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Dear Ben

**LAND AT BARNFIELDS ROAD AND SUNNYHILLS ROAD, CORNHILL, LEEK, ST13 5RJ: FORMAL REQUEST FOR AMENDMENTS TO SECTION 106 AGREEMENT ATTACHED TO PLANNING PERMISSION SMD/2014/0750 (SECTION 106A TOWN AND COUNTRY PLANNING ACT 1990)**

Further to our ongoing discussions in relation to the above site Avison Young (AY) have been formally instructed to submit a request to the Council proposing a series of amendments to the Section 106 Legal Agreement attached to Outline Planning Permission SMD/2014/0750. This submission follows earlier discussions with the Council which identified the requirement to submit a full development viability appraisal to support the changes sought.

**Context to the Request**

On 17 August 2015 the Council granted Outline Planning Permission on the above site for the following description of development:

*"Demolition of former industrial buildings and redevelopment of site comprising: residential (Use Class C3 up to 175 dwellings) with associated open space, play area and cycle links; live/work units (up to 2,000 sqm), employment units (Use Class B1c/B2 up to 1847 gross sqm including Mezzanine); tourism and leisure uses including a Marina/basin and associated boating facilities (up to 20 berths); reserved land for future railway station with associated heritage/railway activities building including tourist/local needs retail unit (Use Class D2/A1 up to 394 gross sqm); public house/restaurant (Use Class A3/A4 up to 340 sqm) including associated car parking and servicing; reserved land for future link road including associated landscaping."*

The Council granted planning permission subject to a number of conditions in addition to a Section 106 Legal Agreement (the Legal Agreement) which is dated 14 August 2015. The Legal Agreement sets out a number of requirements including:

- Provision of public recreation and open space.
- The requirement to submit applications for a Network Access Agreement to the Canal and River Trust prior to the occupation of any more than 25% of the dwellings and the

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construction of a Marina basin and connection to the Caldon Canal to be in place prior to any more than 50% of the dwellings being occupied.

- To reserve land identified for a railway station hub for a minimum period of 7 years following the commencement of development.
- Viability reassessment clause (in the acknowledgment that the proposed development is associated with significant viability issues).
- Land to be reserved for the facilitation of part of a future link road which would connect the A53 via Sunnyhills Road to the A520 and be delivered by the County Council.
- Provision of £200,000 as the education contribution.

Since the Outline Planning Permission was granted the site owner has entered into a commercial agreement with Casey Group (Casey) who are proposing to take the site forward. The Council will be fully aware of Casey and that the company has delivered a number of high quality developments including residential schemes and has extensive experience and technical knowledge in relation to site remediation and geotechnical matters.

Casey have undertaken a significant amount of due diligence on the site including comprehensive site investigation work and other assessments in order to inform a detailed Development Appraisal. The Council will be aware of this work given that discussions have been ongoing for some time and with the assistance of SMDC various avenues have been explored in order to try and overcome the viability challenge on this site including identifying whether grant funding is available. The key viability issues are referred to in further detail below.

With regards to more recent planning history the Council will be aware that the Outline Planning Permission granted in August 2015 was subject to a 4-year time limit requiring the submission of the first Reserved Matters application by 17th August 2019. The first Reserved Matters application was duly submitted within this time limit and approved on 15th November 2019 for:

*"Reserved Matters application for approval of layout for B1(c), light industrial/B2 general development pursuant to Outline Planning Application SMD/2014/0750."*

The Outline Planning Application Permission is therefore still extant and subject to the amendments requested in this submission it is Casey's intention to submit a further Reserved Matters application for residential development as soon as feasible.

The remainder of this letter sets out the relevant planning policy context, the rationale for the changes proposed including the issue of development viability in addition to formally setting out the amendments which are sought to the Agreement. At this stage it is Casey's intention that the amendments to the Legal Agreement are brought about through a Deed of Variation under Section 106A of the Town and Country Planning Act 1990 (as amended) (the Act). For the avoidance of doubt Casey's legal representation will be engaging with the Council's appointed legal adviser in due course.

