

Received On

12 MAR 2019

By Planning Services

UNILATERAL UNDERTAKING

Under Section 106 Town and Country Planning Act 1990

of

(1) BHF DEVELOPMENTS LIMITED

(Landowner/s)

and

(2) TENDRING DISTRICT COUNCIL

(the Council)

Site: Burnthouse Farm, Oakley Road, Harwich CO12 5DW
Planning Application reference: 18/01726/FUL

THIS UNDERTAKING is given on 7TH MARCH 2019

BY

(1)

IN FAVOUR OF

TENDRING DISTRICT COUNCIL of Council Offices, Thorpe Road, Weeley, Clacton-on-Sea, Essex CO16 9AJ ("the Council")

BACKGROUND

- (A) For the purposes of the 1990 Act, the Council is the local planning authority for the area within which the Site is located and the authority by whom the obligations in this Undertaking are enforceable.
- (B) The Landowner is the freehold owner of the whole of the Site free from encumbrances which would prevent the Landowner from entering into this Undertaking.
- (C) A planning application reference number 18/01726/FUL has been made to the Council for the Development on the Site
- (D) This undertaking is given to the Council to secure the payment of the Public Open Space Contribution

OPERATIVE PROVISIONS

1. INTERPRETATION

1.1 In this Undertaking, the following words and expressions have the following meanings:

"1990 Act" means the Town and Country Planning Act 1990

"Commencement of Development" means the implementation of the Planning Permission by the carrying out of a material operation described in Section 56(4) of the 1990 Act and "Commence the Development" shall mutatis mutandis be construed accordingly

"Commencement Date" means the date of Commencement of Development

"Development" means "Proposal for the building of 6 new residential dwellings together with ancillary parking & garaging (including an annex to plot 6) and two points of access onto Oakley Road" in accordance with the Planning Permission

" Dwelling " means a dwelling (including a house or bungalow or self-contained flat or maisonette) comprising part of the Development

" Index " means the " All Items " index figure of the Index of Retail Prices published by the Office for National Statistics or any such alternative index or comparable measure of price inflation as the Council reasonably requires

" Index-Link(ed) " means increase(d) to reflect any increase in the Index during the period from and including the date of this Undertaking to and including the date of actual payment

" Notice of Commencement " means notice in writing by the Landowner to the Council to advise of the Commencement Date

" Party " means a Party to this Undertaking and specifically includes the Council in its capacity as the beneficiary of this Undertaking.

" Plan " means the plan attached to this Undertaking

" Planning Application " means the planning application submitted to the Council under reference 18/01726/FUL and for the avoidance of doubt for the purposes of this Undertaking the term " Planning Application " shall subject to the written confirmation of the Council to be given prior to the determination of any planning applications that may follow include any application(s) to vary or renew the Planning Permission or any application(s) for reserved matters approval, provided that such application(s) shall not increase the number of Dwellings and relate substantially to the same development of the Site as is proposed under the aforementioned application reference number

" Planning Permission " means planning permission (with conditions) granted by the Council pursuant to the Planning Application

" Site " means the freehold property known as **Burnthouse Farm, Oakley Road, Harwich, CO12 5DW** registered at HM Land Registry under Title Number **EX784577** shown for identification purposes only edged red on the Plan

1.2 In this Undertaking:

- 1.2.1 the clause headings do not affect its interpretation;
- 1.2.2 a person includes a natural person, corporate or unincorporated body (whether or not having a separate legal personality);
- 1.2.3 unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular;
- 1.2.4 unless the context otherwise requires, a reference to one gender shall include a reference to all other genders;
- 1.2.5 a reference to any Party shall include that Party's personal representatives, successors and permitted assigns;
- 1.2.6 a reference to the Council shall include the successors to its respective statutory functions;
- 1.2.7 a reference to **writing** or **written** includes e-mail but excludes fax;

