Department for Levelling Up, Housing & Communities

Our ref: APP/J1535/Q/21/3276932
Your ref: EPF/2258/20

Mr Stewart Gregory
StewartGregory@rixandkay.co.uk

24 March 2022

Dear Sir

TOWN AND COUNTRY PLANNING ACT 1990 – APPEAL UNDER SECTION 106B MADE BY THE NATIONAL AUTISTIC SOCIETY
THE ANDERSON SCHOOL, LUXBOROUGH LANE, CHIGWELL, ESSEX IG7 5AB
APPLICATION REF: EPF/2258/20

This decision was made by the Minister of State for Housing, Stuart Andrew MP, on behalf of the Secretary of State, and signed on his behalf

1. I am directed by the Secretary of State to say that consideration has been given to the report of John Felgate BA(Hons) MA MRTPI, who considered your client's appeal against the decision of Epping Forest District Council against a refusal to approve an application for the modification of a planning obligation, in accordance with application Ref. EPF/2258/20, dated 29 September 2020.

2. On 16 August 2021, this appeal was recovered for the Secretary of State's determination, in pursuance of section 79, and paragraph 3 of Schedule 6 to, the Town and Country Planning Act 1990.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that the appeal be allowed and the obligation be modified as proposed in the application.

4. For the reasons given below, the Secretary of State agrees with the Inspector's conclusions, and agrees with his recommendation. He has decided to allow the appeal. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

Legal framework

5. In reaching his decision, and as set out fully under the Legal Framework at IR19-21, the Secretary of State has had regard to Section 106 of the 1990 Act which permits the use of planning obligations for certain specified purposes. S.106A of the Act sets out the procedure by which an obligation may be modified or discharged. Under S106A(6) in the

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event that the obligation is found to no longer serve a useful purpose, it must be discharged. Alternatively, if it does serve such a purpose, but would serve that purpose equally well subject to the modifications sought, then those modifications should be given effect. Otherwise, the obligation shall remain unmodified.

6. The procedure for appeals is contained at S.106B and under S106B(4), and the Secretary of State has the same decision options as those set out above in paragraph 5.

Planning Policy

7. The Secretary of State has taken into account the adopted development plan for the area which comprises the Saved Policies of the Epping Forest District Council (the LP) adopted in January 1998, as amended by the Epping Forest District Local Plan Alterations, adopted in July 2006. The Secretary of State considers that relevant development plan policies include those set out at IR22-23.

8. In addition, the emerging plan which comprises a draft replacement plan the Epping Forest District Local Plan (the draft LP) which has completed its examination, and consultation has subsequently taken place on proposed Main Modifications. The Secretary of State considers that the emerging policies of most relevance to this case include those set out at IR24.

Main issues

The obligation's 'useful purpose'

9. For the reasons given at IR77 the Secretary of State agrees with the Inspector that the main issue is whether the obligation in question continues to serve a 'useful purpose'; and if so, whether it would serve that purpose equally well if modified as proposed.

10. For the reasons given at IR78, the Secretary of State agrees with the Inspector that subsection 5.7.3 (of the Agreement) is designed to control the type of organisation that may be put in change of the Anderson School's operation and management. He further agrees for the reasons given at IR79 that the principal consideration is the extent to which the obligation within it contributes to the School's purpose as set out in subsection 5.7.2, in providing education for ASD-diagnosed pupils. The Secretary of State agrees with the Inspector's reasons given at IR80, that subsection 5.7.3 continues to serve the same useful purpose now as it did then.

11. The Secretary of State acknowledges that if the modifications now proposed were brought into effect, that the type of organisations to run the School would no longer be confined to charties (IR81). However, for the reasons given at IR81-82, he considers the proposed wording is appropriate, and agrees with the Inspector that the opportunity to consider a wider range of organisations with relevant skills and expertise seems an advantage. Furthermore, that the education provider would be regulated and guided by Ofsted and would remain bound by the terms of subsection 5.7.2, to provide education only to those with an ASD diagnosis.

12. Overall, the Secretary of State agrees with the Inspector's conclusions at IR83 that even though the existing subsection 5.7.3 serves a useful purpose, if the modifications now sought were brought into effect, the obligation would still be capable of serving that purpose equally well.

The needs of higher-functioning ASD sufferers

13. For the reasons given at IR84-85, the Secretary of State, like the Inspector, is clear that the vision for the School was that it should be devoted to the needs of higher-functioning, more able ASD pupils. However, the Secretary of State is in agreement that nothing in the wording of subsections 5.7.2 or 5.7.3, or anywhere else in the Agreement, refers directly to these matters. He agrees that it therefore follows that this did not form part of the useful purpose behind subsection 5.7.3 when the Agreement was entered into (IR85).

14. For the reasons set out at IR86, the Secretary of State acknowledges that it is London Borough of Redbridge's (LBR) intention is to manage the Anderson School in a different direction towards an approach that would include pupils whose ASD is accompanied by other Special Educational Needs (SENS). For the reasons given at IR87, he agrees with the Inspector that additional provision is likely to be needed for all types of ASD.

15. Like the Inspector, the Secretary of State fully appreciates why helping the most able ASD sufferers is viewed as an important goal. However, for the reasons given at IR87 he agrees with the Inspector that there is no basis in terms of relevant planning consideration on which to favour one type of ASD education, or one type of provider over any another (IR87).

16. Overall, the Secretary of State therefore agrees with the Inspector's conclusions at IR89 that the proposed modifications to the Agreement would not prevent subsection 5.7.3 from continuing to serve its existing purpose, in the same way as it does now.

The needs of the County of Essex

17. For the reasons given at IR90-91,the Secretary of State agrees with the Inspector that overall the take-over of the Anderson School by LBR would be likely to result in some reduction in the options available to ASD pupils and parents in Essex (IR91). However, he also agrees that the Agreement itself makes no special provisions in this regard, in that it does not reserve any quota of places for Essex children, nor does it restrict the School's geographical catchment area in any way (IR90).

18. For the reasons set out at IR92, the Secretary of State agrees with the Inspector that in planning terms, the need for ASD facilities is evidently a pressing one, regardless of the area or areas they are likely to mainly serve. Furthermore, he agrees in the present case, notwithstanding the location of the school in Essex, that there is no clear basis for prioritising the needs of Essex (IR92).

19. Therefore, the Secretary of State agrees with the Inspector conclusions that securing provision specifically for the needs of Essex was not part of subsection 5.7.3's original useful purpose, and that there are no clear grounds to consider that aim to have become part of the subsection's purpose since then. He further agrees the the modifications to the Agreement would leave the obligation in subsection 5.7.3 equally able to continue to serve its purpose in the future as it does in its present form (IR93).

Other matters

20. For the reasons set out at IR94 whilst the Secretary of State acknowledges that the School is located in an area of Green Belt, he agrees with the Inspector that the proposal would have no effect on the Green Belt and is not affected by Green Belt policies. The Secretary of State agrees that consequently, the proposal would involve no conflict with either Policy GB2A of the adopted LP or Policy DM4 of the draft LP.

21. For the reasons given at IR95, the Secretary of State agrees with the Inspector that there would be no loss of any community facility and therefore no resulting conflict with adopted LP Policy CF12 or draft LP Policy D4.

22. While the Secretary of State acknowledges the strongly held views on the matters raised by objecting parties, for the reasons given at IR97-99, he agrees with the Inspector that the present appeal must be considered on its own merits (IR97),and that the process adopted by NAS, in selecting LBR as their preferred bidder and future partner would appear to be primarily a matter for NAS, as the owner of the land (IR98). He also agrees there is nothing in the relevant legislation which requires an exhaustive consideration of other alternatives (IR98), and further agrees for the reasons given at IR99 that the proposed wording by NAS is acceptable. He therefore agrees with the Inspector that it is not necessary to consider any further alternatives. He further agrees that any matters relating specifically to the conduct of charities are outside the scope of this appeal (IR100).

