

Portsmouth City Council: this draft unilateral undertaking should be used only after reference to the guidance on the Council's Website. Display of the draft undertaking on the website is given without prejudice to the duty of the Council as local planning authority to comply with the Habitats Regulations and to draft, negotiate and complete/accept Section 106 obligations that accord with the Portsmouth Plan and relevant strategies in securing the Council's regeneration objectives.

Dated 201

(1) OWNER

and

(2) MORTGAGEE

to

(3) PORTSMOUTH CITY COUNCIL

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Deed of Unilateral Undertaking  
Creating Planning Obligations under Section 106 Town and Country Planning Act 1990  
Relating to Land at xxxxxxxx Portsmouth

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**RESTRICTING DEVELOPMENT TO PREVENT COMMENCEMENT UNLESS APPROPRIATE CONTRIBUTIONS TO HABITATS MITIGATION FOR THE SOLENT SPAs HAVE BEEN SECURED**

In any case where it is apparent that a number of separate planning obligations will be required dealing with several types of obligation, - for example, affordable housing, travel plan, employment and skills plan, student accommodation - it will be necessary to negotiate a Section 106 AGREEMENT. This form of UNILATERAL undertaking is to be limited to a case where the only required planning obligation relates to securing a contribution for the mitigation of harm to the Solent SPAs.

This Undertaking to be given by developers/owners to the Council is proposed in terms to restrict development of a relevant permission until appropriate contributions have been made to a mitigation strategy in accordance with the Solent Recreation Mitigation Partnership's Solent Recreation Mitigation Strategy (December 2017) in a manner that accords with the planning objectives of the Council as local planning authority into the future in accordance with the Council's policies, including the Portsmouth Plan. In seeking to secure developers' obligations in this way the Council is proposing measures to enable the Council as local planning authority to comply with the requirements of The Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations) (as amended).

The draft is proposed for consideration of developers who understand from details in the Portsmouth Plan and the Solent Recreation Mitigation Strategy (December 2017) that a financial contribution is required to enable their development proposals to accord with the Habitats Regulations by supporting the provision of measures for the mitigation of harm to habitats or species occasioned by their development. The Council has displayed the draft undertaking to facilitate early discussion of its terms with the development management case officer appointed by the Council to advise and report on a relevant application in such a case. The draft is offered without prejudice to further negotiation of terms in a particular case, and without prejudice to the duty of the Council to determine any related planning application "in accordance with the development plan unless material considerations indicate otherwise".

Wherever possible the Council and developers and landowners should begin processing Undertakings offered in this form whilst the related application is being discussed. All parties should seek to avoid adding to the burden of delay and administrative and legal costs. However, in the event that there is an unusual pattern of ownership, or difficult title issues arise, the Council will refer an Undertaking to its legal advisers and a "bespoke" undertaking will be proposed, in terms "tailored" to fit the particular circumstances of the case: there will be an unavoidable additional cost in preparing a bespoke Undertaking for a particular site.

Where there is a mortgagee that lender shall be required to be a party to the unilateral undertaking. The provisions in blue in the draft Unilateral Undertaking reflect parts of the draft undertaking that may be required by lenders where there is a mortgage of the land. If the mortgagee terms as set out here are not acceptable to the mortgagee in a particular case it will be necessary for the Council's legal advisers to negotiate provisions either through the applicants solicitor or, if agreed, directly with the mortgagee.

Any queries in respect of this draft Undertaking should be addressed, in the first instance to the case officer, and not to Legal Services.

**Commented [DH1]:** Please delete the instructions on this page and the headnote on all pages before submitting the draft UU.

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This DEED OF UNDERTAKING is made the                      day of                      201

BY

- (1) (the "First Owner") of
- (2) (the "Second Owner") of
- (3) (the "Mortgagee") of

**TO PORTSMOUTH CITY COUNCIL**, of Civic Offices, Guildhall Square, Portsmouth, PO1 2PX ("the Council")

**BACKGROUND**

- (A) For the purposes of the Act, the Council is the local planning authority for the area within which the Site is located and the local planning authority which is entitled to enforce the obligations contained in this Deed of Undertaking.
- (B) The Owner(s) is/are the freehold owners of the whole of the Site registered at the Land Registry with title absolute under the title numbers.