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**Planning Policy and Key Viability Issues**

In granting the 2015 Outline Planning Permission the Council was aware of the marginal viability of the site and indeed at that time a detailed viability assessment was submitted for review by the Council's externally appointed consultants. The permission was granted with no affordable housing requirement and in view of the marginal nature of the development only limited Section 106 financial obligations were agreed.

The site was subject to extensive market engagement by the landowner following the grant of planning permission and it became clear that the marginal viability and the obligations surrounding the Marina severely restricted interest in the site. However, Casey entered into an agreement with the owner to develop the site in May 2017 and has since shown an appetite and determination to unlock development; hence the collaborative working with SMDC. The site's delivery has unquestionably been hampered by the significant viability issues and, self-evidently, to the extent that some 5 years since the grant of that permission development is yet to commence.

This is clearly an unfortunate position for the landowner and Casey who are keen to see the site brought forward and equally the District Council for whom the delivery of additional new housing and securing environmental/regeneration improvements and the heritage railway facilities are important objectives. The ability to modify the obligations within the Agreement in order to bring the site forward for development is critically important and we note the policies of the Development Plan permit the consideration of viability matters on a site by site basis (Local Plan Policy H3, Affordable Housing). This is also reflected in the National Planning Policy Framework and Planning Practice Guidance (PPG). PPG states that:

*"Can an agreed planning obligation be changed?*

*Planning obligations can be renegotiated at any point, where the local planning authority and developer wish to do so. Where there is no agreement to voluntarily renegotiate, and the planning obligation predates April 2010 or is over 5 years old, an application may be made to the local planning authority to change the obligation where it "no longer serves a useful purpose" or would continue to serve a useful purpose in a modified way."*[1]

Under the law, section 106B of the Act makes provision for the modification or discharge of a S106 legal agreement:

a) By agreement between the appropriate authority and the person or persons against whom the obligation is enforceable; or

b) In accordance with this section and section 106B.

As mentioned above and recognised in the NPPG, S106 agreements may be renegotiated at any time, but it must be agreed between all those who originally entered into it as an interested party. This is usually through informal application and discussion/negotiation with the Council and contracting parties.

[1] Paragraph: 020 Reference ID: 23b-020-20190315

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Section 106B only applies after 5 years have lapsed from the date of a S106 legal agreement. It is a formal application process and a right of appeal applies in the event of refusal.

The Council has prescribed options when considering a formal application under section 106B, which are set out within the section of the Act:

- No modification; the S106 still serves a useful purpose;
- Discharged; the S106 no longer serves any useful purpose; and
- Modification; the S106 still serves a useful purpose but it could do so accepting the modification sought in the S106B application.

Whilst there are clearly elements of the original proposed development that cause viability concern and might be capable of demonstrating the agreement as a whole as no longer serving a useful purpose[2], the request in this letter is for modification of the S106, not its entire discharge.

*Government Guidance*

On 13 May 2020 the government published guidance to local authorities encouraging them to take a more pragmatic and proportionate approach to the enforcement of planning obligations. Whilst this was in response to the COVID-19 lockdown and to try to deal with delays that might otherwise be seen during a period of non-compliance; missed triggers because of lockdown restrictions, the guidance is termed in such a way that greater flexibility is invited wholeheartedly to "help remove barriers for developers and minimise the stalling of sites".[3] This is clearly relevant in this case.

The Council will be aware of the importance of ensuring the timely regeneration of the site not least due to its identification as a committed site for the purposes of calculating the Council's rolling 5-year Housing Land Supply. It is also the case that there has been little new build housing development within Leek at any significant scale and there is significant planning benefit in the site coming forward from a regeneration perspective and in the context of contributing towards meeting local housing needs and addressing housing affordability issues. Casey is also committed to developing a high quality bespoke housing product that will provide the town with the type of aspirational homes that will attract and retain people with the skills that are vital to support the Council's economic ambitions for the area.