Overall conclusion

23. For the reasons set out in IR101, the Secretary of State agrees with the Inspector's conclusion that by setting some limit on the type of organisation that may run the Anderson School, subsection 5.7.3 of the Agreement serves a useful purpose. Furthermore, that the purpose has not changed as a result of any subsequent events and the obligation therefore continues to serve the same useful purpose. He further agrees for the reasons set out in IR102, that the amended obligation would continue to be effective in serving its current purpose.

Formal decision

24. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby allows your client's appeal and determines that the S106 Agreement dated 26 March 2015, relating to planning permission Ref. EPF/0853/14, shall hereafter have effect subject to the following modifications:

In Clause 1.1: Amend the definition of 'ASD School', by deleting the words *"…and which will be managed by the National Autistic Society";*

and after those deleted words, add:

"ASD School Provider: An organisation regulated by Ofsted, or its statutory successor, providing education to children and young adults with Autistic Spectrum disorder".

In Section 5.7: Delete the existing Clause 5.7.3 in its entirety;

and replace with:

"That the School will be managed and run by an Autistic Spectrum Disorder (ASD) school provider"

Formal decision

25. Accordingly, for the reasons given above, the Secretary of State agrees with the Inspector's recommendation. He hereby allows your client's appeal, and determines that the S106 Agreement dated 26 March 2015, relating to plannnng permission Ref.

EPF/0853/14, shall hereafter have effect subject to the modifications, in accordance with application ref EPF/2258/20, dated 29 September 2020.

Right to challenge the decision

26. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged. This must be done by making an application to the High Court within 6 weeks from the day after the date of this letter for leave to bring a statutory review under section 288 of the Town and Country Planning Act 1990.

27. A copy of this letter has been sent to Epping Forest District Council, and notification has been sent to others who asked to be informed of the decision.

Yours faithfully

M A Hale

Mike Hale
Decision officer

This decision was made by the Minister of State for Housing, Stuart Andrew MP, on behalf of the Secretary of State, and signed on his behalf

The Planning Inspectorate

Report to the Secretary of State for Levelling Up, Housing and Communities

by John Felgate BA(Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Date 29 November 2021

APPEAL BY:

THE NATIONAL AUTISTIC SOCIETY

AGAINST A REFUSAL BY EPPING FOREST DISTRICT COUNCIL

TO AGREE A VARIATION OF AN EXISTING SECTION 106 OBLIGATION

RELATING TO:

THE ANDERSON SCHOOL, LUXBOROUGH LANE, CHIGWELL, ESSEX IG7 5AB

Site visit made on 9 November 2021

The Anderson School, Luxborough Lane, Chigwell, Essex IG7 5AB

File Ref: APP/J1535/Q/21/3276932

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ABBREVIATIONS USED IN THIS REPORT

AF	Anderson Foundation
ASD	Autistic Spectrum Disorder
EFDC	Epping Forest District Council
ECC	Essex County Council
LP	Local Plan
LBR	London Borough of Redbridge
NAS	National Autistic Society
SEN	Special Educational Need
SoS	Secretary of State

File Ref: APP/J1535/Q/21/3276932
The Anderson School, Luxborough Lane, Chigwell, Essex IG7 5AB

- The appeal is made under section 106B of the Town and Country Planning Act 1990 against a refusal to approve an application for the modification of a planning obligation.
- The appeal is made by The National Autistic Society against the decision of Epping Forest District Council.
- The application Ref EPF/2258/20, dated 29 September 2020, was refused by notice dated 24 November 2020.
- The planning obligation forms part of a Section 106 agreement dated 26 March 2015.
- The planning permission to which the agreement relates is Ref EPF/0853/14, for: *"The redevelopment of the former Tottenham Hotspur training ground with an autistic spectrum disorder school, comprising 3,800 sq m school building to accommodate up to 128 pupils aged 4-19, a mixed use games area, playing fields, 100 parking spaces and a minibus drop-off area; additionally the development of 60 dwellings on land to the west of the proposed school to act as enabling development to facilitate the delivery of the school".*

Summary of Recommendation: That the appeal be allowed and the obligation be modified as proposed in the application.

The Obligation and the Modifications Applied For

1. Planning permission for the development described above was granted on 27 March 2015, subject to an Agreement under Section 106 of the Town and Country Planning Act 1990. The developer's covenants contained within the Agreement include the following:

   5.7 ASD School:

   5.7.1 Not to occupy any unit until the ASD School has been completed and is ready for occupation unless otherwise agreed in writing with the Council in accordance with Clause 13;

   5.7.2 The ASD School shall only be used by pupils who have been diagnosed with Autistic Spectrum Disorder;

   5.7.3 That the ASD School will be managed and run by the National Autistic Society.

2. The definitions contained within Clause 1.1 of the agreement include the following:

'ASD School':	*the autistic spectrum disorder school to be constructed on the site as part of the development and which will be managed by the National Autistic Society'*
'National Autistic Society':	*the organisation of that name or such other body being a charitable organisation set up to support people with autism and their families*

3. In the present appeal, the appellants' proposal is to modify the Agreement as follows:

In Clause 1.1: amend the definition of 'ASD School', by deleting the words *"…and which will be managed by the National Autistic Society"*;

And after those deleted words, add:

"ASD School Provider: An organisation regulated by Ofsted, or its statutory successor, providing education to children and young adults with Autistic Spectrum disorder".

In Section 5.7: delete the existing *Clause 5.7.3* in its entirety;

and replace with:

"That the School will be managed and run by an Autistic Spectrum Disorder (ASD) school provider"

Procedural Matters

Status of the Appellant

4. The appeal is made by the National Autistic Society (the NAS). The NAS is stated to be the freehold owner of what is now the Anderson School and its campus, and therefore a successor in title to Tottenham Hotspur Academy (Chigwell) Limited, one of the original signatories to the Agreement[1].

Recovery by the Secretary of State

5. The appeal was made on 24 April 2021. On 16 August 2021, the Secretary of State (SoS) directed that the appeal be recovered for his own decision. The reason for the direction was that the appeal involves proposals which raise important or novel issues of development control, and/or legal difficulties.

6. I carried out an unaccompanied visit to the site and surrounding area on 9 November 2021.

Issue raised by Essex County Council as to jurisdiction over the original application

7. The application to modify the Agreement was submitted to Epping Forest District Council (EFDC). This aspect is challenged by Essex County Council (ECC), on the grounds that the application should either have been made in duplicate, to both EFDC and ECC, or alternatively should have been made to ECC alone[2].

8. Section 106A(3) of the 1990 Act requires that applications to modify or discharge a planning obligation are made to the 'appropriate authority', which is defined by S.106(11) as the local planning authority by whom it is enforceable. In the present case, paragraph (4) of the Recitals states that both EFDC and ECC are local planning authorities, and that both may enforce the Agreement's obligations.

9. Having given due consideration, I am inclined to agree that nothing in the terms of the Act directly contradicts ECC's view on these matters, and nothing would have precluded the present appellants from addressing their application to ECC, or to both authorities in parallel. But equally, nor does the Act expressly require either of these courses of action.

[1] Simul Consultants' Planning Statement for NAS: para 4
[2] ECC Appeal Statement: paras 1.3, 5.1 – 5.8

10. I am aware that in matters of legal interpretation, the singular may include the plural. But nevertheless, it is not uncommon for agreements to include both the relevant district and county councils, and for both to have the status of planning authorities. To my mind it follows that, if the view that ECC now advocates were widely shared, it seems likely that there would by now be at least some form of precedent; but none has been drawn to my attention. In any event, the submission of duplicate applications to two authorities, as ECC suggest, would run the risk of two conflicting decisions being issued on the same matter. From a practical point of view, this seems both illogical and undesirable, and this reinforces my view that this is unlikely to have been what was intended by the legislation. On this basis, it seems to me that in the present case a single application should be regarded as acceptable, and indeed preferable.