- 1.2.8 where in this Undertaking reference is made to a clause, paragraph, schedule, plan, drawing or recital, such reference (unless the context requires otherwise) is to a clause, paragraph, schedule, plan, drawing or recital of or (in the case of a plan or drawing) attached to this Undertaking;
- 1.2.9 unless the context otherwise requires any reference to a statute a provision thereof a statutory instrument or such Specification Code of Practice or General Direction as is issued under statutory authority or by a Secretary of State shall include any modification extension or re-enactment thereof 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 thereunder or deriving validity therefrom;
- 1.2.10 references to the Site include any part of it;
- 1.2.11 references to any Party include the successors in title of that Party;
- 1.2.12 "including" means "including, without limitation" any words following the terms including, include, in particular, for example or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms;
- 1.2.13 any covenant by a Party not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing;
- 1.2.14 where two or more persons form a Party the obligations of that Party may be enforced against those persons jointly and severally; and
- 1.2.15 if any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of the Undertaking shall be unaffected
- 1.3 The Parties do not intend that any of the terms of this Undertaking will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person who is not a Party
- 1.4 The Landowner agrees that any payment that is due to the Council under the terms of this Undertaking that is made later than the date such payment is due shall attract interest at 4% above the Bank of England base lending rate and shall accrue on a daily basis (both before and after any judgement) from the date payment was due until the date payment is received by the Council
- 1.5 The Landowner also agrees that in the event that any payment due to the Council under the terms of this Undertaking has not been received by the Council by the date such payment is due and the Council is required to take action to recover such payment the Landowner shall pay the Council's costs of such action to include but not limited to the costs of the Council's Officer's time and legal costs.
- 2. EFFECT OF THIS UNDERTAKING**
- 2.1 This Undertaking is made pursuant to Section 106 and (where applicable) 299A of the 1990 Act, Section 111 of the Local Government Act 1972 and any other enabling powers to the extent that they fall within the terms of the said sections, the obligations in this Undertaking are planning obligations for the purposes of those sections and are enforceable by the Council

- 2.2 This Undertaking shall be registered as a Local Land Charge by the Council against the Site in accordance with Section 106 (11) of the 1990 Act.
- 2.3 This Undertaking is entered into in respect of the Site with the intent that it shall bind the Landowner's freehold interest in the Site and each and every part of it.
- 2.4 This Undertaking shall be binding on all successors in title and assigns of the Landowner and any person claiming under or through them
- 2.5 The obligations in this Undertaking on the part of the Landowner shall not be enforceable against a statutory undertaker in respect of any of the Site for the time being vested in it.
- 2.6 Nothing in this Undertaking amounts to or shall be construed as a planning permission or approval
- 2.7 If the Planning Permission:
- 2.7.1 shall expire before the Commencement Date;
 - 2.7.2 or shall at any time be varied or revoked otherwise than at the request of the Landowner;
 - 2.7.3 is quashed following a successful legal challenge;

this Undertaking shall forthwith determine and cease to have effect but without prejudice to any of the covenants that arise to be performed prior to any such expiration or revocation or challenge

3. COMMENCEMENT DATE

- 3.1 This Undertaking has immediate effect but the covenants contained in this Undertaking shall not take effect until the Planning Permission has been granted.

4. OBLIGATIONS OF THE PARTIES

- 4.1 The Landowner covenants with the Council to observe and perform the obligations in the Schedule to this Undertaking
- 4.2 The Landowner covenants with the Council to serve on the Council a Notice of Commencement not less than fourteen (14) days prior to the Commencement of the Development
- 4.3 No person shall be liable for any breach of the terms of this Undertaking occurring after the date on which they part with their interest in the Site or the part of the Site in respect of which such breach occurs except to the extent that they have caused or contributed to that breach, but they will remain liable for any breaches of this Undertaking occurring before that date. Neither the reservation of any rights nor the inclusion of any covenants or restrictions over the Site in any transfer of the Site shall constitute an interest for the purposes of this clause.
- 4.4 The Landowner warrants that no person has any legal or equitable interest in the Site.

4.5 The Landowner covenants that until the obligations in this clause 4 have been complied with the Landowner will give the Council the following details within fourteen (14) days of any conveyance, transfer, lease, assignment, mortgage or other disposition (neither the reservation of any rights nor the inclusion of any covenants or restrictions over the Site in any transfer or lease of the Site shall constitute a disposition for the purposes of this clause) entered into in respect of any part of the Site:

4.5.1 the name and address of the person to whom the disposition was made; and

4.5.2 the nature and extent of the interest disposed of.