The site has the ability to make a significant contribution to the objectives of Local Plan policy SS3 (Future Provision and Distribution of Development) and is fully in accordance with Policy SS5 which seeks to support the delivery of new housing within the Leek urban area.

The planning merits of the site are well documented and have been dealt with in previous Officers Reports and we understand from previous discussions with the Council that it is keen to see the site come forward in a timely manner. Importantly the site also plays a strategic role in

[2] The term 'useful purpose' is not confined to useful planning purpose; see R (on the application of Mansfield District Council) v Secretary of State for Housing Communities & Local Government & JA Clark [2018] EWHC 1794 (Admin)

[3] https://www.gov.uk/guidance/coronavirus-covid-19-community-infrastructure-levy-guidance#section-106

the context of the Local Plan and specifically its ability to help unlock and facilitate development on land at "Cornhill East" (see Local Plan policy DSL4).

The Local Plan Submission Version under the Vision for Leek States that:

*"Underused and poorer quality areas, such as Cornhill, Newton House and the Churnet Works, will have been regenerated providing new development opportunities and its mill buildings will have been conserved with new uses…. New housing will help to support the role of the town, including the development cluster off Mount Road, which will be supported by necessary infrastructure improvements including education, transport and open space, sport and recreation."*

Paragraphs 9.23 onwards of the Submission Version Local Plan state that:

*"In 2014 the Council adopted the Churnet Valley Masterplan to guide development proposals within this Valley, which is considered to extend from Rushton Spencer/Blackshaw Moor in the north, to Alton in the southeast, and including Leek town. The terminus of the disused Churnet Valley railway line from Leekbrook at Cornhill in the south of the town (where it meets Caldon Canal) is identified as a tourism 'gateway' into the town, and the wider Cornhill area encompassing Barnfields industrial estate to the A52 to the west, as far as the land east of the railway line but west of Britannia House premises is identified as an 'opportunity site' for commercial/ residential/ tourism redevelopment, with concept plan.*

*As per Leek Strategic Spatial Policy SS5, it also supports a potential link road route in between A53 and A520 to allow easier access across the southern side of the town, and to relieve pressure on Junction Road. 9.25 In 2015 the Council approved a major redevelopment scheme on the Cornhill area west of the railway line, to accommodate residential, commercial and tourism-related uses (including boating Marina, railway station and pub/restaurant); crucially this scheme reserved land for a link road to enable continuation east across the railway line to the Britannia House junction with A520."*

Policy DSL4 as submitted to the Planning Inspectorate (Cornhill East) proposes the allocation of around 3ha of land for a mix of uses including employment and residential development. This site must be brought forward in line with a number of development criteria including the need to provide for any transport infrastructure improvements having regard to the Churnet Valley Masterplan. It is clear therefore that the benefits of bringing forward the application site in a timely manner is critical not only for the purposes of delivering the planning permission and much needed new housing but also in a wider sense by contributing towards the Council's aspirations and objectives for the southern part of Leek.

This is because the development facilitates and reserves land (as embodied in the Outline Planning Permission) for the critical link road to the A520. If the development does not commence and the planning permissions lapses this would be a retrograde step with regards to securing regeneration in the area and the catalytic effect this would have in terms of the promotion of Cornhill East and the Council's planned accessibility enhancements.

It is also relevant to highlight here that the delivery of housing and the regeneration of the site will provide the optimal conditions for the Churnet Valley Masterplan objectives (Local Plan Policy SS11) including the Churnet Valley Railway (CVR) project to proceed, which is being progressed by another party. We understand that CVR now has significant funding in place and aspires to create facilities off Barnfield Road as soon as possible. Securing housing delivery is also consistent with the National Planning Policy Framework and the Government's objective to

significantly boost the supply of new homes. The land at Barnfields is importantly both suitable and available for development immediately however its deliverability is currently impinged due to the requirements of the Section 106 Agreement and the overall impact upon viability which is expanded upon below.