11. The determining authority for the purposes of the March 2015 planning permission was EFDC, and it follows in my view that an application under S.106A may validly be made to that authority in the first instance. ECC is also a local planning authority as defined in the 1990 Act, and therefore has an interest in planning matters, but its formal role in that capacity is limited to 'county matters', and neither the 2015 permission nor the present appeal fall within that category. ECC's participation in the 2014 Agreement was not made necessary because of its status as a planning authority, but only because of its other roles as the local Education and Highways authorities. As the Education authority, ECC clearly has an interest in matters relating to the management of the Anderson ASD School, which is the subject of the present appeal. But nevertheless, ECC has not entered into any covenants relating to the School, and nor does the Agreement assign any particular role or responsibilities in this respect to the education authority, and thus it seems to me that the relevant provisions relating to the School were not dependant on ECC's involvement. It might well be that the present application could have been addressed to ECC rather than EFDC. But this does not change my view that the appellants were entitled to make their application to EFDC, as indeed they did.

12. In this context, I also note that ECC's submissions on this matter, as to which authority has the stronger claim to jurisdiction, are not supported by EFDC[3].

13. In any event, ECC has made full representations on the appeal, and I have taken those views into account. I am therefore satisfied that no party has been prejudiced.

14. For these reasons, I have proceeded to make my recommendation on the appeal, based on the application and evidence that are before me.

Background

15. Following the granting of the 2015 planning permission, the Anderson School and its campus and related facilities were constructed, by the Anderson Group in partnership with the NAS, and handed over to the NAS on completion. The School opened as a non-maintained independent school in September 2017.

16. During the period that it operated, the School was run directly by the NAS, offering placements to local authorities for children and young people diagnosed

[3] EFDC delegated report on application EPF/2258/20: 4th page, 1st main para

with Autistic Spectrum Disorder (ASD), in the age range 4-19 years. The School's stated aim was to develop the potential of relatively high-functioning ASD pupils, of average to high cognitive ability, with the potential to progress to mainstream further education or to enter regular employment.

17. After experiencing difficulties, the School closed in July 2020. The NAS has subsequently announced that their preferred partner to take over the operation of the School, if the present appeal is allowed, is the Council of the London Borough of Redbridge (LBR).

18. In addition, the enabling development of 60 dwellings and associated open space, which was also included in the 2015 permission, has also now been completed, and is known as the Park View development. It is not disputed that the remaining planning obligations relating to the development, including financial contributions to mainstream education, affordable housing, healthcare facilities and bus services, and covenants in respect of highway works, a travel plan, the remediation of land contamination, and a residents' management company, have all been discharged.

Legal Framework

19. Section 106 of the 1990 Act permits the use of planning obligations for certain specified purposes. These include restricting the development or use of land, or requiring the land to be used, in a specified way. As noted above, the section also contains other general provisions relating to obligations, including those concerned with enforceability.

20. S.106A of the Act set out the procedure by which an obligation may be modified or discharged. After a period of 5 years has passed, a modification may be made by application to the appropriate authority. Under S. 106A(6), in the event that the obligation is found to no longer serve a useful purpose, it must be discharged. Alternatively, if it does serve such a purpose, but would serve that purpose equally well subject to the modifications sought, then those modifications should be given effect. Otherwise, the obligation shall remain unmodified.

21. The procedure for appeals is contained at S.106B. Under sub-section S.106B(4), the decision options available to the Secretary of State (SoS) on appeal are the same as those available to the local planning authority at the application stage as set out above.

Planning Policy

22. The development plan for the area includes the saved policies of the Epping Forest District Local Plan (the LP) adopted in January 1998, as amended by the Epping Forest District Local Plan Alterations (the LP Alterations), adopted in July 2006. The sites of both the Anderson School and the Park View development are within the Metropolitan Green Belt, as defined in these plans.

23. Saved LP Policy GB2A states that planning permission for the construction of new buildings or changes of use within the Green Belt will not be granted other than for various specified purposes. Saved Policy CF12 seeks to protect existing community facilities, except where the facility in question is no longer needed or viable, or is to be re-provided elsewhere and will be accessible to existing and potential users in the locality.

24. In addition, a draft replacement plan, also titled the Epping Forest District Local Plan (the draft LP), submitted in 2017, has completed its examination, and consultation has subsequently taken place on proposed Main Modifications. In the emerging plan, Policy DM4 restricts development in the Green Belt. Policy D4 seeks to retain existing community facilities that are valued by the community; the loss of such facilities is not to be permitted except where no longer needed or viable, or where the loss is outweighed by other benefits. Policies D1 and D2 require new development to provide for the infrastructure, services and facilities needed to serve that development.

The Case for the National Autistic Society

25. On behalf of the NAS it is submitted that the Society is a long established, well-known and reputable charity, dedicated to providing support for ASD sufferers and their families. From the start, the NAS was a key participant and driving force, alongside the Anderson Foundation, in the development of the Anderson School. The aim of the project was to provide a purpose-built, 'state-of-the-art' specialist educational facility for children and young people with ASD, designed and tailored to meet their needs in every detail. The School was to be managed and run directly by the NAS itself, and was to serve a wide area, transcending local authority boundaries, within which a high level of need had been identified[4].

26. The first part of this aim was realised, in so far as that the School and its campus were built, and achieved the high standards of design, construction and equipment that had been sought from the start. During the three years that it operated under the Society's management, the School provided what the NAS considers to be much-needed services to a large number of ASD children, and those services were taken up by a number of local education authorities.

27. The NAS states that the closure of the School was due to a combination of unforeseen and exceptionally challenging circumstances, some of which were beyond the Society's control. The recruitment of high calibre and experienced staff proved more difficult than expected. As a result, issues arose over pupil assessment and selection, leading to consequent problems with safeguarding, and then spiralling into further recruitment issues, poor Ofsted reports, and reduced take-up of places. Despite committing to a school improvement plan, and investing further financial resources, the School was facing continuing annual deficits which were considered to pose a risk to the financial stability of the charity as a whole. The decision was therefore taken, reluctantly, to close the School and seek an alternative way forward[5].

28. Despite this failure, the NAS says that it is still committed to seeing the School campus used for its intended purpose, to meet the growing need for specialist ASD education, and to secure the best outcome in the circumstances for ASD children and their families. Following a tender process, LBR has been selected as the Society's preferred bidder and future partner. In making this choice, the NAS states that it took account of a wide range of relevant considerations, extending well beyond purely financial matters, and had regard to their legal obligations under the Charites Acts. Amongst other things, LBR is seen as an experienced and responsible public body, with experience in providing for ASD, as well as

[4] NAS's Statement (Appx 1 to Simul Consultants' Planning Statement)
[5] NAS's Statement, as above

other Special Educational Needs (SEN) at some of its other existing schools. If the present appeal is successful, LBR will be offered a lease on the Anderson School. The Society has received assurances that places at the School would continue to be made available to children from other local authority areas, including Essex[6].

29. On the NAS's behalf it is argued that the principal purpose behind the inclusion of Section 5.7 as a whole, in the March 2014 Agreement, was to secure the provision of the School, and to ensure that it would be used for the provision of ASD education. These aims are secured by sub-sections 5.7.1 and 5.7.2. No change is proposed to those clauses, and thus the retention of the School, and its continued use as an ASD education facility, would continue to be secured irrespective of the outcome of the present appeal[7].

30. In contrast, it is argued, the retention of sub-section 5.7.3, restricting the management and running of the School to the NAS itself, is not necessary, and was never necessary, for that main purpose. Indeed, now that the NAS is no longer able to operate the School directly, the retention of 5.7.3 can only frustrate that purpose. As long as this restriction remains in place, it is suggested, the School is likely to remain unused, with its excellent facilities being wasted. The harm that was done to the Green Belt, by permitting the Park View housing development, would also have been incurred for no lasting benefit[8].

