

# UNILATERAL UNDERTAKING

Under Section 106 Town and Country Planning Act 1990

of

land to the rear of 683 St Johns Road, Clacton on Sea, Essex

(1) R. BURFOOT CONSTRUCTION LIMITED

(Landowner)

and

(2) TENDRING DISTRICT COUNCIL

(the Council)

Site: land rear of 683 St Johns Road, Clacton on Sea, Essex CO16 8BJ  
Planning Application reference: 18/00540/FUL

THIS UNDERTAKING is given on 13 FEBRUARY

20  
2019

BY

- (1) R. BURFOOT CONSTRUCTION LIMITED (Co Regn. No 04325431) of Unit 7, Brunel Road, Gorse Lane Industrial Estate, Clacton on Sea, Essex CO15 4LU ("the Landowner");

IN FAVOUR OF

- (2) 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 Landowners from entering into this Undertaking.
- (C) A planning application reference number 18/00540/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, the Recreational Disturbance, Avoidance & Mitigation Contribution in relation to the increased impact and harm created by the Development upon the European Designated Sites at Colne Estuary and the Essex Estuaries and for the provision of Affordable Housing on the Site

## 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 18/00540/FUL on land to the rear of 683 St Johns Road, Clacton on Sea, Essex 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 18/00540/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 land on the south side 683 St Johns Road, Clacton on Sea, Essex registered at HM Land Registry under Title Number EX980062 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" words following the terms including, include, in particular, for example or 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 Schedules 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 other 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 £350 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.

## FIRST SCHEDULE : Public Open Space

### 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 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 outplay facilities at Bockings Elm

### 2. Payment of the Contribution

- 2.1 The Landowner covenants and undertakes with the Council 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 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 (10<sup>th</sup>) 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 (10<sup>th</sup>) anniversary then the Council may retain and use such unused part of the said contribution for Public Open Space Contribution Purposes.



## **SECOND SCHEDULE : Recreational Disturbance, Avoidance & Mitigation (RAMS)**

### **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:

**“Relevant Designated European Wildlife Sites”** means Special Protection Areas, Special Areas of Conservation and Ramsar sites at Colne Estuary and at the Essex Estuaries designated primarily to protect waders & wildfowl

**“Recreational Disturbance, Avoidance & Mitigation Contribution”** means the sum of £2,690.60 (Two thousand six hundred and ninety pounds and sixty pence) calculated using the Recreational Disturbance, Avoidance & Mitigation Contribution Calculation to be paid by the Landowner as a contribution towards the impact of development on the Relevant Designated European Wildlife Sites such sum of money to be Index Linked

**“Recreational Disturbance, Avoidance & Mitigation Contribution Calculation”** means the sum of £122.30 x (multiplied) by the total number of new Dwellings proposed pursuant to the Planning Permission to calculate the Recreational Disturbance, Avoidance & Mitigation Contribution

### **2. Payment of the Contribution**

#### **2.1 The Landowner covenants and undertakes with the Council:**

**2.1.1 To pay to the Council the Recreational Disturbance, Avoidance & Mitigation Contribution before Commencement of the Development and not to Commence the Development unless and until the said Recreational Disturbance, Avoidance & Mitigation Contribution has been paid to the Council**

**THIRD SCHEDULE**  
**AFFORDABLE HOUSING**

1. In this Schedule unless the context requires otherwise the following words and expressions shall have the following meanings:-

<b>“Affordable Housing”</b>	means housing provided to Persons in Housing Need whose needs are not met by the market with eligibility determined with regard to local incomes and local house prices with provision for the said housing to remain at an affordable price for future Persons in Housing Need and for any subsidy received to be recycled for alternative affordable housing provision and includes Affordable Housing For Rent
<b>“Affordable Housing Dwellings”</b>	means 6 x 3 bed (plots 16-21 inclusive) Dwellings (which shall unless otherwise agreed by the Council) comprise Affordable Housing for Rent
<b>“Affordable Housing for Rent”</b>	has the meaning ascribed to it in paragraph a) of the definition of affordable housing at Annex 2 of the NPPF
<b>“Affordable Housing Tenure”</b>	means Affordable Rented Housing
<b>“Approved Body”</b>	means a provider of social housing registered with Homes England under the provisions of the 2008 Act or any body organisation or company which is a registered charity with the Charity Commissioners for England and Wales and approved by Homes England or any other body organisation or company approved by the Council and which has objects demonstrably similar to or compatible with or promoting those of a housing association
<b>“Chargee”</b>	means any mortgagee or chargee or any receiver or manager (including an administrative receiver) appointed by such mortgagee or chargee or any administrator (howsoever appointed) or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any Housing Administrator of the whole or any part of the Affordable Housing Dwellings that have been transferred to an Approved Body