5. NOTICES

5.1 Any notice, demand or any other communication served, to be given under, or in connection with this Undertaking will be effective only if given in writing and delivered by hand, pre-paid post or e-mail.

5.2 Notices to the Council shall be marked for the attention of the Head of Planning Tendring District Council, Council Offices, Weeley, Clacton-on-Sea, Essex, CO16 9AJ or such other recipient and address as notified by the Council in writing.

5.3 This clause does not apply to the service of proceedings or other documents in any legal action

6. COSTS OF THIS UNDERTAKING

6.1 On or before the entering into this Undertaking the Landowner shall pay the Council a contribution of £100 towards the preparation, completion and registration of this Undertaking by the Council.

7. DETERMINATION OF DISPUTES

Wherever there is any dispute under the terms of this Undertaking which shall not be resolved within one (1) month of any party having notified the others in writing that such dispute exists any party shall have the right to refer the same to the decision of an independent expert (to act as an expert and not as an arbitrator in the absence of contrary agreement by the parties in dispute) with relevant professional expertise and agreed between the parties in dispute or (in absence of such agreement) to be appointed by the President for the time being of the Chartered Institute of Arbitrators (or other appropriate President of a professional institute with expertise in the relevant discipline as agreed between the parties in dispute). Such expert shall be required to give each party the opportunity to make representations to him and to comment on the representations of one another and shall be required to deliver his decisions in writing and supported by reasons within 8 weeks of his appointment. His decision shall be binding on the parties save in the case of manifest error and the parties shall bear his fees in equal shares unless he awards otherwise.

8. JURISDICTION

The applicable law for this Undertaking shall be English law.

9. EXECUTION

This Undertaking has been executed as a deed and it is delivered on the date set out above.

SCHEDULE

1. Defined terms

In this Schedule, in addition to the words and expressions in clause 1 of this Undertaking the following words and expressions have the following meanings:

- "Annex A"** means the table attached hereto and marked Annex A
- "Bedrooms"** means those rooms within a house or bungalow or self-contained flat or maisonette but not any other type of property on the Site and which are designated for the purpose of sleeping
- "Public Open Space Contribution"** means a sum of money to be paid to the Council being the product of the Public Open Space Contribution Calculation adjusted to reflect pre-existing Bedrooms which form part of the Site prior to the Commencement of Development such sum of money to be Index Linked
- "Public Open Space Contribution Calculation"** means the calculation based on the number of Dwellings and the number of bedrooms in those Dwellings all in accordance with the version of Table 4 of the Council's Supplementary Planning Document "Provision of Recreational Open Space for New Development" that is in force on the date of this Undertaking a copy of which is attached at Annex A
- "Public Open Space Contribution Purposes"** means the use of the Public Open Space Contribution towards the provision of **improvements at Memorial Club, Lt Oakley.**

2. Payment of the Contribution

2.1 The Landowner covenants and undertakes with the Council:

2.1.1 To pay to the Council the Public Open Space Contribution before Commencement of the Development and not to Commence the Development unless and until the said Public Open Space Contribution has been paid to the Council PROVIDED THAT the Public Open Space Contribution is given strictly on the condition that:

- 2.1.1.1 the Council will use the Public Open Space Contribution towards the Public Open Space Contribution Purposes

- 2.2 The Landowner shall be entitled to request in writing that the Council returns to the Landowner any unused part of the Public Open Space Contribution (plus interest that has accrued on that unused part) on the tenth (10th) anniversary of the date that the Council received the said Public Open Space Contribution PROVIDED THAT if such request has not been served on the Council within six (6) months of the said tenth (10th) anniversary then the Council may retain and use such unused part of the said contribution for Public Open Space Contribution Purposes

ANNEX A

Number of bedrooms per Dwelling	Contribution per Dwelling
Bedsit/elderly	No Contribution
Studio Flat	£544.00
1 bedroom	£845.00
2 bedrooms	£1690.00
3 bedrooms	£2253.00
4 bedrooms	£2816.00
5+ bedrooms	£3380.00

Once the contribution has been calculated it must be Index Linked