31. It is further contended by NAS that no evidence has been produced to suggest that the purpose of Section 5.7, to ensure the continuing provision of ASD education, could not equally be achieved through a suitable alternative provider, subject to ensuring that such other provider is required to be competent, and is properly regulated. LBR is an example of such a provider. The modifications now proposed, to sub-section 5.7.3 and the related definitions of 'ASD School' and 'ASD School Provider', would provide for the necessary level of continuing control. Consequently, far from undermining the original purpose of Section 5.7, the proposed modifications would restore the Agreement's effectiveness in this respect.

32. The national Planning Practice Guidance advises that planning obligations should operate so as to 'run with the land'. In the present case it is argued by NAS that subsection 5.7.3 effectively makes the planning permission for the School personal to NAS, and thus directly conflicts with that principle[9].

33. Having regard to the tests in S.106A of the Act, NAS submits that 5.7.3 serves no useful purpose, but in any event, the relevant provisions of the Agreement would continue to serve their purpose equally well if they were subject to the modifications now proposed.

The Case for Epping Forest District Council

34. On behalf of EFDC it is submitted that the case originally advanced for the granting of the 2015 planning permission, for the School and the enabling development, was based on the overriding need for additional ASD education

[6] NAS's Statement; and NAS's letter to Dame Eleanor Laing, 20 May 2021 (attached to Forsters' letter, 13 Sept 2021)
[7] Grounds of Appeal: paras 6.1 – 7.14;
[8] Grounds of Appeal, paras 6.1-6.7; and Planning Statement: para 11
[9] Grounds of Appeal: para 6.3

facilities to serve the western Essex area. The Council is concerned that allowing the Anderson School to be taken over by an education authority from another area would mean that the School would prioritise the needs of children from that area over those of Essex. There is no evidence of any intention by LBR to enter into any partnership arrangements with other authorities such as Essex, and no guarantee that any pupils from outside Redbridge will be accepted at all. Opening up the School to LBR or other outside authorities is therefore seen as potentially reducing the level of ASD provision available for western Essex, and exacerbating the area's existing problems in that regard. This adverse impact on an existing community facility is regarded as contrary to Policies CF12 of the LP and D4 of the emerging draft LP[10].

35. EFDC further states that the case put forward at the time of the 2015 permission was specifically based on the advantages of the particular model of ASD education proposed by the NAS. This was for the Anderson School to operate as a highly specialised facility, focussed solely on ASD, and catering principally for higher-functioning sufferers, to address the particular needs of that group. As the Council sees it, LBR's intention would be to integrate the School with Redbridge's other existing SEN schools, where ASD children would be merged with pupils with other types of special needs. The pupils would also be drawn from a more limited age range than previously. In the Council's view these changes would significantly weaken the educational benefits that the School would be able to provide to ASD sufferers and families[11].

36. In addition, EFDC argues that NAS has failed to substantiate the reasons for its decision to discontinue directly managing and operating the School in its own name; there is no evidence as to whether any options other than closure were considered. There is also considered to be no transparency about the NAS's selection process for choosing a new operator. No information has been given as to the other potential providers considered, or the relative weighting given to educational criteria as opposed to financial or other matters. Without evidence on these matters, the Council suggests that it has not been demonstrated that any change to the Agreement is necessary[12].

37. In any event, it is contended that widening the definitions of the School and Provider to the extent now proposed would potentially open the way to further changes in the future, which could result in the School moving even further away from its original concept and purpose.

38. The Council states that whilst it might be prepared to accept the possibility of the School being operated by some other body than the NAS, the identity of that organisation and the management arrangements should be matters for negotiation, involving the relevant planning and education authorities, rather than being imposed unilaterally.

39. In addition it is stated that the reason that the S.106 Agreement was needed in the first place was because of the site's location in the Green Belt. In policy terms, the School and its accompanying housing constituted inappropriate development. The educational needs and benefits of the School were found

[10] EFDC Appeal Statement: paras 4.4, 4.11; and delegated report: 4th page, 2nd and 3rd main paras
[11] EFDC Appeal Statement: paras 4.4, 4.11
[12] EFDC Appeal Statement: paras 4.9, 4.10, 5.1 – 5.6, 6.3

sufficient to outweigh the harm to the Green Belt, thus providing the very special circumstances that were needed to justify granting the permission. The Agreement, guaranteeing those benefits, was central to that assessment. Despite now being fully developed with a school and housing, the site is proposed to remain designated Green Belt, and the harm caused to it by the original development is permanent. In these circumstances, EFDC takes the view that diluting the commitments made in the Agreement would weaken the justification for the original development, and thus undermine the long-established policies for the protection of the Green Belt, including Policies GB2A of the adopted LP and DM4 of the emerging draft LP[13].

The Case for Essex County Council

40. ECC supports EFDC's refusal of the application, on similar grounds to those covered above.

41. In ECC's view, the main aim of the original development was to provide a highly specialised ASD facility, for a specific type or cohort of ASD children and young people. These would be pupils whose primary SEN is ASD, but without severe complex needs, such as learning disability. These children's learning ability would be in line with age-related expectations, and they would therefore have the potential to follow National Curriculum courses, to achieve GCSEs and A-Levels, and to progress beyond. They would be people who were unable to reach these goals through mainstream schools, but could be helped to do so with the aid of specialised teaching and care, in a specially tailored environment. These aims were reflected in the design of the School buildings and campus, with a dedicated assessment centre, a range of classroom spaces for small classes, one-to-one teaching, independent study, and vocational studies, and provision for a 6th form. In all these respects, the Anderson School was intended to be an innovative and unique facility, offering educational benefits not available at any other school in Essex or the surrounding area[14].

42. In addition, ECC concurs with EFDC that the case on which the need for the School was founded was based specifically on the needs of Essex, and in particular those of Essex's 'western quadrant', comprising the districts of Epping Forest, Harlow and Uttlesford. ECC's most recent strategic business case for its SEN services, dated 2015, shows that those needs still exist, and are expected to become more acute, with a 30% rise in ASD-diagnosed children forecast between that year and 2024/25. Although the County Council has devoted substantial resources to SEN and ASD provision, and is supporting the development of two new Free Schools elsewhere in the County, there remains no provision of an equivalent type to that previously provided at the Anderson School. The new SEN schools planned for Chelmsford and Witham will take some pupils with ASD, but those will be children who also have moderate to severe learning difficulties; they will not necessarily be suitable for those with higher levels of cognitive ability. Autism hubs are provided at some other Essex secondary schools, but these are designed for those pupils with a prospect of joining mainstream classes. Following the Anderson School's closure, alternative facilities have had to be sought for 27 children from Essex. Some of these will now have to travel

[13] EFDC Appeal Statement: paras 4.1 – 4.8, 4.12 – 4.13, 6.1 – 6.2
[14] ECC Appeal Statement: paras 6.2.3.1 – 6.2.3.3, and 6.2.3.11; and consultation response 2 November 2020: 2nd – 4th pages

long distances, or stay away from home in residential settings. Not all have yet found places[15].

43. It follows, in the County Council's view, that the whole reason for allowing the original development was to secure the provision, in Essex, of a school of the specific type proposed by the Anderson Foundation and NAS, managed and operated on the lines that had been described and agreed. The purpose of Section 5.7 of the Agreement was therefore to secure that facility, and to ensure that the School continued in the future to operate as originally envisaged, or in a manner acceptable to the Education Authority. In the light of events, with the setback that has occurred with the School's current closure due to the failure of the NAS's management, ECC considers that the degree of control provided by Section 5.7 as a whole has been shown to be justified, and continues to be needed. Control over the identity of the operator, as provided by subsection 5.7.3, is seen as an essential part of that overall control, to ensure that the direction of the School, and the type of ASD education it provides, remains true to the original aims. Subsection 5.7.3 therefore continues to serve an important purpose.

