

yvonneparker@programmeofficers.co.uk

Tel: 01484 221000

Email: sandra.haigh@kirklees.gov.uk
www.kirklees.gov.uk

21 January 2022

Our Reference: PLA/SJH/GDM/D114-163
Your Reference:

Dear Ms Parker

NATRAN/YH/S247/4377

I write further to recent emails and as requested enclose the Council's comments on the submitted Unilateral Undertaking.

Applicability/appropriateness of Section 106 in this matter

Section 106 of the Town & Country Planning Act 1990 (as amended) states:-

Any person interested in land in the area of a Planning Authority may by agreement or otherwise, enter into an obligation (referred to in this section and section 106A as a planning obligation enforceable to the extent mentioned in subsection (3))

- (a) Restricting the development or use of the land in any specified way;
- (b) Requiring specified operations or activities to be carried out, in, on, under or over the land;
- (c) Requiring the land to be used in any specified way; or
- (d) Requiring a sum or sums to be paid to the Authority on a specified day or dates periodically.

The Planning Obligation must identify the land in which the person entering the land is interested and identify the persons interest in the land.

Submitted title WYK448872 shows the extent of the land owned by Richard Butterfield and this does not include the Highway verge. The Council is unclear on the basis upon which this undertaking is given in relation to the highway verge.

Use of a unilateral obligation with bilateral obligations

A unilateral undertaking is not suited to a complex transaction including those that require covenants from the Local Authority since the Authority is not a signatory party. A bilateral agreement covenant which requires for example the payment of a financial contribution by a developer will normally be subject to a reciprocal covenant by the Authority to repay any part of

the contribution which they have not spent within a specified period. It is not appropriate however to include such a “clawback” in a unilateral undertaking because the Authority is not a party to it and not bound by it.

Bilateral clauses, including a clawback clause, appear throughout the submitted unilateral undertaking; including at clauses 4.19, 4.1.9.1 and 4.1.9.2 and in the First Schedule at 1.1.3, 1.1.4, 1.1.5, 1.1.6, 1.1.7.

As the Authority is not a party to the Unilateral Undertaking there can be no covenants on behalf of the Local Authority as the Council is not a signatory and is not bound by the agreement.

Highways Design shortcomings

Highways Design concerns on the initial draft were sent to the applicant’s agent on the 23rd December 2021 (attached at Appendix A) and commented upon by the agent but in the main they have not been addressed in the second submitted draft.

In summary, the council’s highways design team would require a more comprehensive detailed design package from the applicant’s representative for review prior to making further design comments on the proposal and determining associated costs.

By email of 10th January the council wrote to Mr Scanlon clarifying his query that paragraphs 39-43 in the Council’s closing submission accurately reflected the Council’s current position on the Unilateral Undertaking as currently drafted, pointing out that it was still open to him to submit a revised draft Section 106 Unilateral Undertaking that addressed the numerous issues identified with the initial draft.

Essentially the Council’s Highways design team consider that insufficient technical information has been provided.

In response to the council’s emails and council’s tracked changes comments upon the Section 106, the present Unilateral Undertaking was submitted and whilst including a couple of the suggestions (namely enforceability and registration as a land charge) the other points remained unaltered. A sum of £12000 was stated.

Conclusion

In summary the council comments:

- (i) The council disagrees on the appropriateness of section 106 use in this matter as there appears to be no legal interest in the land to be purportedly bound by the applicant.
- (ii) The Council considers that the applicant has no interest in the highway verge since his title and interest in the land is merely adjacent to the verge and as drafted the unilateral would be registered against his property which is next to the highway verge.
- (iii) Disagree on the use of bi-lateral obligation in the purported unilateral agreement.
- (iv) The obligation is insufficient due to lack of technical proposals.
- (v) The lack of technical detail and assessment submitted with the Unilateral Agreement make it impossible for the council to properly assess the development proposed, nor its costings, nor any proposals for its maintenance.
- (vi) The sum of £12000 does not reflect the cost of a footway designed and installed to Kirklees Highways Standards. (See Appendix A)

For ease I attach a copy of the tracked unilateral which highlights the comments between the Council and the agent. The tracked document was provided to the applicant's representative by email dated 10th January 2022.