<b>"Homes England"</b>	means the public body set up to fund and regulate the provision of Affordable Housing in England and any successor body
<b>"Housing Administrator"</b>	has the meaning ascribed to it in Section 101 of the Housing and Planning Act 2016
<b>"Housing Needs Register"</b>	means the register maintained by the Council or its nominee or an Approved Body for Persons in Housing Need
<b>"Market Dwellings"</b>	Means those Dwellings which are not Affordable Housing Dwellings
<b>"Nomination Rights"</b>	the ability for the Council to nominate 100% of the occupants on the first letting of the Affordable Housing for Rent and 100% of the occupants of subsequent lettings of Affordable Housing for Rent
<b>"NPPF"</b>	means the National Planning Policy Framework 2019 issued by H M Government
<b>"Persons In Housing Need"</b>	means a person or persons registered on the Housing Needs Register or such other person considered by the Council or the Approved Body to be in housing need having regard to their income and local house prices and rents
<b>"Protected Tenant"</b>	means any tenant who: <ul style="list-style-type: none"> <li>a) has exercised the right to acquire pursuant to the 2008 Act or any statutory provision for the time being in force (or any equivalent contractual right) in respect of a particular Affordable Housing Dwelling</li> <li>b) has exercised any statutory right to buy (or any equivalent contractual right) in respect of a particular Affordable Housing Dwelling</li> </ul>
<b>"2008 Act"</b>	means the Housing and Regeneration Act 2008

2. The Owner hereby covenants with the Council as follows:

- 2.1 Not to permit the Occupation of more than 50% of the Market Dwellings until such time as the Affordable Housing Dwellings to be provided have been constructed and are available for Occupation and have been transferred to an Approved Body

- 2.2 The transfer of the Affordable Housing Dwellings to an Approved Body shall be subject to the provisions of Part 2 of this Schedule
- 2.3. That the Affordable Housing Dwellings shall be Occupied for no other purpose than as Affordable Housing and additionally shall be Occupied in accordance with the Nomination Rights (but subject to the provisions of paragraph 4 below).
3. To serve on the Council notice in writing not less than 14 days after the first Occupation of 50% of the Market Dwellings
4. It is Hereby Agreed and Declared
- 4.1 The obligations and restrictions contained in this Schedule shall not bind:
- 4.1.1 a Chargee (or a receiver appointed by such Chargee) of the whole or part of the Affordable Dwellings PROVIDED THAT such Chargee (or any receiver thereby appointed including an administrative receiver) acting pursuant to any event of default has first complied with the provisions of paragraph 4.2 of this Schedule; or
  - 4.1.2 a Protected Tenant; or
  - 4.1.3 any person or body deriving title through or from any of the parties mentioned in paragraphs 4.1.1 –4.1.2 above.
- 4.2 Any Chargee claiming the protection granted by paragraph 4.1 above must first:
- 4.2.1 give written notice to the Council of its intention to dispose of the Affordable Dwelling,
  - 4.2.2 use reasonable endeavours over a period of twelve weeks from the date of such written notice to dispose of the Affordable Dwelling to another Approved Body or to the Council for a consideration not less than the amount due and outstanding to the Chargee under the terms of the mortgage or charge including all accrued principal monies, interest and costs and expenses incurred by the Chargee in respect of the mortgage or charge

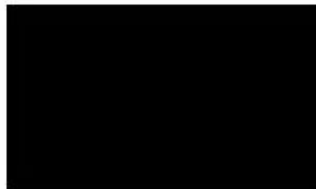
PROVIDED THAT at all times the rights and obligations in this paragraph shall not require the Chargee to act contrary to its duties under the charge or mortgage

- 4.3 If such disposal referred to in paragraph 4.2.2 above has not taken place within such twelve week period the Chargee shall be entitled to dispose of the Affordable Dwellings free from the affordable housing provisions contained in this Agreement which shall determine absolutely.