44. ECC submits that the modifications to the Agreement sought by NAS would allow the Anderson School to be taken over by almost any existing school operator or education provider, because they would only need to have had one pupil with ASD, and on that basis most existing schools, mainstream or otherwise, would qualify. This would therefore effectively remove any effective control over the identity of the operator. In ECC's view, this would open the way to other forms of ASD education, far removed from that for which the School was intended. This would leave Essex, and some other Authorities, with greatly reduced options for day placements, and without suitable provision for some ASD children. The proposed modifications would therefore result in Section 5.7 no longer serving its intended purpose[16].

45. With regard to the choice of the London Borough of Redbridge as NAS's preferred bidder, ECC sees this as further evidence supporting the above contentions. ECC understands that LBR's intention would be to use the Anderson School as a satellite campus for their existing Hatton and Little Heath SEN schools. Those schools are primarily geared to children diagnosed as learning-disabled. Some pupils may also have ASD, but that is not their primary condition, and ASD is not a requirement for admission. LBR would therefore not be able to offer places to the types of children previously served by the Anderson School when it was run by NAS; and indeed the type of education and care that would be available under LBR's management would not be suitable for those children. In addition, LBR would use the school for a much narrower age range, 10-13 years only, and it is not clear whether any places would continue to be available to pupils from outside Redbridge[17].

46. ECC draws attention to a previous application made by NAS, earlier in 2020, which sought to amend the Agreement to allow the School to be used for any type of SEN education rather than only for ASD. Although that application was

[15] ECC Appeal Statement: paras 6.2.3.4 – 6.2.3.10; and consultation response 2 November 2020: 2nd – 8th pages
[16] ECC Appeal Statement: paras 6.2.4.1 – 6.2.4.5, 7.2; and consultation response 2 November 2020: 6th – 8th pages
[17] ECC Appeal Statement: para 6.2.4.4; and consultation response 2 November 2020: 4th – 5th pages

refused and not appealed, this is seen as an indication of the direction in which NAS and LBR are likely to seek to go in the future[18].

47. ECC accepts that the NAS has been shown to be unable to manage the School. Despite its intended capacity, the number of children on the roll never exceeded 57, and the age range served never included any pupils over 16 years old. The failings identified by Ofsted in terms of educational and care standards were serious ones, and NAS's decision to discontinue its own role in managing the school was correct. But that did not mean that the course that NAS has now taken with LBR was necessary. ECC has offered support and discussions to find alternative solutions. It is believed that other education providers have expressed interest in taking on the School, and that some remain interested[19].

48. It is agreed that some form of modification to the Agreement will be necessary, deleting reference to the NAS. But ECC considers that the amendments need not, and should not, allow such wide scope as those proposed. The County Council would prefer an alternative wording which would require the operator to be a specialist in ASD education provision, and for the latter to be limited to a multi-academy trust or independent school, with direct experience of running a school and sixth form exclusively for that purpose. They would also wish the definition to specify that the provider's experience must relate to a school for both children and young adults, and whose primary SEN is ASD. ECC also seeks to incorporate a role for itself in approving the appointment of such a provider[20].

49. In addition, ECC echoes the submissions of EFDC regarding the implications for Green Belt policy. In this context it is also noted that the original planning permission included no requirement for any affordable housing. It is suggested that the lost opportunity for such provision, together with the accepted harm to the Green Belt, is a further adverse impact that would not have been permitted but for the specific benefits anticipated to result from the School[21].

The Other Interested Parties

The Council of the London Borough of Redbridge

50. LBR confirms that it is in negotiations with NAS for a lease on the Anderson School, with a view to taking over the running of the School. In that capacity, LBR supports the appeal proposal[22].

51. LBR states that Redbridge faces steeply rising numbers of local children with all forms of SEN, including ASD. The Borough has made provision for SEN and ASD at two existing special schools, Hatton and Little Heath. However, both of these are now full to capacity. The Anderson School would be used as a satellite to these existing schools, taking pupils with ASD in years 6-8 (ages 10-13), and freeing up capacity in other age groups to allow for an expanded intake at those other schools. The option of using the otherwise unused Anderson School is seen

[18] ECC Appeal Statement: paras 2.5 – 2.7
[19] ECC Appeal Statement: paras 6.1, 6.2.4.11; and consultation response 2 November 2020: 3rd, 4th and 6th pages
[20] ECC Appeal Statement: para 1.6
[21] ECC Appeal Statement: paras 1.4, 6.2.4.8 – 6.2.4.10; and consultation response 2 November 2020: 3rd , 7th pages
[22] LBR Appeal Statement: para 2

as the most sustainable of these alternatives, and the best for the educational interests of the children involved[23].

52. One way or another, LBR contends that the need for ASD and other SEN education in Redbridge has to be met somehow, and if the present appeal is unsuccessful, LBR will have to either resort to the use of mobile classrooms, or will look to place some of its children outside the Borough. The latter option would increase pressure on other Education Authorities who all face similar problems[24].

53. LBR maintains that it has a proven track record in providing education services for pupils with ASD. Both Hatton and Little Heath Schools admit significant numbers of children in this category, and staff are experienced in their needs. At Little Heath, ASD children are in the majority. These schools are rated by Ofsted as 'outstanding' and 'good' respectively[25].

54. With regard to Essex, LBR recognises the right of ECC to seek placements in Redbridge schools, including the Anderson School, and would aim to co-operate fully with ECC and other outside Education Authorities, having regard to the needs of the particular child in each case. In LBR's submission, such co-operation is automatically required of all Education Authorities, by the SEND Regulations, and by the Statutory Guidance on Admissions, and the High Needs Block Guidance. All of Redbridge's existing special schools already accept placements from Essex and other authorities; this would not change, and the arrangements relating to the Anderson School would not be any different. Even when the Anderson School was run by the NAS, it was fully independent of ECC, and the County had no special priority. Although Essex children accounted for almost half the School's occupied places, that was partly because the School never filled more than 78 places out of its 128 capacity. LBR would seek to utilise the School more fully, in accordance with the 2015 planning permission, and thus there would be significantly more places available in total. Essex children, along with those from other areas, would stand to benefit from that increased throughput[26].

55. LBR suggests that under their management the costs that would be charged to ECC and other authorities, and thus borne by the public purse, would be significantly lower than under the NAS or another independent provider[27].

56. LBR considers the NAS's tender process to have been fair, open and transparent. As well as its financial offer, LBR believes that the main factors that gave it an advantage were its proven track record in ASD education, its high Ofsted ratings, and its plans for on-going collaboration with NAS on staff skills and training, best practice development, and family support[28].

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[23] LBR Appeal Statement; LBR letter dated 28 Sept 2020 (Appx 2 to Planning Statement); LBR letters dated 27 August 2021 to Dame Eleanor Laing MP and to Mr Gagan Mohindra MP (attached to Forsters' letter 13 Sept 2021)
[24] As above (footnote 23)
[25] LBR letter 28 Sept 2020 (Appx 2 to Planning Statement)
[26] LBR Appeal Statement: paras 3-11; LBR letter 28 Sept 2020: final para; LBR letter 27 August 2021 to Mr Gagan Mohindra MP: 2nd page
[27] LBR Appeal Statement: para 11; LBR letter 27 August 2021 to Dame Eleanor Laing MP: 4th page
[28] LBR letter 27 August 2021 to Dame Eleanor Laing MP: 3rd page; LBR letter 27 August 2021 to Mr Gagan Mohindra MP: 1st and 3rd pages

57. LBR recognises that their proposal to take over the School is dependent on the modifications now proposed to the 2015 Agreement. However, the Agreement contains no restrictions as to the School's geographical catchment area, the type of ASD needs that are to be catered for, the level of cognitive ability of the pupils, or the style or method of teaching. LBR's proposals would therefore not conflict with any of the Agreement's other provisions, and no other modifications or variations would be needed.