*In each case these background details must be adapted to ensure all interest in the land and the owners of such interests are described*

- (C) The Owner(s) *(insert Developer if a developer has made the application: if so, the Developer must be a party shown in the numbered section at the beginning)* has applied to the Council for prior approval of a development proposal to accord with the provisions of Class J, Town and Country Planning (General Permitted Development) Order 1995, and Article 3(1) of the said Order
- (D) The Council has required a contribution to the costs for providing mitigation of harm to Special Protection Areas caused by the Development of the Site in accordance with the requirements of Regulation 61, of The Conservation of Habitats and Species Regulations 2017 (as amended), and the Solent Recreation Mitigation Strategy (December 2017).
- (E) The Owner(s) *(and all other parties referred to as above and listed here)* give this Undertaking in anticipation of approval pursuant to the Conservation of The Conservation of Habitats and Species Regulations 2017 being given by the Council subject to the Owner(s) *(and all other parties)* entering into this Undertaking which makes provision for regulating the Development mitigating the harm to the Special Protection Areas and securing the matters referred to in this Undertaking.
- (F) The Mortgagee is mortgagee of the Site under a legal charge dated

**NOW THIS DEED WITNESSES AS FOLLOWS:**

**Commented [SW2]:** This part of the document is sometimes referred to as the "Recitals"

**Commented [SW3]:** Insert Land Registry title numbers. If the site is not registered land, special arrangements will have to be made with the Council's legal service to check title

**Commented [SW4]:** The Council cannot accept a unilateral undertaking unless all parties with an interest in the land are included as signatories and parties to the Deed, and their interests recited here. Satisfactory proof of title to those interests must be shown. This must include, for example, all owners of any part of the Site, and mortgagees

**Commented [SW5]:** -This clause to be inserted where a lender/bank/building society etc. has a mortgage on all or any part of the site. If the interest is on part of the site only, it must be identified on the map in a separate colour and the following the word "mortgagee" in this recital "of the Site" should be deleted and the following should be added

*"of that part of the Site coloured"* and then state the colour of the mortgaged part of the site shown on the plan.

Finally, in this clause, insert date of the charge from information in the land registry documents

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**1. DEFINITIONS**

"the Act"	the Town and Country Planning Act 1990;
"Commencement of Development"	shall mean the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Development is begun other than (for the purposes of this Undertaking and for no other purpose) operations consisting of site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, erection of any temporary means of enclosure, the temporary display of site notices or advertisements and "Commence Development" and similar expressions shall be construed accordingly
"Development"	shall Mean <del>~~~~~</del> <i>insert here the details of the works proposed by using the description of development referred to in the application for prior approval</i> as described in the application for prior approval pursuant to Class J, Town and Country Planning (General Permitted Development) Order 1995
"Dwelling"	means a self-contained unit of residential accommodation comprised within the Development (and for the avoidance of doubt this definition shall include houses flats and apartments as appropriate comprised within the Development)
"Habitat Mitigation Contribution"	Shall mean the sum of £ <u>.....</u> <i>(insert also the amount in words)</i> to be paid by the Owner to the Council as a contribution towards measures to mitigate the impacts of the Development on the Portsmouth Harbour Special Protection Area and the Chichester and Langstone Harbours Special Protection Area
"Index"	All Items Index of Retail Prices issued by the Office for National Statistics
"Interest Rate"	shall mean interest at 4% above the base lending rate of the Bank of England from time to time
"Legal and Administrative"	Shall mean a contribution of £50 (fifty pounds) <u>to the legal and administrative costs of the Council in considering and</u>

**Commented [SW6]:** This sum is calculated by the number of bedrooms per dwelling

**Commented [SW7]:** Note: this is the sum for the consideration of the UU by the Council - if the Council undertakes to obtain land registry confirmation of title details, there will be a further payment of £16 will be required (£8 x 2 - one LR Search to identify interests in the first draft, one LR Search to confirm ownerships remain the same when the deed is executed)