**Part Two**

- A The transfer of the Affordable Housing Dwellings to the Approved Body shall be with vacant possession
- B. The transfer deed for the transfer of the Affordable Housing Dwellings to the Approved Body shall be prepared by the Landowner at no cost to the Approved Body and shall contain:
  - 1. a grant by the Landowner to the Approved Body of all rights of access and passage of services and all other rights reasonably necessary for the beneficial use and enjoyment of the Affordable Housing Dwellings
  - 2. a reservation of all rights of access and passage of services and all other rights reasonably necessary for the purpose of the Development and the beneficial use and enjoyment of the remainder of the Site

SIGNED as a deed by  
**R. BURFOOT CONSTRUCTION LTD**  
in the presence of:



Witness' signature:

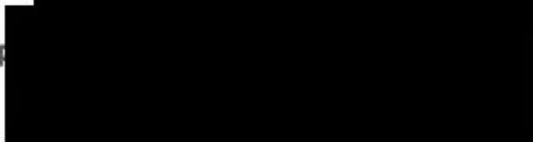


Name:



Address:

Occupation:

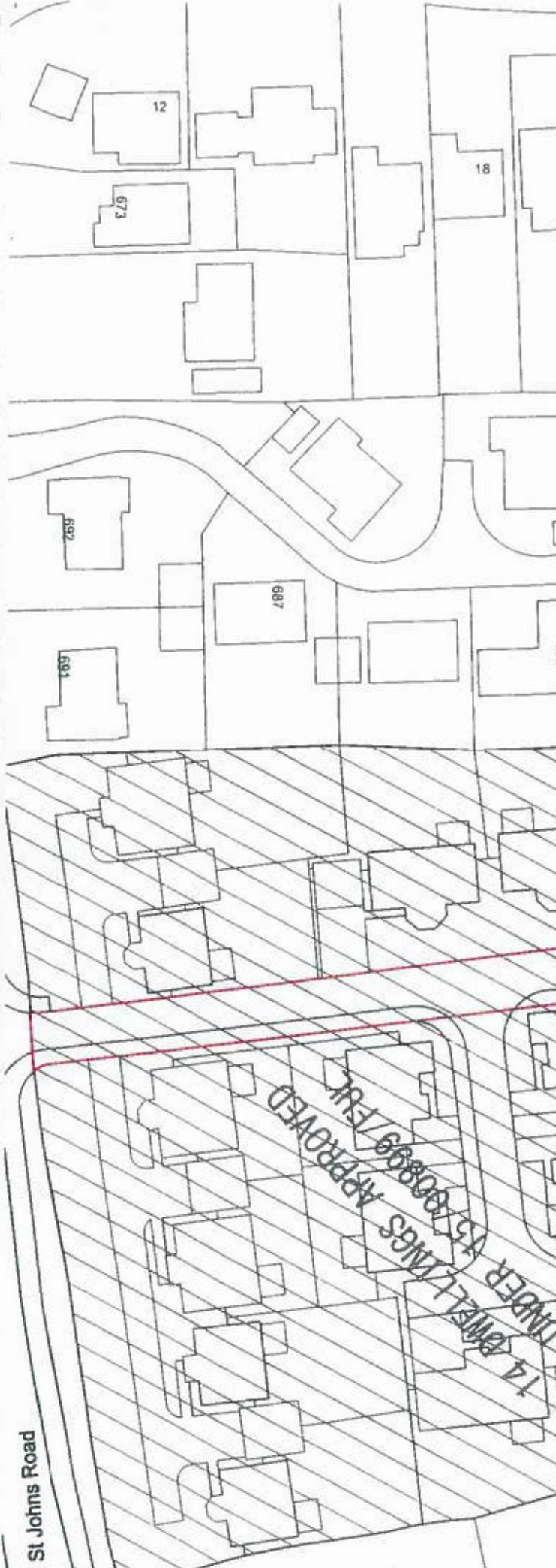


## ANNEX A

Number of bedrooms per Dwelling	Contribution per Dwelling
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