The Anderson Foundation

58. The Anderson Foundation (AF) is a charity concerned with disability and autism, and is closely associated with the Anderson Group, a large construction and engineering company. Autism is seen as a serious and increasing national issue. AF played a leading role in the development of the Anderson School. The Foundation objects to the proposed changes to the Agreement[29].

59. AF states that it was the main driving force behind the development of what is now the Anderson School. The Foundation was responsible for initiating the project, bringing the NAS on board, carrying out the building works, and financing the school and campus through the enabling housing development. It was AF that acquired the land from Tottenham Hotspur, negotiated the necessary approvals, and handed the freehold of the School over to NAS on completion. Throughout, AF worked with NAS to develop the concept for the School, the learning model and the design[30].

60. Every element of the design was carefully considered with regard to the needs of the target group of higher-functioning autism sufferers. The design incorporated numerous special features, including anti-glare lighting, sound attenuating materials, wider corridors, specialised kitchens, dining rooms, science laboratories, IT suites, and sports facilities, all tailored to the expected user-group's particular needs. Consequently the School was, and still is, a unique, pioneering facility, unrivalled anywhere in the world. The aim was to provide end-to-end specialist learning and support, which would optimise the life chances of young ASD sufferers of all ages. The Foundation was proud to lend the Anderson name to the completed development[31].

61. AF considers that, for the first 18 months or so after opening, the School was well managed and began to fulfil its purpose. But then, following the departure of NAS's chief operating officer at that time, Mr Mark Lever, NAS seemed to lose focus and lose interest in the project. From that point on, the School went rapidly into decline[32].

62. AF is keen to see the School reopened. However, it should be managed and operated on the basis of the original vision and purpose, for the type of higher-functioning, more academically able ASD pupils that it was designed for[33].

63. If the London Borough of Redbridge is enabled to take over, their intention is to move away from this original concept, and instead to run the School as a general

[29] Letter from A Jay, 20 August 2020 (Appx 2 to AF's Appeal Statement by Town Legal)
[30] AF's Appeal Statement: paras 3-4; Letter from A Jay, 20 August 2020; Letter from M Lever, 17 August 2020 (Appx 3 to AF's Appeal Statement)
[31] AF's Appeal Statement: paras 10(2), 20(2) and 23(1); Letters from A Jay and M Lever
[32] AF's Appeal Statement: paras 5-7; Letter from A Jay, 20 August 2020: 2nd page
[33] AF's Appeal Statement: para 10(1)

SEN school, for all types of learning disability within one particular age range. In AF's view, this would completely lose sight of the benefits that the School was intended to provide. All of the effort and resources that went into planning, building and equipping the School for its original purpose would then be negated[34].

64. Given AF's instrumental and very recent role in setting the School up, the Foundation considers that it should have been involved in the NAS's decisions as to any disposal. Whatever the legal position might be, AF sees this as a moral obligation on the NAS, and is disappointed to have found itself excluded from that process. In AF's view, efforts should have been made to find an operator who would carry on the School's original purpose. That approach would have accorded with the relevant Charity Commission Guidance, which requires trustees to act in the best interests of their charity. Instead it appears that the NAS simply took the highest financial offer[35].

65. AF believes that other bids were made, but their nature has not been revealed. Without that information, it is not known whether the extent of the changes now proposed to the Agreement are necessary.

66. AF suggests that the sequence of events could be viewed as raising questions as to the possibility that the running down of the School under NAS's tenure might have been a deliberate ploy, as a route to making a profit on the sale. Seen in that light, amending the S.106 Agreement in a way that facilitated such an outcome could appear as condoning a potential abuse the planning system. On this basis, the Foundation suggests there would be a risk of bringing the system into disrepute[36].

67. Attention is drawn to the judgement of the High Court in *R (Mansfield District Council) v SoSHCLG*[37], in which it was held that, for the purposes of S.106 of the 1990 Act, there is no express limitation on what may constitute a 'useful purpose'. Such a purpose therefore need not be a planning purpose in the normal sense. In addition, it is noted that in the case referred to as *JA Pye (Oxford) Ltd v South Gloucestershire DC (No 1) [2001]*, the Court held that over the course of time, the nature of the useful purpose served by a particular obligation may change[38].

68. In the present case, it is argued that the useful purpose served by Section 5.7 of the Agreement is closely bound up with the specific needs of west Essex; and also with the desire to provide specifically for the higher-functioning, higher-achieving cohort of ASD sufferers in that area, across the whole age range of children and young adults. That purpose should also be viewed in the context of the need in 2015 to demonstrate very special circumstances to justify the development against Green Belt policy[39].

69. It is pointed out that the definition of 'National Autistic Society', within the existing Section 1.1 of the S.106 Agreement, includes the words *"or such other*

[34] AF's Appeal Statement: para 10(2)
[35] AF's Appeal Statement: paras 8, 10(3-5), 11, 22(2, 4), 23(3), 24; Annex 1 to AF's Appeal Statement: responses to Grounds 1-3; Letter from A Jay, 20 August 2021: 2nd page
[36] AF's Appeal Statement: paras 19(2), 21(1,2), 22(1,2), 23(1,2), 24; and Annex: responses to Grounds 1, 5 and 6
[37] *[2018] EWHC 1794 (Admin)*
[38] AF's Appeal Statement: paras 14 -17
[39] AF's Appeal Statement: paras 20, 23

body, being a charitable organisation set up to support people with autism and their families". This does not preclude an alternative solution whereby the NAS could work in partnership with another charity to enable the School to continue to operate on its intended basis. Such a solution would not require any change to the existing Agreement[40].

The Rt Hon Dame Eleanor Laing MP

70. Dame Eleanor Laing is the Member of Parliament for Epping Forest. Dame Eleanor objects to the proposed changes to the Agreement, largely on similar grounds to those raised by the other parties reported above, together with some additional points[41].

71. In Dame Eleanor's view, the purpose which the relevant provisions of the S.106 Agreement were designed to serve was to ensure that the Anderson School was made available for the needs of high-functioning, able, ASD-affected children in western Essex, to enable them to realise their academic potential. The School should remain available for that purpose[42].

72. Furthermore, given that the NAS has failed at running the School in their own right, Dame Eleanor considers it wrong that they should retain the sole right to appoint a successor body. In her view, the future of the School should be resolved in a way that secures the best outcome for ASD-affected children. She suggests that such an outcome will not necessarily be achieved through maximising the proceeds from the site disposal. The loss of the existing School, and the loss of access to it by the most able group of potential users, would not be easy to replace, and there is little likelihood that the opportunity to develop an outstanding facility of this type, will recur[43].

73. Dame Eleanor has made representations to the Charity Commission for England and Wales, requesting an investigation into the circumstances of the proposed disposal of The Anderson School, and the NAS's role and conduct in the matter[44].

74. The matter was the subject of an adjournment debate in the House of Commons on 18 May 2021. Responding for the Government, the Minister for School Standards undertook to ensure that the concerns raised would be reflected upon by the Department for Education[45].

Chigwell Parish Council

75. Chigwell Parish Council, in whose area the Anderson School is located, agrees with the decision of EFDC to refuse permission for the modifications sought, on the grounds stated in the refusal notice[46].

[40] Annex 1 to AF's Appeal Statement: response to Ground 1
[41] Dame Eleanor's letter to the Planning Inspectorate, 29 July 2021
[42] Dame Eleanor's letter to the SoS, 24 June 2021: 1st page
[43] Dame Eleanor's letters to the Parliamentary Under-Secretary, 14 May 2021, and to the Charity Commission, 2 June 2021
[44] As above (footnote 43)
[45] Extract from Hansard, 18 May 2021 (attachment to 24 June 2021 letter)
[46] The Parish Council's letter dated 27 August 2021

Inspector's Reasoning

76. In the remainder of this report, the numbers shown in square brackets, thus **[]**, refer to the corresponding earlier paragraphs.