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<b>Costs Contribution"</b>	approving this Undertaking
<b>"Owners"</b>	shall mean the <i>the First Owner and the Second Owner</i>
<b>"Plan"</b>	shall mean the ... <i>definition of an appropriate plan to be inserted and the plan attached e.g.... Plan annexed to this Undertaking and marked "yyy"</i>
<b>"Application"</b>	shall mean the application for prior approval under Class J, Town and Country Planning (General Permitted Development) Order 1995 submitted on <i>insert date</i> to the Council for the Development and allocated reference number <i>to be inserted</i> by the Council
<b>"Site"</b>	Means the freehold property at <i>address of application site including all land in any title of ownership which is affected by the development or the agreement</i> as shown edged in red on the Plan and registered at the Land Registry under the Title Number(s) <i>xxxxxxxxxx</i>
<b>"Undertaking"</b>	Shall mean this Deed of Undertaking

**Commented [SW8]:** Whether this definition is necessary will be particular to each case

**Commented [SW9]:** Insert the title of the plan used at "yyy" . There must be a plan showing the Site

## 2. INTERPRETATION AND CONSTRUCTION

- 2.1 The clause headings in this Undertaking are for reference only and do not affect its construction or interpretation.
- 2.2 References to clauses and Schedules are to the clauses and Schedules of this Undertaking, unless stated otherwise.
- 2.3 A reference to a paragraph is to the paragraph of the Schedule in which the reference is made, unless stated otherwise.
- 2.4 Words importing one gender include any other genders and words importing the singular include the plural and vice versa.
- 2.4 A reference to a person includes a reference to a firm, company, authority, board, department or other body and vice versa.
- 2.6 Unless this Undertaking states otherwise, any reference to any legislation (whether specifically named or not) includes any modification, extension, amendment or re-enactment of that legislation for the time being in force and all instruments, orders, notices, regulations, directions, byelaws, permissions, policies and plans for the time being made, issued or given under that legislation or deriving validity from it.

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- 2.7 References to the Site include any part of it.
- 2.8 References to "written" "writing" or "written down" does not include faxes or e-mail.
- 2.9 References to any party in this Undertaking include the successors in title of that party and any references to the Council include any successor local planning authority exercising planning powers under the Act.
- 2.10 References to "including" means "including, without limitation" and where appropriate in context shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- 2.11 Words imposing an obligation on a party to do any act whatsoever include an obligation to procure that act and words placing a party under a restriction include an obligation not to cause permit or suffer any infringement of that obligation.
- 2.12 Where two or more people form a party to this Undertaking, the obligations they undertake may be enforced against them all jointly or against each of them individually.
- 2.13 If any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of this Undertaking shall be unaffected.

### **3. EFFECT OF THIS UNDERTAKING**

- 3.1 This Undertaking is made by Deed pursuant to Section 106 of the Act
- 3.2 To the extent that they fall within the terms of section 106 of the Act, the obligations contained in this Undertaking are planning obligations for the purposes of section 106 of the Act and are enforceable by the Council against the Owner *mortgagee etc.*
- 3.6 The remedies provided in this Undertaking are cumulative and not exclusive of any remedies provided by law.
- 3.7 None of the terms of this Undertaking may be rescinded or varied except in accordance with Sections 106A and 106B of the Act.

### **4. COMMENCEMENT**

- 4.1 Unless otherwise provided, this Undertaking its terms provisions covenants and obligations shall have effect from the date first shown above.
- 4.2 The Owners shall give to the Council not less than seven days written notice of intention to Commence Development on the Site and shall confirm in writing within seven days following Commencement of Development that it has Commenced

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PROVIDED THAT failure to provide either of the said notifications shall not render this Undertaking inoperative.

4.3 The Owner(s) shall be deemed to have Commenced the Development pursuant to the Planning Permission if they Commence works referable to the Development amounting to a material operation as defined in Section 56(4) of the Act (not being works for which planning permission is not required) on the Site whether or not:

4.3.1 The Owner has satisfied all conditions precedent to Commencement set out in the Planning Permission

4.3.2 Those works are in accordance with the Planning Permission

## 5. OBLIGATIONS OF THE PARTIES

5.1 The Owner *mortgagees etc* hereby UNDERTAKES AND COVENANTS as owner of the Site and so as to bind their interest in the Site with the Council to comply with its obligations as set out in this Undertaking and the Schedule in relation to the Development.