Yours sincerely

Sandra Haigh

Sandra Haigh
Senior Legal Officer
for Service Director – Legal, Governance and Commissioning

DATED

2021

RICHARD HOWARD BUTTERFIELD

TO

THE METROPOLITAN BOROUGH OF KIRKLEES COUNCIL

**Planning obligation by Unilateral Undertaking pursuant section 106
of the Town and Country Planning Act 1990 relating to the land being
existing highway verges on**

Wolfstones Road, Upperthong, Holmfirth, West Yorkshire HD9 3UU

DRAFT

THIS DEED BY WAY OF UNILATERAL UNDERTAKING is made the _____ day
of _____ 2021

BY

RICHARD HOWARD : of Wolfstone Heights Farm, Wolfstones
BUTTERFIELD Road, Upperrhong, Holmfirth HD9 3UU
("the Owner")

TO

THE METROPOLITAN : of Civic Centre 3, Market Street,
BOROUGH OF KIRKLEES Huddersfield, West Yorkshire HD1 1WG
COUNCIL
("the Council")

BACKGROUND

- (1) The Owner is the freehold owner with title absolute of that part of the Land which is registered at the Land Registry under title number WYK448872 and shown for the purposes of identification coloured blue on the Plan appended to this Undertaking and is the authority by whom the planning obligations in this Undertaking are enforceable.
- (2) The Council is the local planning authority and for the purposes of Section 106 of the Act and is also the highway authority for the purposes of the Highways Act 1980 for the area within which the Verge and the Land and is the authority by whom the planning obligations in this Undertaking are enforceable.
- (3) The Owner has submitted an application to the Secretary of State for Transport pursuant to section 247 of the Act for a stopping up and diversion of part of the Holmfirth Footpath 60 in order to be able to fully implement the Planning Permissions and is providing the Verge Works Contribution to the Council in order that the Council may subject to this planning obligation implement the Verge Works.
- (4) The Owner has agreed to enter into this Undertaking in favour of the Council in order to secure the planning obligations contained in this Undertaking.

Commented [GM1]: Comments added by Georgina McLaughlin (Legal Secretary for Kirklees Council) on behalf of SJH

Commented [NS2R1]: We are not sure what the change or point made here is.

Commented [GM3]: Obligation enforceable by the Council. Part of (2)?

Commented [NS4R3]: Yes, agreed

Commented [GM5]: Obligation enforceable by the Council. Part of (2)?

Commented [NS6R5]: Yes, agreed. Thank you and moved.

AGREED TERMS

1. DEFINITIONS AND INTERPRETATION

In this Undertaking:

- 1.1 the following words and expressions shall have the following meanings unless otherwise stated or the context otherwise provides:

“Act” : means the Town and Country Planning Act 1990 (as amended).

“Application” or “247 Application” : means the application by the Owner to the SoS pursuant to Section 247 of the Act for the Stopping-Up of the Footpath and establishment of the Diversion Route as a public footpath as identified and administered under SoS reference: NATTRAN/Y&H/S247 /4337 which is subject to the Final Order.

Commented [GM7]: Made Order?

Commented [NS8R7]: See definition of ‘Final Order’ – it is the final made order

“Challenge” : means any judicial review or associated proceedings, appeal, statutory or any other legal challenge by any person or persons against the Confirmation of the Application as is more particularly described and set out in Clause 10 of this Undertaking and for the avoidance of doubt this shall also be taken to include any application for such action outside of otherwise permitted timescales pursuant to Rule 3.1 CPR.

“Commenced” or “Commencement” : means the commencement of the Verge Works by the Council or its appointees which for the purposes of this Undertaking shall be taken to mean the carrying out of the full removal of the current surface of the Verge as at the date of this Undertaking or any other activity falling within the definition of the relevant parts of section 56 of the Act so far as they relate to the Verge and the relevant works to the Highway.

“Completed” : means the completion of the Verge Works by the Council such that its physical state is capable of the reasonable interpretation of being complete and capable of being signed-off and maintained by the Council such that it is complete and capable of being used by pedestrians.

Commented [GM9]: ? Unilateral Agreement Council not party to.

Commented [NS10R9]: Correct but respectfully wrong in context. The money is for the Council to use to do the works

Commented [GM11]: ? Made Order?

Commented [NS12R11]: See definition of ‘Final Order’

“Confirm” “Confirming” or “Confirmation” : means approval of the Application by the making of the Final Order by the SoS as notified in the Decision Letter

“CPR” : means the Civil Procedure Rules 1998 as amended.

“Decision Letter” : a letter issued by the SoS or on their behalf either Confirming or Refusing the Final Order.

“Definitive Map and Statement” : means the Kirklees Council Definitive Map and Statement as defined in section 53(1) of the Wildlife and Countryside Act 1981 as presently

exists in its present form at the date of this Undertaking and which is administered and managed and maintained by the Council and which provides a legal record of public rights of way in the Council's area.

Commented [GM13]: Seeking clarification on this wording – Final Order re: Made Order?