The obligation's 'useful purpose'

77. Having regard to the terms of the relevant legislation **[20, 21]**, I consider that the main issue in the appeal is whether the obligation in question continues to serve a 'useful purpose'; and if so, whether it would serve that purpose equally well if modified as proposed by the appellant.

78. To my mind, the route to deciding whether the purpose served by the obligation is useful or not, must necessarily start from identifying what that purpose is. As set out elsewhere in this report, what subsection 5.7.3 of the Agreement actually says is simply that the Anderson School will be managed and run by the NAS **[1]**. As the AF has pointed out, on closer inspection, it becomes apparent that the definition of 'NAS' would in fact potentially admit other autism charities as well as the NAS itself **[69]**; however, this does not seem to me to affect the subsection's main purpose or role. On a plain reading, it is clear in my view that what 5.7.3 is designed to do is to control the type of organisation that may be put in charge of the Anderson School's operation and management.

79. The separate question as to the purpose of the School and who is intended to benefit, is dealt with at subsection 5.7.2. That subsection requires that the School be used solely for pupils diagnosed with ASD **[1]**. It follows, in my view, that in judging the usefulness of subsection 5.7.3, the principal consideration is the extent to which the obligation within it contributes to the School's purpose as set out at 5.7.2. Considered in this light, what 5.7.3 appears to achieve, in its existing form, is to ensure that the body entrusted with managing and running the School is one that must have a strong interest and expertise in the subject of autism, and a special concern for the welfare of those so diagnosed. The control that it provides in this respect appears to me to support the stated aim of providing education for ASD-diagnosed pupils. I therefore find that subsection 5.7.3, as originally agreed, was designed to serve a useful purpose in relation to the aims and purposes of the Anderson School.

80. As is indicated by AF's evidence, it is possible for the purpose served by a planning obligation to change over time **[67]**. In this case, the failure of the NAS's management, and their consequent desire to hand over control of the School to another body, is a change of circumstances that has occurred since the Agreement was entered into. But, given that subsection 5.7.3 does not preclude charities other than the NAS from running the School, this change of circumstance does not seem to me to alter the subsection's function in controlling the type of organisations that are permitted to play that role. Nor does it appear to affect the way that subsection 5.7.3 supports the aim of providing for ASD pupils in accordance with 5.7.2. I therefore consider that subsection 5.7.3 continues to serve the same useful purpose now as it did then.

81. If the modifications now proposed **[2]** were brought into effect, the type of organisations allowed to run the School would no longer be confined to charities. However, the experience of the recent past has already demonstrated that charitable status is no guarantee of success in this type of enterprise **[17, 27, 47, 61, 72]**. The proposed changes would not include any specific requirement for

previous experience in ASD education, nor indeed in any other kind of education; but nor is there any such requirement in the Agreement as it stands now.

82. On the other hand, the changes would open the way to bids from a large number of existing providers of ASD education who are currently excluded, such as free schools, independent schools, and local education authorities. In this respect I accept that experience is not necessarily the same as competence, but on balance, the opportunity to consider a wider range of organisations with relevant skills and expertise seems to me an advantage. In addition, as the proposed new wording notes, the education provider would be regulated and guided by Ofsted **[2]**; and in the case of the previous management regime, it is clear that the role played by that body, in protecting the interests of pupils, and bringing matters rapidly to a head, was very important **[27, 47]**. And in any event, any new provider would remain bound by the terms of subsection 5.7.2, to provide education only to those with an ASD diagnosis **[1]**.

83. Consequently, it seems to me that even though the existing subsection 5.7.3 serves a useful purpose, if the modifications now sought were brought into effect, the obligation would still be capable of serving that purpose equally well.

The needs of higher-functioning ASD sufferers

84. It is clear that, when the NAS and AF were working together to bring the Anderson School project to fruition, their vision for the School was that it should be devoted to the needs of higher-functioning, more able ASD pupils, to help them achieve their full potential, throughout all their school-age years **[35, 41, 60, 71]**. This particular role for the School seems to have had the full support of ECC as well as that of some parents and campaign groups. The School campus and buildings were evidently designed to achieve this shared vision, and the assessment, selection and teaching policies that were jointly devised and put in place then were all evidently geared to that purpose.

85. However, nothing in the wording of subsections 5.7.2 or 5.7.3 **[1]**, or anywhere else in the Agreement, refers directly to these matters. The restriction under 5.7.3, to use by the NAS or another autism charity, does not limit the School to any particular type of pupil profile, or any single model of ASD education. Nor are there any such limitations in the requirement under 5.7.2, that the School be used only for the benefit of those with ASD. Consequently, although there seems little doubt that it was the wish of the parties most closely involved that the School should provide exclusively for higher-functioning ASD, it is equally clear that this particular aim does not form part of the Agreement itself. It therefore follows that this did not form part of the useful purpose behind subsection 5.7.3 when the Agreement was entered into.

86. The emergence of LBR as a preferred bidder **[28, 50]** is a new circumstance. LBR's intention would be to manage the Anderson School as a satellite campus for two of its existing SEN schools, thus moving it in a different direction; away from its previous focus on high-functioning ASD, and towards an approach that would include pupils whose ASD is accompanied by other SENs, and with a broader range of abilities, but within a narrower age band **[35, 44, 45, 51, 63]**. LBR is not permitted to run the School under the terms of the existing subsection 5.7.3, but would become eligible as a result of the changes now proposed. In practical terms therefore, subsection 5.7.3 is the only thing standing in the way of a hand-over to LBR. The objectors' contention is essentially that this amounts

to an additional useful purpose, which justifies retaining the subsection in its existing form.

87. I appreciate the strength of feeling behind these submissions. It is not difficult to understand why helping the most able ASD sufferers is viewed as an important goal by many, and the evidence suggests that specialist facilities for the needs of this group are few and far between **[34, 42, 45, 72]**. But equally, it seems that there are differing views among educationists as to the merits of alternative approaches to ASD **[51. 52]**. Clearly there are substantial and rising numbers of ASD sufferers, not just in the high-functioning category, but across the whole of the Spectrum, including those complex cases where ASD is accompanied by other types of learning disability **[42, 51, 52]**. The evidence before me therefore suggests that additional provision is likely to be needed for all types of ASD, and indeed also for other types of SEN education. Decisions as to the best way to prioritise resources are primarily ones for the education authorities, and other education providers, not for the planning system. When the planning permission for the Anderson School was granted in 2015, the need to provide for ASD was clearly decisive, but there is no clear evidence that this was dependent on the particular operating model favoured by AF and ECC. None of the planning policies identified by any party has any bearing in this respect. Having regard to all these matters, I can see no basis in terms of any relevant planning considerations on which to favour one type of ASD education, or one type of provider, over any other.

88. It follows that, even though subsection 5.7.3 of the Agreement does currently have the effect of blocking RBL's plans for the School, and the changes that would follow, in my view preventing that scenario from happening cannot properly be viewed as an addition to the obligation's useful purpose. That purpose therefore remains as identified earlier **[79,80]**: that the subsection is simply a means of controlling the type of managing organisation, in order to ensure that the School provides education to pupils with ASD, and no more than this.

89. This being so, I see no reason to depart from my earlier conclusion, that the proposed modifications to the Agreement would not prevent subsection 5.7.3 from continuing to serve its existing purpose, in the same way as it does now.

