter. If therefore cannot be said the owners are in default of the requirements as set out in schedule 2 of the s.106.

Landscaping Works

7.8 Schedule 3 of the s.106 by virtue of clause 4 required the clearance of the landscaped area of all deleterious material and rotavated to a depth of 500mm followed by planting of an equal mix of sorbus aucuparia (rowan), quercus petraea (oak), corylus avellana (hazel) and viburnum opulus (rose). From a visual inspection of the landscaped area it is clear that the species as required by the s.106 do not currently exist on the site and the area is characterised by low shrubs and ground cover. If the planting was carried out the species either did not establish or were subsequently removed and cultivated with other planting.

7.9 However, the landscaped area continues to act as an amenity space and is accessible. A sign indicates a management company was established to subsequently maintain the land although it is noted that the s.106 did not require future maintenance by the owners and as such it cannot be demonstrated the owners are in default of the s.106 agreement with regard to the landscaped areas.

Gate

7.10 Clause 4(b) of the s.106 required the construction of a timber gate across the riverside walk. It was noted that a timber gate continues to be in place at the location shown on the s.106 plan. It can be confirmed this requirement can be discharged.

Riverside Walk Surface

7.11 Clause 4(c) of the s.106 required the surfacing of the riverside walk “if such works shall be considered necessary by the Council”. While there is no evidence to show the Council required the surfacing, it was noted that the riverside walk had been surfaced within pea gravel and thus in satisfactory with regard to the aims of the s.106.

Clause 6a

7.12 The aim of clause 6a was to provide a mechanism to transfer the landscaped area and riverside walk to the Council, with a commuted sum for future maintenance. This was done to satisfy the Council that the areas would be completed in accordance with the s.106. In the event

these areas are not completed to the satisfaction of the Council there are no mechanisms to require any other maintenance other than any other obligation upon the management company by virtue of private agreements with the owners of the dwellings on the adjacent residential development. It does appear from signage on the landscaped areas that a management company was established which remains to be an active company.

7.13 While the applicant makes reference to clause 5, which requires the public maintenance of the concrete platform and riverside walk, this is only upon completion of the necessary works. If the owner wished in invoke clause 5 upon the discharge of the s.106, it would also be required to pay the commuted sum and transfer the land to the Council. As it has not been established the retaining wall and concrete platform were investigated and technically provided in accordance with the s.106, clause 5 and clause 6a have no force.

Useful Purpose

7.14 As assessed above, there is no clear evidence to demonstrate that the requirements of the s.106 agreement to satisfactorily provide a structurally sound retaining wall and concrete platform, a planted landscaped area and riverside walk were in fact carried out. This in turn precludes the owners discharging the transfer of land to the Council with a commuted sum or claiming these areas should be publicly maintained.

7.15 However, it can be seen from the committee report dated 28 June 2001 that the purpose of the s.106 was a mechanism to provide open space as part of the development, in accordance with planning policy relevant at the date of the decision. While current planning policies still require public open space to be provided, these are not relevant to the question of useful purpose. Notwithstanding this, it is clear that the developers did take steps to provide a riverside walk, concrete platform, landscaped area and gate as set out in clause 4 of the s.106 albeit with no evidence all the investigative requirements were in fact satisfied in full accordance with Schedules 1, 2 & 3. These areas have existed in their intended form for a period of twenty-three years and continue to serve the residents of the development. Moreover, the owners had no specific obligation to maintain or retain the works thereafter other than to transfer the land to the Council once the dwellings on the development were practically completed.

7.16 Given the significant period of time elapsed since the structural matters were required to be investigated, it appears the investigative ability to demonstrate the structural soundness of the retaining wall and concrete platform has diminished as time moved on. At this point it should be noted that any liability continues to fall on the owners should the retaining wall fail at any point in the future despite there being no duty to maintain under the provisions of the s.106.

7.17 Consequently, for the s.106 to continue to have some purpose there would need to be an ability for the Council to take enforcement action. To attempt to start enforcement proceedings on the basis there is no evidence to show whether or not the structural investigations were undertaken, any structural investigation of the retaining wall and concreate platform at this point would need to discount any deterioration in the wall and platform over the previous twenty three years to demonstrate either structural remedial works were not necessary at the time specified in the s.106. Moreover, section 8 of the Limitation Act 1980 provides that "*any action upon a speciality (i.e. not a simply contract)(sic) shall not be brought after the expiration of twelve years from the date on which the cause of the action accrued*." In this case, if it is argued that the investigative works were not undertaken in accordance with schedules 1 & 2 and landscaping not undertaken in accordance schedule 3, the action accrued would trigger upon the practical completion of the dwellings. Aerial photographs indicate this occurred sometime before 2006 and as such the latest date the Council may have taken action would be 2018 thus rendering clause 4 of the s.106 unenforceable.

7.18 In brief, the aim of clause 4 of the s.106 agreement has in substance been achieved albeit without investigative works and in event appears to be now unenforceable and thus it cannot be said to continue to serve any useful purpose.

7.19 With respect to any public interest in the land being maintained under the provisions of clauses 5 and 6, the purpose of the s.106 with regard to this matter was to ensure the Council had funds to maintain in the event the land is transfer to the Council. As the applicant is seeking a full discharge of the s.106 the maintenance liability on the Council in the event the owner wishes to transfer the land falls away irrespective of whether the technical aims of the s.106 can be demonstrated to have been satisfied. Consequently, clauses 5 and 6a do not continue to have any meaningful lasting effect given it appears the owners have not and do not wish the land should be transferred to the Council. Clauses 5 & 6 therefore do not continue to serve any useful purpose.

7.20 Clauses 3 & 7 provided a mechanism for the Council to undertake works in default of the owner not discharging clause 4 of the s.106. There is no evidence to suggest the bonds were deposited with the Council and the applicant is not suggesting the Council should return or cancel any bond arrangement. Given it is concluded clauses 4, 5 & 6 do not continue to serve any useful purpose, it followed clauses 3 & 7 do not either.

7.21 In conclusion, as clauses 3, 4, 5, 6 and 7 of the s.106 were the operative obligations, if these are not considered to now serve any useful purpose, the provisions of the entire s.106 fall away.

8. <u>Recommendation</u>

8.1 By virtue of all of the above reasons, it is considered the original s.106 agreement served a useful purposes although through the operation of time the investigative provisions to provide a structurally sound riverside walk, retaining structure, concrete platform and landscaped area have become ineffective, principally by reason of the owner or the Council not invoking clause 6 for the Council to acquire the land with a commuted maintenance sum.

8.2 By this reason, the s.106 does not serve any further useful purpose considering the management company taking responsibility for maintenance of the landscaped area and the owners' liability for the riverside walk and therefore can be discharged.

Report Dated: 29/04/2025

Recommended decision notice text:

The application to discharge the obligations contained within section 106 agreement pursuant to planning application 2001/91271 dated 5 February 2002 is considered acceptable in so far as the applicant has demonstrated that the section 106 agreement no longer serves a useful purpose.

It is therefore confirmed the Section 106 agreement dated 5 February 2002 is discharged.