Commented [NS14R13]: The DMMO made (but not confirmed by the Council) means that the DMS could be modified in the future – this is to cover that position as we can only rely on the DMS as exists at the time of entry into this UU

- “Diversion Route”** : means the route marked “C” on the Order Plan
- “DMMO”** : means a Definitive Map Modification Order pursuant to the Wildlife and Countryside Act 1981 to widen and confirm the alignment of the Holmfirth Footpath 60 (including in part the Footpath) so far as it exists on land owned by the Owner which was made by the Council on or around 12th July 2021 administered under the Council's Reference: D105-171 and which has been opposed and is at the time of entry into this Undertaking presently being submitted by the Council to SoSEFRA for determination by them and any reference to 'DMMO' in this Undertaking shall if applicable also be construed to mean any modification agreed or otherwise imposed by the SoSEFRA at any time.
- “Final Order”** : means the final order pursuant to the Application made by the SoS and thereby finally Confirming.
- “Footpath”** : means that part of Holmfirth Footpath 60 as identified on the Council's Definitive Map and Statement which is proposed for Stopping-Up as identified between the points “A” and “B” on the Order Plan and replaced with the Diversion Route.
- “Future DMMO”** : means any definitive map modification order or orders or other application or applications by any person following the date of this Undertaking relating alternation physical or legal in relation to the line position or description of the current Holmfirth Footpath 60 so far as it exists in its present line at the date of this Undertaking and unconnected to the Diversion Route.
- “Highway”** : means Wolfstones Road which is adopted highway and on which the Verge is situated
- “Holmfirth Footpath 60”** : means the footpath identified as such on the Council's Definitive Map and Statement which includes the Footpath

- “Index”** : means the ‘All Items’ Index of Retail Prices issued by the Office of national Statistics or any successor (or equivalent index should the Index cease to be compiled) and if the basis of computation of the index shall change any official reconciliation between the two bases of computation shall be binding upon the parties hereto and shall be applied in adjusting the application of the index hereto. In the absence of any such official reconciliation such adjustments shall be made to the figures of the index as to make it correspond as nearly as possible to the previous method of computation and such adjusted figures shall be used to the exclusion of the actual published figures (until officially reconciled figures are published).
- “Index-Linked”** : means increased in accordance with the following formula:
- Amount payable = the relevant contribution x (A/B) where:
- A = the figure for the Index that applied immediately preceding the date the payment is due.
- B = the figure for the Index that applied when the index was published in January 2016.
- $\frac{A}{B}$ is equal to or greater than 1.
- “Land”** : means the land owned by the Owner under HM Land Registry number: WYK448872 as shown edged blue on the Plan on which the Diversion Route is situated.
- “NMAs”** : means non-material amendments to the Planning Permissions granted under Council (as Local Planning Authority) reference numbers: 2018/93302 and 2018/93277 pursuant to Section 96A of the Act.
- “Order Plan”** : means the plan made in draft by the SoS provided for ease of reference with this Undertaking at Appendix 2 [for reference only or any replacement Order Plan that may be required by the Inspector.](#)
- “Planning Permission”** : planning permissions subject to conditions to granted by the Council as Local Planning Authority under Local Planning Authority

reference numbers: 2014/92814 and 2017/92374 as amended by the NMAs and 'Planning Permissions' and 'Permissions' shall be construed accordingly.

- “Plan”** : means the plan attached to this Undertaking at Appendix 1 showing the Land edged blue and the Verge shaded red compiled by Messrs ADP and titled: 'Plan Referred To' allocated with drawing number: 13072D-206-P01 and dated: 15.10.21.
- “Refusal” “Refused” or “Refusing”** : means a refusal to make the Final Order as notified in the Decision Letter [such that the Final Order is not made](#).
- “SoS”** : means the Secretary of State for Transport (through the Department for Transport) or their delegates or such other Secretary of State or department allocated with related functions associated with this Undertaking from time to time.
- “SoSEFRA”** : means the Secretary of State for Environment Food and Rural Affairs through the Department for Environment Food and Rural Affairs or their delegates or such other Secretary of State or department allocated with related functions associated with this Undertaking from time to time.
- “Stopping Up”** : means the stopping up of the Footpath as part of the Application and a reference to “Stopping-Up” shall be construed in a like manner.
- “Undertaking”** : means this document, including the schedules, [plans](#) and appendices. ~~[as may be amended, modified or supplemented from time to time in accordance with its terms].~~
- “Verge”** : means the highway verge on the easternmost side of the Highway in two sections as identified and shown shaded red on the Plan and a reference in this Undertaking to “Verges” shall be construed accordingly.
- “Verge Works”** : means the proposed works to the Verge as identified in the Second Schedule to be carried out by the Council or its appointees following payment of the Verge Works Contribution by the Owner in accordance with and subject to the conditions and parameters of this [Undertaking](#).