The needs of the County of Essex

90. The considerations applying to the question of the local needs of Essex are broadly similar. It is evident that the case made for the Anderson School in 2015 relied, at least in part, on the needs of ASD children in Essex, and in particular western Essex **[34, 42, 43, 68, 71]**. Before its closure in 2020, nearly half of the School's pupils were drawn from Essex **[42, 54]**. However, the Agreement itself makes no special provisions in this regard. It does not reserve any quota of places for Essex children, nor does it restrict the School's geographical catchment area in any way. If the School were to be transferred to another autism charity under the terms of the existing subsection 5.7.3 **[1]**, there would be no requirement for the new managing body to give any special priority to Essex. It therefore seems to me that, whilst the School when it was open clearly did serve the purpose of meeting part of Essex's needs, as well as other areas, that was not due to anything specific in the Agreement. In my view it follows that the needs of Essex do not form a specific part of the Agreement's 'useful purpose'.

91. Under LBR's management, ECC and parents of Essex children would still have the right to apply for places at the Anderson School **[28, 54]**. But such places would only be available in the context of LBR's proposed new operating model, including the School's proposed role as a satellite of other existing LBR schools, with a restricted age range, but a broadened range of ability, embracing ASD pupils with other SENs **[35, 45, 51]**. Making places available to Essex pupils on this basis might meet the needs of some of those children, but would not necessarily align with ECC's priorities, having regard to the expected pattern of need and other facilities available **[45]**. Under such an alternative approach, it seems likely that the Anderson School would no longer be geared to meet the needs of the Essex children who previously attended it, or those of similar cohorts from Essex in the future. The School might possibly become suitable for some other ASD pupils from Essex who previously did not fit its entry profile, but ECC does have at least some existing or planned provision for those cases already **[42]**. Overall therefore, the take-over of the Anderson School by LBR would be likely to result in some reduction in the options available to ASD pupils and parents in Essex.

92. However, on the basis of the submissions before me, it is clear that ECC is not alone in struggling to keep up with the increasing demands made on its services for children with all forms of SEN, including ASD **[25, 51, 52, 58]**. LBR makes an equally powerful case, that existing special schools in Redbridge are either at or approaching capacity, and that all available forecasts suggest that the pressure on such schools will continue to increase with rising numbers of cases **[51]**. I see no reason to doubt this evidence, nor to question that LBR's proposed plan to take over the Anderson School represents for them the best available option for tackling this situation. Indeed it seems probable that these same issues are mirrored in other nearby local authority areas. In planning terms, the need for ASD facilities is evidently a pressing one, regardless of which area or areas they are likely to mainly serve. In the present case I see no clear basis for prioritising the needs of Essex above those of any other area.

93. In the light of these considerations, I see no reason to depart from my earlier finding, that securing provision specifically for the needs of Essex was not part of subsection 5.7.3's original useful purpose **[90]**. Nor do I find any clear grounds to consider that aim to have become part of the subsection's purpose since then; the prospect of the School being transferred to LBR does not change this analysis. None of these matters causes me to depart from my earlier conclusion, that the modifications to the Agreement, as now proposed, would leave the obligation in subsection 5.7.3 equally able to continue to serve its purpose in the future as it does in its present form.

Other matters

94. Although the School is located in an area of Green Belt, the proposed changes to the S.106 Agreement would not involve carrying out any further development. The appeal proposal would therefore have no effect on the Green Belt, and is not affected by Green Belt policies. Consequently the proposal would involve no conflict with either Policy GB2A of the adopted LP or Policy DM4 of the draft LP **[23, 24]**.

95. Whilst the appeal proposal would potentially allow changes to the School's admissions policy and teaching methods, it would remain as a school for pupils

diagnosed with ASD **[79]**. There would therefore be no loss of any community facility, and no resulting conflict with adopted LP Policy CF12 or draft LP Policy D4 **[23,24]**.

96. Although draft LP Policies D1 and D2 are cited in EFDC's refusal notice, neither of these policies been referred to in any party's submissions, and their relevance to the appeal has not been explained. Both policies appear to relate to infrastructure provision to serve new development. In my view they have no bearing on the appeal.

97. I note the apparent suggestion by some objectors that the appeal proposal gives reason to doubt the merits of the original decision to grant planning permission in 2015, or indeed the motives of some of those involved **[66, 72]**. From the evidence presented, I am satisfied that such doubts have no basis of any kind in any of the evidence before me now. Likewise, I see no basis for any suggestion of any deliberate abuse of the planning system. But in any event, the present appeal must be considered on its own merits.

98. I fully understand the views expressed by some parties regarding what they see as shortcomings in the process adopted by NAS, in selecting LBR as their preferred bidder and future partner. However, that process would appear to be primarily a matter for NAS, as the owner of the land. I note the views expressed that there might be other potential operators or arrangements that could have been explored, possibly including options that would not have required any change to the S.106 Agreement. But there is nothing in the relevant legislation that requires an exhaustive consideration of other alternatives. Under Section 106A of the Act **[20]** it seems to me that it is sufficient for the appellant to show that the proposed changes would leave the obligation's useful purpose intact.

99. I have paid regard to the alternative or additional amendments to the Agreement suggested by ECC **[48]**. But these do not appear to have been the subject of any consultation, and are not part of the proposal that is before me. In any event, for the reasons explained above, I have come to the view that the wording proposed by the NAS is acceptable. It is therefore not necessary for me to consider any further alternatives.

100. Any matters relating specifically to the conduct of charities, in relation to their duties under the relevant Charities Acts, including any current or future reference to the Charities Commission **[73]**, are outside the scope of this appeal.

Conclusion

101. As set out above, I have found that by setting some limit on the type of organisation that may run the Anderson School, subsection 5.7.3 of the Agreement serves a useful purpose, in that it helps to underpin subsection 5.7.2 in support of the School's role in providing education services for persons with ASD **[78, 79]**. In my view that purpose has not changed as a result of any subsequent events **[80, 88, 89, 93]**. The obligation therefore continues to serve the same useful purpose.

102. The proposed modifications to subsection 5.7.3, and the related change to Recital Clause 1.1, would widen the range of eligible bodies, but would retain

an appropriate degree of control **[81, 82]**. In combination with subsection 5.7.2, which would remain unaltered, the amended obligation would continue to be effective in serving its current purpose.

103. None of the other matters raised changes these conclusions **[94 – 100]**.

104. I therefore conclude that the appeal should be allowed, and that the proposed modifications to the Agreement be given effect.

Recommendation

105. I hereby recommend that the appeal be allowed, and that the Section 106 Agreement dated 26 March 2015, relating to planning permission Ref. EPF/0853/14, shall thereafter have effect subject to the following modifications:

In Clause 1.1: amend the definition of 'ASD School', by deleting the words *"…and which will be managed by the National Autistic Society"*;

And after those deleted words, add:

"ASD School Provider: An organisation regulated by Ofsted, or its statutory successor, providing education to children and young adults with Autistic Spectrum disorder".

In Section 5.7: delete the existing *Clause 5.7.3* in its entirety;

and replace with:

"That the School will be managed and run by an Autistic Spectrum Disorder (ASD) school provider"

J Felgate

INSPECTOR

Department for Levelling Up, Housing & Communities

www.gov.uk/dluhc

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial Review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand,London,WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS

The decision may be challenged by making an application for permission to the High Court under section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act
With the permission of the High Court under section 288 of the TCP Act, decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application for leave under this section must be made within six weeks from the day after the date of the decision.

SECTION 2: ENFORCEMENT APPEALS

Challenges under Section 289 of the TCP Act
Decisions on recovered enforcement appeals under all grounds can be challenged under section 289 of the TCP Act. To challenge the enforcement decision, permission must first be obtained from the Court. If the Court does not consider that there is an arguable case, it may refuse permission. Application for leave to make a challenge must be received by the Administrative Court within 28 days of the decision, unless the Court extends this period.

SECTION 3: AWARDS OF COSTS

A challenge to the decision on an application for an award of costs which is connected with a decision under section 77 or 78 of the TCP Act can be made under section 288 of the TCP Act if permission of the High Court is granted.

SECTION 4: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the Inspector's report of the inquiry or hearing within 6 weeks of the day after the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.