5.2 Where in this Undertaking the Owner undertakes to comply with any requirement prior to Commencement of Development the Owner shall not Commence Development nor permit any other person to Commence Development before the said requirement has been satisfied.

5.3 Where any payment is made in accordance with this Unilateral Undertaking it shall be provided with notice in writing giving the date of this Unilateral Undertaking and to the effect that it is paid in accordance with this Unilateral Undertaking and including reference to the prior approval reference number assigned by the Council to the application for prior approval

## 6. MORTGAGEE PROVISIONS

6.1 The Owner acknowledges the interest of the Mortgagee in the Site and hereby declares that other than the Mortgagee [and the Developer] the Owner(s) has(ve) the sole proprietary interest in the Site and there are no third party interests which would require any other party to give this Unilateral Undertaking

6.2 The Owner hereby agrees to indemnify and keep indemnified the Mortgagee from and against all action, costs, claims and demands of whatsoever nature arising out of any breach or non-observance of the terms in this Unilateral Undertaking

6.3 The Mortgagee acknowledges and declares that this Unilateral Undertaking has been entered into by the Owner with its consent and that the Site shall be bound by the

**Commented [SW10]:** These provisions are normally required where there is a mortgagee. They are intended to conform to the general requirements of lenders when they are required to be party to a planning obligation. Your lender may have preference for other or additional provisions. Such other provisions can only be considered on behalf of Portsmouth City Council by one of its legal advisers and there will be a charge.

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obligations contained in this Unilateral Undertaking and that the security of the mortgage over the Site shall take effect subject to this Unilateral Undertaking

6.4 The Mortgagee shall have no liability for breaches of the obligations made under this Unilateral Undertaking except for a breach of the Unilateral Undertaking that it has itself caused whilst mortgagee in possession of the Site in which case it shall also be bound by the obligations as if it were a person deriving title from the Owner

## **7. REGISTRATION**

6.1. The Owner(s) acknowledge that this Undertaking is a Local Land Charge and registrable as such in the Register of Local Land Charges maintained by the Council.

## **8. NOTIFICATION**

8.1 Any notice, demand or any other communication served under this Undertaking will be delivered by hand or sent by first or second class post, pre-paid or recorded delivery.

8.2 Any notice, demand or any other communication served shall be sent to the address of the relevant party set out at the beginning of this Undertaking or to such other address as one party may notify in writing to the others at any time as its address for service and in the case of service upon the Council shall be marked for the attention of the City Solicitor.

8.3 The Owner (mortgagee etc) undertakes to give the Council immediate written notice of any change in ownership of any of its interests in the Site 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 details of the area of the Site transferred to the transferee by reference to a plan.

## **9. INDEXATION**

Any sum referred to in this Undertaking 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 payable.

## **10. INTEREST**

If any payment due under this Undertaking is paid late, Interest will be payable from the date payment is due to the date of payment.



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**11. JURISDICTION**

The County Court in whose district the Site is situated shall have full jurisdiction to hear and determine any proceedings arising from or relating to this Undertaking or for the enforcement of its terms or any of them.

**12. COSTS**

The Owner shall pay to the Council on completion of this Undertaking the Legal and Administrative Costs Contribution.

**Commented [SW11]:** Please note - the Undertaking will not be accepted unless these costs are paid on completion

**IN WITNESS** whereof the parties hereto have caused this Undertaking to be executed as a deed the day and year first before written

<p><b>EXECUTED AS A DEED</b> by <i>THE APPROPRIATE EXECUTION CLAUSE FOR EACH PARTY WILL HAVE TO BE INSERTED HERE IN EACH CASE (having regard to their identity as an individual, company or other body corporate)</i></p>	<p>..... Director</p>
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## **SCHEDULE**

### **HABITATS MITIGATION CONTRIBUTION**

The Owner(s) for themselves and their successors in title to the Site covenant as follows:

- 1 To pay the Habitat Mitigation Contribution on giving notice of Commencement of Development on the Site in accordance with Clause 4.2 of this Unilateral Undertaking
- 2 Not to cause or permit Commencement of Development until the Habitat Mitigation Contribution and the Legal and Administrative Costs Contribution have first been paid to the Council.
- 3 If any payment of any sum due under this Undertaking is paid late, Interest will be payable in respect of that sum from the date payment is due to the date of payment.