Commented [GM15]: Querying this wording

Commented [NS16R15]:

Commented [GM17]: Unilateral Undertaking which the Council is not a party to or its appointees

Commented [NS18R17]: No it is not, but again the position is that the money is given to the Council for it to carry out the works as Highway Authority/LPA

“Verge Works Contribution” : means the sum of [~~£12,000.00~~ ~~TBC (Twelve Thousand Pounds)~~ ~~AMOUNT IN WORDS~~] to be paid by the Owner to the Council in accordance with and subject to the terms of this Undertaking ~~solely for the Verge Works~~ and which shall be Index-Linked from the date of this Undertaking.

“Working Day” : any day from Monday to Friday (inclusive) that is not Christmas Day, Good Friday or a statutory Bank Holiday.

2. CONSTRUCTION OF THIS UNDERTAKING

- 2.1 Where in this Undertaking reference is made to any clause, paragraph or schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph or schedule or recital in this Undertaking.
- 2.2 Clause headings shall not affect the interpretation of this Undertaking.
- 2.3 Words importing the singular meaning where the context so admits include the plural meaning and vice versa.
- 2.4 Words of the masculine gender include the feminine and neuter genders and words denoting or referencing persons or actual persons include companies, corporations and firms and organisations and all such words shall be construed interchangeable in that manner.
- 2.5 Wherever there is more than one person named as a party and where more than one party undertakes an obligation all their obligations can be enforced against all of them jointly and severally unless there is an express provision otherwise.
- 2.6 An obligation in this Undertaking on a person not to do something includes an obligation not to agree or allow that thing to be done.
- 2.7 Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it.
- 2.8 References to any party to this Undertaking shall include the successors in title to that party and to any person deriving title through or under that party and in the case of the Council the successors to their respective statutory functions.
- 2.9 The headings and contents list are for reference only and shall not affect construction.

3. THE PLANNING OBLIGATIONS

- 3.1 This Undertaking constitutes a planning obligation for the purposes of section 106 of the Act and should at its discretion and/or as applicable also be construed by the Council pursuant to section 1 of the Localism Act 2011 and any other relevant enabling powers.
- 3.2 The obligations set out in the First Schedule of this Undertaking constitute planning obligations for the purpose of section 106 of the Act and the planning obligations are to be discharged by the Owner and are enforceable against them and any person deriving title through them under them or otherwise from them (subject always to clause 5.1 and 5.2).
- 3.3 This Undertaking shall only come into effect upon the Confirmation of the Final Order with the exception of the obligations contained in clause [9 and 11] which shall come into effect on the date of this Undertaking.

~~3.3.4~~ This Undertaking is capable of and may be registered as a local land charge by the Council.

4. COVENANTS TO THE COUNCIL

- 4.1 The Owners covenant with the Council to observe and perform the covenants and obligations on their part contained within the First Schedule subject always to the conditions elsewhere in this Undertaking and specifically for the purposes of this Clause 4 the following conditions:
- 4.1.1 Where the Final Order shall be the subject of any Challenge then this Undertaking shall be of no effect unless and until such time as the conditions set out in Clause 10 may allow.
- 4.1.2 Where the Application is Refused and therefore the Final Order is not finally made then this Undertaking shall be of no effect and for the avoidance of doubt this Undertaking shall remain of no effect in the event that the Refusal is subject to legal or other challenge by the Owner or any person regardless of the outcome of such legal or other challenge.
- 4.1.3 Where the DMMO shall subsist in its present made but unconfirmed state at the date of this Undertaking and in the reasonable opinion of the Owner or the Council or both prevents the Final Order from being lawfully implemented then this Undertaking shall be of no effect unless and until such time as sub-clause 4.1.8 below shall apply.
- 4.1.4 Where the DMMO shall not be confirmed by SoSEFRA or another and such non-confirmation is subject to any legal or other challenge by any person then this Undertaking shall be of no effect until such time as all legal and other proceedings are completely exhausted by such persons and the DMMO shall following such proceedings remain not confirmed following the conclusion of such proceedings unless and until such time as sub-clause 4.1.8 shall apply.

Commented [GM19]: Not made?