St Johns Road



**KEY**

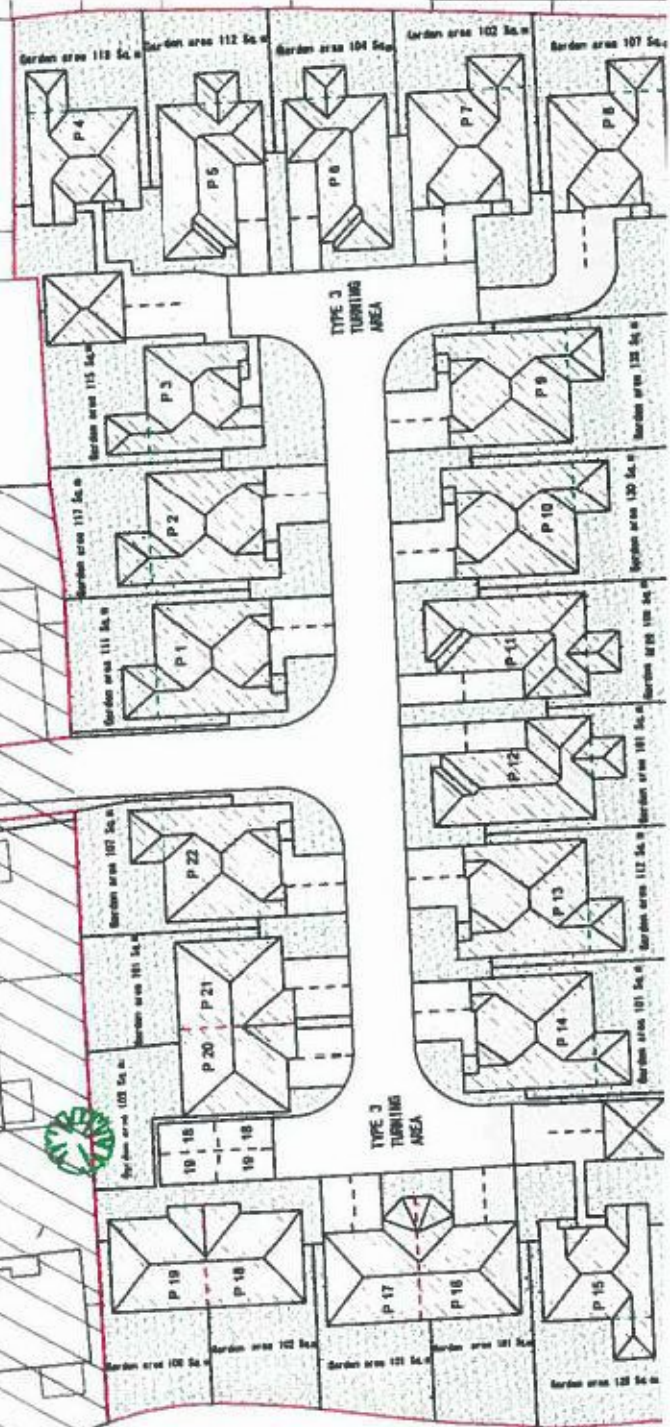
Plots 1 - 16 and 22 are detached three bedroom bungalows with garages.

Plots 16 - 21 are three bedroom semi-detached bungalows. These plots are allocated for on site affordable housing. They will be built to a registered affordable housing provider's specification details and handed over once constructed.

Green Dotted Line indicates the back of the properties habitable area and the Conservatories.

Black Dotted Line indicates the division between parking bays (minimum 2.9m x 5.6m).

Red Dotted Line indicates the division between semi-detached properties.



**PROPOSED TITLE: SITE LAYOUT**

**DESCRIPTION:** Proposed site layout Plan for 22 three bedroom bungalows

**SITE ADDRESS:** 683 St Johns Road  
Clacton-on-Sea  
Essex  
CO16 8BJ

**SCALE:** 1:500 (A3)