**Submitted Planning Viability Statement**

The submitted Viability Statement has been undertaken by Casey with input from its technical team and cost advisors. It provides a comprehensive overview of the development as a whole, the methodology used to undertake the assessment, relevant assumptions and development costs with a clear set of Viability Appraisal results. The report is appended by various documents including a draft Phase 1 Residential Layout and detailed information on infrastructure costs and local market data. The masterplan, as per earlier conversations with the Council, does not contain a Marina as it is simply not viable to deliver this.

In short the report demonstrates that the existing obligation within the Legal Agreement for the development of the wider site to essentially cross fund the delivery and building out of the Marina is not viable. For the avoidance of doubt it is not the purpose of this exercise to extinguish the Marina as an entity from the outline planning consent but rather to "decouple" the various clauses which are linked to occupation of the residential development including the submission of a Network Access Application and for the construction of the Marina prior to 50% of the residents units being occupied.

In summary the Marina represents an additional cost to the development which renders it unviable and therefore development cannot proceed in the context of the current Legal Agreement parameters.

For the avoidance of doubt the methodology utilised for the purposes of the Viability Appraisal has been informed by all relevant guidance. The Council has confirmed that the May 2019 Royal Institute of Chartered Surveyors Guidance (Financial Viability in Planning) should be adhered to. The methodology in respect of benchmark land value and other parameters including development return is in line with national policy and Planning Practice Guidance.

In summary the Viability Report confirms that:

- The landowner (Barnfield Hughes) entered into a Development Agreement with Casey in May 2017 and the parties have been working since this time to resolve the identified viability issues stemming from the Marina obligations including options for pursuing Public Sector Grant support (the Council is already aware of this process).
- The scale of investment required for the delivery of a Marina in the context of the likely net returns does not provide an investable option and cannot be viably cross funded by any other aspect of the development (i.e. residential).
- The Appraisal assumes that the land identified for the heritage railway uses, link road and retail/leisure uses remain as per the outline consent and no changes are sought in this regard.
- The original Viability Appraisal costed the Marina at circa £1.5m however a budget of circa £1.1m was agreed in the final Compromise Appraisal. At the time this generated a net deficit of circa £730,000.

- The submitted Appraisal demonstrates when excluding the Marina, the development profit would be below 20% and with a return of 16.1% on GDV this demonstrates the difficulties in bringing the site forward as it is at the lower end of the acceptable profit range, especially for a constrained site such as this.

The Appraisal goes on to test the impact of a notional 10%, 20% and 33% affordable housing on the scheme and it can be seen that in all scenarios the provision of affordable dwellings is not viable.

In conclusion given the very constrained nature of the site from a geotechnical and remediation perspective and owing to the marginal viability situation which has now persisted over the 5 years since the outline permission was granted it is clear that a fundamental change is necessary in order to allow for development to proceed. The section below sets out the specific amendments to the agreement which we suggest are secured by a Deed of Variation.

**Formal Request to Amend the Section 106 Legal Agreement**

*Redefinition of Commencement of Development Clause*

As identified within the submitted Viability Appraisal the wording of the Commencement of Development definition in the Legal Agreement (page 2) is problematic to the forward funding of the development most notably the ability to carry out site remediation and land remodelling works. As drafted the 'Commencement of Development' definition excludes for the purposes of the Legal Agreement site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions including breaking up of in situ hardstanding, remedial work and works in respect of contamination/drainage/ utilities.

This could result in two different dates being capable of having Commenced Development; one for the purpose of planning permission – noting that the general rule in section 56(4) would apply together with the description of development; and another when the bespoke definition given 'for the purpose of the Legal Agreement' applies.