Commented [NS20R19]: See the definitions of 'Final Order' and 'Refused'

- 4.1.5 Where the DMMO shall be confirmed by the SoSEFRA then this Undertaking shall be of no effect unless and until such time as clause 4.1.8 below shall apply.
- 4.1.6 Where any Future DMMO shall be submitted by any persons following the date of this Undertaking then this Undertaking shall be of no effect unless and until such time as sub-clause 4.1.8 below shall apply.
- 4.1.7 Where the SoS or the Inspector shall expressly or otherwise confirm in the Decision Letter that the Verge Works Contribution is not necessary or is for any reason in their view not required or the Decision Letter is silent or ambiguous or otherwise uncommitted on the issue of the Verge or the Verge Works or the Verge Works Contribution (or a combination of these) then this Undertaking shall be of no effect unless clause 4.1.8 below shall apply.
- 4.1.8 Notwithstanding sub-clauses 4.1.3 to 4.1.7 above the Owner may entirely at their discretion and for any or no reason still pay the Verge Works Contribution to the Council and where the Owner shall pay the Verge Works Contribution under this sub-clause 4.1.8 the remainder of this Undertaking shall apply and shall remain enforceable by the Council as if the Owner had been required to pay the Verge Works Contribution in accordance with any other provision of this Undertaking UNLESS any part of this Undertaking expressly or implicitly provides to the contrary or alternative.
- 4.1.9 Where the Verge Works Contribution shall have been paid by the Owner to the Council in accordance with this Undertaking at any time then in the case where the Verge Works shall not have been Commenced and it is subsequently discovered or otherwise transpires or is believed in the reasonable opinion the Owner that the DMMO (whether in the current made or SoSEFRA or other confirmed or unconfirmed form) or any Future DMMO may for any reason prevent the Final Order from being implemented or otherwise render the works incapable of lawful implementation (temporarily or permanently, explicitly or implicitly, directly or indirectly) then the Owner shall provide notice in writing to the Council and in such a case:
- 4.1.9.1 the Verge Works shall not be Commenced; and
- 4.1.9.2 the paid Verge Works Contribution shall be returned to the Owner in full together with any interest accrued.

Commented [GM21]: ? querying inclusion in a unilateral agreement

Commented [NS22R21]: Perfectly normal for the avoidance of any doubt – conditionality in a s106

Commented [GM23]: Querying inclusion in that this is a unilateral agreement.

Commented [NS24R23]: Apologies, we don't understand the concern.

Commented [GM25]: Appears to be a bi-lateral clause in the unilateral agreement

Commented [NS26R25]: No, simple conditionality

Commented [GM27]: Appears to be a bi-lateral clause in the unilateral agreement

Commented [NS28R27]: No, simple conditionality – the Council cannot expect to hold on to monies where it elects not to carry out the associated works

Commented [GM29]: Querying these clauses in a bi-lateral agreement in that the Council is not party to the Agreement

Commented [NS30R29]: No, simple conditionality

5. ENFORCEABILITY

The obligations imposed on the Owner at clause 4 are also conditional upon the following:

- 5.1 The Council not seeking to enforce any breach of a covenant, restriction or obligation contained in this Undertaking against any person after such person has parted with its interest in the Land except in respect of any breach subsisting prior to parting with such interest and neither the reservation of any rights or the inclusion of any covenants or restrictions over the Land in any transfer of the Land will constitute the retention of an interest for the purposes of this clause.
- 5.2 The Council not seeking to enforce any provision of this Undertaking against -
- 5.2.1 any occupier, tenant, licensee or mortgagee of a dwelling or other unit on the Land which may or may not exist at the date of this Undertaking; or
- 5.2.2 a statutory undertaker (within the meaning of section 262 of the Act) who acquires any interest in the Land.

5.3 The obligations in this Undertaking ceasing to have effect if:

5.3.1. The Planning Permissions are revoked or otherwise modified in accordance with the Act or other legislation;

5.3.2. The Application is withdrawn.

6. FUTURE PERMISSIONS

Nothing in this Undertaking shall prohibit or limit the right to develop any part of the Land in accordance with any planning permission (other than the Planning Permissions or modification, variation or amendment or derivative thereof) granted before or after the date of the Final Order.

7. NOTICES

7.1 Any notice required to be given under this Undertaking shall be in writing and shall be delivered personally, or sent by pre-paid first class post or recorded delivery or by commercial courier, to any person required to receive the notice or communication at its address or as otherwise specified by the relevant person by notice in writing to each other person.

7.2 Any notice shall be deemed to have been duly received:

7.2.1. if delivered personally, when left at the address set out in this Undertaking;

7.2.2. if sent by pre-paid first class post or recorded delivery, on the second Working Day after posting; or

7.2.3. if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.

Commented [GM31]: Seeking clarification as to the inclusion of modified.

Commented [NS32R31]: Section 97 TCPA 1990 obviously contains the powers to revoke or modify planning permissions

Commented [GM33]: Querying inclusion in that the land does not contain the verge

Commented [NS34R33]: The point is noted and well made. However, this is in for the avoidance of any doubt.

8. MISCELLANEOUS

Nothing contained or implied in this Undertaking shall prejudice or affect the rights discretions powers duties and obligations of the Council under all statutes by-laws statutory instruments orders and regulations in the exercise of their functions as a local authority.

Commented [GM35]: Querying inclusion in that this is a unilateral agreement not a bi-lateral agreement.

Commented [NS36R35]: This can be included and moreover is common to and properly included in a unilateral undertaking – it is a simple ‘non-fetter’ provision for the avoidance of doubt. Unless the Council is considering that it needs it to be removed for another reason – in which case do please inform us.

9. CHANGE OF OWNERSHIP

The Owner covenants to give the Council written notice within 10 (ten) Working Days of any change in freehold ownership in the Land or part of the Land occurring before all the obligations under this Undertaking have been discharged such notice to give details of the transferee’s full name and registered office (if a company or usual address if not) together with the area of the Land or unit of occupation purchased by reference to a plan save for the transfer of any individual Dwelling.

10. CHALLENGE

10.1 Where the Application is Confirmed and therefore the Final Order is made and is for any reason the subject of any Challenge the following conditions shall apply:

10.1.1. this Undertaking shall be of no effect until such time as such proceedings or Challenge including any appeal or appeals have finally been resolved;

10.1.2. where or if following the conclusion of such proceedings or Challenge including any appeal or appeals have finally resolved the Final Order remains confirmed and unaltered then the timescale requirement to make the Verge Works Contribution in accordance with paragraph 1.1 of the First Schedule shall begin on the day following the conclusion of such proceedings;

10.1.3. if following the conclusion of such proceedings or Challenge the Final Order is quashed then this Undertaking will cease to have any further effect as from the date upon which the Final Order is quashed.

10.2 Wherever in this Clause 10 or elsewhere in this Undertaking reference is made to a date on which legal proceedings or Challenge in relation to the Final Order are concluded (or cognate expressions are used or could reasonable be construed), the following provisions have application:

10.2.1 proceedings by way of judicial review are concluded:

(a) when permission to apply for judicial review has been refused and no further application can be made; or

- (b) when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or
- (c) when any such appeal is finally determined with no further recourse to any other court of appeal or other court or alternative dispute resolution or the timescale for such continuation has lapsed and is incapable of being received by any court or alternative dispute resolution body or person;

10.1.2 proceedings under or in respect of any other Act of Parliament legal challenge are concluded:

- (a) when permission (if applicable) to bring any such proceedings has been refused and no further application may be made; or
- (b) when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or
- (c) when any appeal is finally determined with no further recourse to any other court of appeal or other court or legal challenge or alternative dispute resolution or the timescale for such continuation has lapsed and is incapable of being received by any court or alternative dispute resolution body or person.

11. THIRD PARTY RIGHTS

No provisions of this Undertaking shall be enforceable under the Contracts (Rights of Third Parties) Act 1999.

12. SEVERANCE

Insofar as any clause or clauses or schedule or schedules or any parts of the same of this Undertaking are found (for whatever reason) to be invalid, illegal or unenforceable, then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions or if applicable any part or parts of this Undertaking.

13. INDEXATION AND VAT

13.1 Any sum to be paid to the Council under Schedule 1 shall be increased by an amount equivalent to the increase in the Index from the date of this Undertaking until the date on which such sum is paid calculated in accordance with the formula specified in the definition of Index Linked.

13.2 All consideration given in accordance with the terms of this Undertaking shall be exclusive of any value added tax properly payable.

14. JURISDICTION

This Undertaking is governed by and interpreted in accordance with the law of England and the parties submit to the non-exclusive jurisdiction of the courts of England.

15. DELIVERY

The provisions of this Undertaking (other than this clause which shall be of immediate effect) shall be of no effect until this Undertaking has been dated.

IN WITNESS whereof the parties hereto have executed this as Undertaking a deed on the day and the year first before written.

DRAFT

FIRST SCHEDULE – COVENANTS BY THE OWNER

The Owner covenants with the Council as follows –

1. VERGE WORKS CONTRIBUTION

1.1 That in the case that the Application is Confirmed and the Final Order is made (SUBJECT ALWAYS to the conditions in Clause 4 and sub-clause 5.3 of this Undertaking and the conditions below in this paragraph 1.1 of this First Schedule) then during the period and at any time within ~~165~~ sixteen calendar weeks from the day following the date of the Confirmation of the Final Order, to pay the Verge Works Contribution to the Council PROVIDED THAT (and subject always to the provisions of this Undertaking):

1.1.1 there shall have been no Challenge filed or otherwise actioned (and Challenge for the purposes of this First Schedule shall include where applicable pre-action or preliminary or proposed alternative dispute resolution) in relation to the Confirmation and where such a Challenge shall have been filed then Clause 10 of this Undertaking shall apply;