Casey formally request that the Council considers an amendment to the Commencement definition within the Legal Agreement in order that this simply refers to *"the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Development begins to be carried out ….."*.

This amendment should in our opinion be wholly uncontroversial and will help facilitate the funding of development in the context that the significant remediation and land remodelling works associated with the scheme will have the effect of triggering the obligations that are triggered upon/are calculated from Commencement of Development. AY proposes that the precise wording on this redrafted clause is agreed between the acting solicitors.

*Marina Obligations*

In line with the rationale set out in this Statement and in the associated Viability Appraisal, Casey submits this formal request in line with S106A(b) and S106B of the Act seeking modification of the Legal Agreement; that the obligations to obtain permission from the Canal and River Trust and further obligation to construct and complete the Marina are removed in their entirety. We therefore propose that the Agreement is amended to:

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- Remove the definitions “Canal and River Trust”, “Canal and River Trust new Marina process”, “Marina”, “Marina land”, “Marina land transfer” and “Network Access Arrangement”.
- Deletion of all obligations under and including the heading “Marina” within Schedule 2 – The Owner’s Covenants with the Council.
- The deletion of all text including and underneath the heading “the Marina” within Schedule 4 – Council’s Covenants and appropriate alterations to text under “Other Council Owned Land” within Schedule 4 to remove reference to “Marina Land”.
- Any such other drafting alterations which Casey’s solicitor and/or the Council’s solicitor identifies as being appropriate to include for example provisions under Schedule 6 – Contract and Land Transfer (subsection 1.1).

For the purposes of this submission and whilst Casey do not propose any amendments to the Legal Agreement in relation to the “link road reserved land” they do wish to highlight that notwithstanding this obligation and the provision to make the access land available for a nominal sum (as per Schedule 6 of the Legal Agreement), that this does not affect the owners’ rights for any appropriate compensation if development occurs to the east within the “Cornhill East” development (as identified in the Local Plan).

In conclusion the above alterations are necessary in order to allow for the development to proceed. The alternative “do nothing” scenario would be to maintain the status quo which has seen this key regeneration site lie vacant for well over 5 years and thereby contributing nothing to the Council’s objectives for the local or wider area. The reconsideration of viability matters is permitted by local and national policy and is supported by the Act. The evidence submitted to the Council is both comprehensive and emphatic in its findings that the Marina obligations must be omitted/disapplied.

It is noted that the CVR have made progress on their proposals to bring a reactivated line to Leek and the signs are promising that this will progress further. The changes proposed in the Legal Agreement will allow this important regeneration site to proceed with the creation of new high quality housing/environmental benefits and thereby foster the conditions for the railway proposals and other spin off leisure uses including the local needs retail and family pub/restaurant use. In the absence of a viable residential led redevelopment scheme for the wider site, the land required for the CVR could theoretically revert to an open storage/ traditional employment use and an important element of planning gain would be lost. Subject to the changes sought being granted by the Council, Casey are committed to submitting a reserved matters application for high quality new housing at the earliest available opportunity and to also bring forward the light industrial/workshop employment units which would provide further economic and regeneration benefits to Leek.

In summary there is strong justification for the Council to be satisfied that the useful purpose at the heart of the Legal Agreement will still be served, subject to the modification sought in this application. The proposed amendments are acceptable in planning policy terms and in turn will secure the regeneration of the site which is noted in various plans, policies and published masterplans as being of significant importance to the Council and other key stakeholders.

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Importantly it should be noted that whilst the consequence of these changes would essentially decouple the Marina delivery from the proposed residential and commercial uses, this needs to be viewed in the context of the evidence that regeneration of the site will simply not occur otherwise.

Should the Council or its appointed viability advisors require any further information or clarification we shall be pleased to assist. I trust the submission and enclosed information is sufficient to allow the Council to register this formal request and on behalf of Casey we look forward to working with you in a positive and collaborative fashion to secure the delivery of this important regeneration opportunity.

Yours sincerely



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