1.1.2 none of the conditions of Clause 4 of this Undertaking shall apply (save for sub-clause 4.1.8 where the Owner may still at their discretion pay the Verge Works Contribution to the Council notwithstanding the remainder of Clause 4.1);

1.1.3 the Verge Works Contribution is provided on trust that it shall be applied by the Council specifically and only towards the Verge Works and for no other purpose whatsoever;

1.1.4 the Council is able to account for the expenditure of the Verge Works Contribution on the Verge Works within 14 (fourteen) days of any written request from the Owner to do so;

1.1.5 where the Verge Works shall not have been Commenced within six (6) calendar months from the date of payment of the Verge Works Contribution under this Undertaking then the Verge Works Contribution shall be returned to the Owner (or if applicable in the event of a transfer of the Land shall be returned to the person that paid the Verge Works Contribution) immediately and in full together with any interest that shall have accrued.

1.1.6 where the Verge Works shall not have been Completed by the Council or its appointees within one (1) calendar year (being 12 (twelve) calendar months) from the day following the date of payment of the Verge Works Contribution under this Undertaking then the Verge Works Contribution or any part unspent shall be returned in full to the Owner within 14 (fourteen) days together with any interest that shall have accrued.

1.1.7 Where sub-clause 5.3.1 shall apply for any reason (Planning Permissions are revoked or otherwise modified in accordance with the

~~Act or other legislation~~) or there shall have been a Challenge utilising Rule 3.1 of the CPR following the payment of the Verge Works Contribution then the Verge Works Contribution shall be returned in full to the Owner together (if applicable) with any interest that shall have accrued whether or not the Verge Works shall have Commenced or shall have been Completed.

Commented [GM37]: This is a unilateral agreement and it cannot bind the Local Planning Authority as the LPA is not party to the Agreement.

Commented [NS38R37]: I am afraid that this is wrong in this case. The Council receive monies under a planning obligation for specific works and nothing else. There is clear case law on this position should you wish for me to cite it, though I am sure that you will be familiar. Minor changes are made, but otherwise this will stay. For the Council to utilise monies for purposes outside the parameters of the planning obligation is a financial irregularity, as I am sure you are also aware.
In addition, the Council is unable to hold on to surplus and thereby unused monies generated from a planning obligation for a specified purpose.

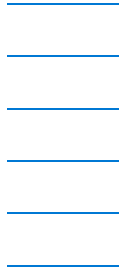
DRAFT

SECOND SCHEDULE – VERGE WORKS

Commented [GM39]: Separate comments attached
Commented [NS40R39]: Should these be the comments in your covering email, that is noted. Otherwise, please supply these for consideration.

1. The schedule works for the Verge Works shall consist of the following:
 - 1.1 Turf-strip removal of existing turf to existing Verges across entire length and width (but no greater than this)
 - 1.2 The removal of the under-soil and stone to a 200mm depth whichever across the entire existing length and width of the Verges (but no greater than this) with no intervention on the existing Highway surface including the accessway to Wolfstone Heights on the Land which bisects the Verges
 - 1.3 Compacted stone sub-base material that is permeable and suitable for a the 'Cellpave 40' cellular lattice paving grid as identified or similar to that supplied at: <https://www.groundtrax.com/cellpave-40-porous-plastic-pavers/> backfilled to 150mm depth
 - 1.4 Application of membrane and topsoil bedding layer to across entire length of Verges on top of sub-base material to 50mm depth.
 - 1.5 Heavy grass-seeding application of topsoil bedding layer
 - 1.6 Application of the cellular lattice paving grid compacted into the seeded topsoil bedding layer to meet flush with the existing Highway surface not forming part of the Verges.
2. In the alternative to paragraph 1 of this Second Schedule the Council may use the Verge Works Contribution to carry out such works to the Verge as the Council's Highways Engineers shall in their reasonable professional opinion consider necessary or appropriate in the circumstances to provide a permeable system with firmer alternative surface to the Verge Works identified in paragraph 1 of this Second Schedule which shall be suitable for a rural road of this nature but the Owner shall not be liable for any further costs above the Verge Works Contribution should the Council elect alternative Verge Works (the 'Alternative Verge Works').
- ~~3.~~ For the avoidance of doubt where the Council shall elect to provide the Alternative Verge Works under paragraph 2 of this Second Schedule utilising the Verge Works Contribution then the conditions in this Undertaking and in the particular the First Schedule in relation to the Verge Works Contribution shall apply instead to the Alternative Verge Works in the same way that they would have applied to the Verge Works~~continue to apply~~.
- ~~4.~~

5-3



DRAFT

**APPENDIX 1
PLAN**

DRAFT

**APPENDIX 2
ORDER PLAN**

DRAFT

EXECUTED as a deed by **RICHARD**)
HOWARD BUTTERFIELD in the)
presence of)
)

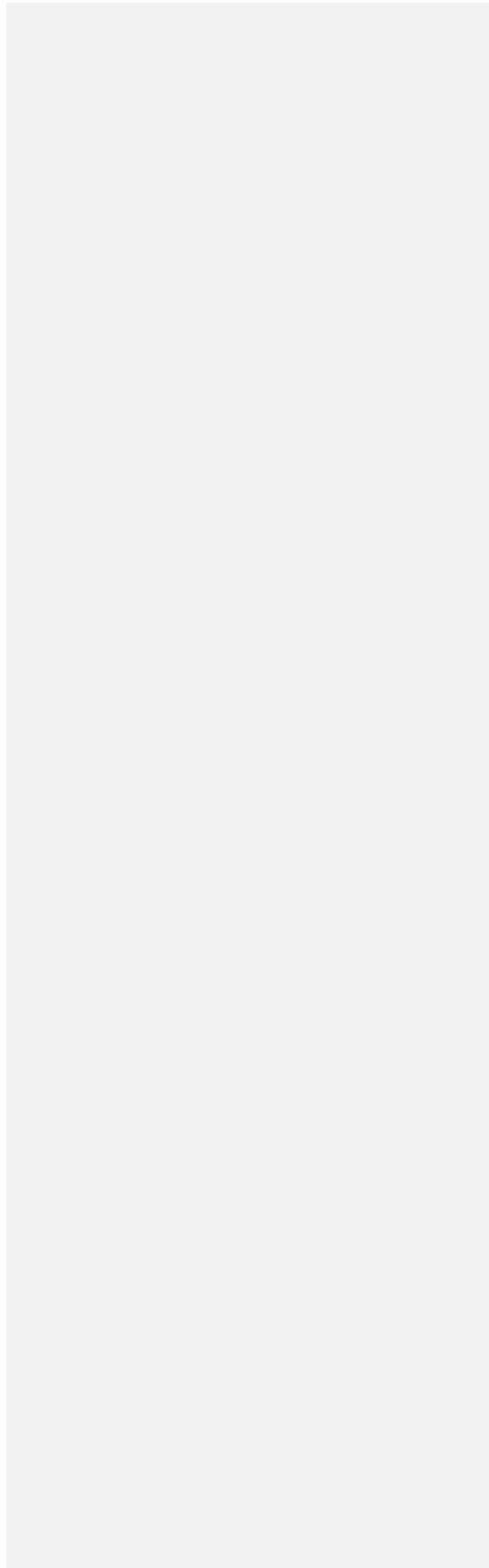
.....
Witness Signature

Witness Name:

Witness Address:

Witness Occupation:

DRAFT



Appendix A

S.106 Unilateral Undertaking – proposed ‘improvements’ to the verge on Wolfstones Road, Netherthong.

1. Comments from Highway Design following consideration of the information provided in the Initial Draft s106 Unilateral Undertaking (December 2021):
 - Is the client’s representative putting forward a proposal for a shared area for the verge (pedestrians/vehicles) as this is not clear? If it is a shared area, then this has significant safety issues for pedestrians
 - If the proposal is for a pedestrian footway, then this requires a kerb, as per the council’s standard details. (consideration to pedestrian safety is of paramount concern)
 - The cellular material proposed adjacent to existing carriageway would require a suitable edging/kerbing to keep the cellular material in place. (however, this is not standard construction for a pedestrian footway)
 - The client’s representative makes reference to the Cellpave 40 data sheet, which also refers to Dot Type 1 sub-base being used provided that an adequate drainage system is installed. However, the client’s representative has not made reference to any form of drainage to be installed.
 - CBR information is required
 - Vehicle traffic flow information required
 - Stage 2 RSA required to support the proposal
 - The Highways design team would require a more comprehensive detailed design package from the client’s representative for review prior to making further design comments on the proposal and determining associated costs.
 - Discussion with asset management and Highways Registry would also be required to ascertain maintenance regimes and the legalities of the proposal.

2. Comments from Highway Design following consideration of the information provided in the Final Draft s106 Unilateral Undertaking (January 2022):
 - Based upon the submission of the S106 final draft and the lack of detail submitted we stand by our initial comments, therefore there is no change in our position regarding the acceptability of this scheme.
 - The sum of £12,000.00 does not reflect the cost of a footway designed and installed to Kirklees Highway Standards. Cellpave - 40 is not standard construction for a pedestrian footway