

Lower Thames Crossing

9.165 Draft Section 106 Agreement – Essex County Council

Infrastructure Planning (Examination
Procedure) Rules 2010

Volume 9

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Lower Thames Crossing

9.165 Draft Section 106 Agreement – Essex County Council

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1 Introduction

- 1.1.1 This document presents the draft section 106 agreement (s106) between National Highways (the Applicant) and Essex County Council.
- 1.1.2 To give the Examining Authority an indication of the status of negotiations, Table 1.1 presents a broad summary of positions on the main clauses and schedules.
- 1.1.3 The draft s106 between the Applicant and Essex County Council is presented in full in Appendix A.

Table 1.1 Summary positions on the main clauses and schedules of the draft s106 at Deadline 7

Sections	Commentary
s106 clauses	Drafts of the Section 106 agreements have been exchanged between the two parties and a number of the Council's comments have been addressed by the Applicant. The drafts are continuing to develop in light of the discussions that have been had and will progress following Deadline 7 submissions.
Schedule 1 – Officer Support Contributions	The Applicant has made a financial offer for Officer Contributions. This matter will be subject to further discussion.

Appendices

Appendix A Draft s106 agreement

DATED

2023

(1) ESSEX COUNTY COUNCIL

and

(2) NATIONAL HIGHWAYS LIMITED

DEED

**Pursuant to section 106 of the Town and Country Planning Act
1990 and section 111 of the Local Government Act 1972 relating
to the Lower Thames Crossing**



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Annex - Plan showing land owned by National Highways

THIS AGREEMENT is dated

2023

BETWEEN

(1) **ESSEX COUNTY COUNCIL** of [] (**the Council**);

and

(2) **NATIONAL HIGHWAYS LIMITED** of Bridge House, 1 Walnut Tree Close, Guildford, Surrey, GU1 4LZ (Company Registration number 09346363) (**National Highways**).

together '**the Parties**'.

WHEREAS

(A) Essex County Council is the local planning authority for the purposes of the Town and Country Planning Act 1990 for an administrative area in respect of which part of the Lower Thames Crossing Project is situated;

(B) On 31 October 2022 National Highways applied to the Secretary of State for Transport (c/o The Planning Inspectorate) under section 37 of the Planning Act 2008 for a development consent order entitled 'The A122 (Lower Thames Crossing) Development Consent Order' (the **Development Consent Order**);

(C) The Development Consent Order would enable National Highways to acquire rights in land, to construct various works and exercise powers for the purposes of, and in connection with, the construction of works authorised by the Development Consent Order, namely works to construct the A122 Lower Thames Crossing project, a new road a connection between the A2 and M2 in Kent and the M25 south of junction 29, crossing the River Thames through a tunnel;

(D) The Parties enter into this Deed in order to secure the development consent obligations (within the meaning of section 106(14) of the 1990 Act, as inserted by s174(2) of the Planning Act 2008) contained in it; and

(E) National Highways is the freehold owner of the Land (as defined in clause 1,1).

NOW IT IS HEREBY AGREED AS FOLLOWS

1 Interpretation

1.1 In this Deed the following terms and expressions have the following respective meanings unless otherwise stated:

1972 Act means the Local Government Act 1972;

1990 Act means the Town and Country Planning Act 1990;

2008 Act means the Planning Act 2008;

Application	means the application submitted by National Highways to the Secretary of State on 31 October 2022, pursuant to section 37 of the 2008 Act for the Order to grant development consent for the Authorised Development;
Authorised Development	has the meaning ascribed to the term “authorised development” in the Development Consent Order;
Business Day	means any day (apart from Saturday, Sunday and any statutory bank holiday) on which clearing banks are open in England for the transaction of ordinary business;
CIL	means the charge created pursuant to section 205 of the 2008 Act and Regulation 3 of the CIL Regulations and referred to as the Community Infrastructure Levy in those enactments;
CIL Regulations	means the Community Infrastructure Levy Regulations 2010;
Commencement	means the carrying out of a material operation as defined in section 155 of the 2008 Act comprised in the Authorised Development and the words ‘Commence’ and ‘Commenced’ and cognate expressions shall be construed accordingly but shall exclude any preliminary works as defined in Schedule 2 of the Development Consent Order;
Commencement Date	means the date of Commencement of the Authorised Development pursuant to the Development Consent Order;
Construction Period	means the period between the Commencement Date and the date when both tunnels comprised in the Authorised Development beneath the River Thames are open for traffic;
Development Consent Order	means the development consent order entitled The A122 (Lower Thames Crossing) Development Consent Order which may be made by the Secretary of State pursuant to the Application;
Dispute	means any dispute, issue, difference or claim as between the Parties in respect of any matter

contained in or arising from or relating to this Deed; or the Parties' obligations and rights pursuant to it (other than in respect of any matter of law);

Expert

means an independent person appointed in accordance with the provisions of Clause 10 to determine a dispute between the Parties to this Deed;

Land

The freehold land in title EX671077 and edged in red on the plan Annexed to this Deed;

Secretary of State

means the Secretary of State for Transport.

1.2 In interpreting this Deed:

- 1.2.1 words incorporating the singular shall include the plural and vice versa, words importing any gender include every gender;
- 1.2.2 words incorporating persons shall include firms, companies and corporations and vice versa;
- 1.2.3 references to the Council shall include any successors to its relevant statutory and other functions;
- 1.2.4 references to National Highways shall include any successors to its relevant statutory and other functions;
- 1.2.5 references to numbered Clauses, Paragraphs or Schedules are unless otherwise stated references to the relevant Clauses of, Paragraphs of and Schedules to this Deed;
- 1.2.6 references to numbered articles are unless otherwise stated references to the numbered articles comprised within the draft Development Consent Order comprised within the Application at the time that this agreement is made but are to be interpreted as being adjusted to the extent necessary to accord with the provisions of the Development Consent Order as made;
- 1.2.7 words denoting a requirement or an obligation on a Party to do any act, matter or thing include an obligation to procure that it can be done and words placing a party under a restriction include an obligation not to cause, permit or suffer any infringement of the restriction;
- 1.2.8 references in this Deed to statutes, by-laws, regulations, orders and delegated legislation shall include any statute, by-law, regulation, order or delegated legislation amending, re-enacting or made pursuant to the same as current and in force from time to time;

- 1.2.9 if any provision of this Deed shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be deemed thereby to be affected, impaired or called into question;
- 1.2.10 the recitals and headings in this Deed are for ease of reference only and shall not affect its construction or otherwise have any binding legal effect;
- 1.2.11 in the event of any conflict between the provisions of this Deed and of any document annexed hereto or referred to herein, the provisions of this Deed shall prevail;
- 1.2.12 references to 'the Parties' shall mean the Parties to this Deed and reference to a 'Party' shall mean either of the Parties;
- 1.2.13 references to 'notice' shall mean notice in writing;
- 1.2.14 references to 'including' shall mean including without limitation;
- 1.2.15 terms and expressions defined in the Schedules shall have the meanings specified wherever those terms and expressions are used in this Deed;
- 1.2.16 the Interpretation Act 1978 shall apply to this Deed.

2 Legal Effect

- 2.1 This Deed is made pursuant to section 106 of the 1990 Act, section 111 of the 1972 Act and all other enabling powers.
- 2.2 The obligations, covenants and undertakings on the part of National Highways in this Deed are planning obligations in the form of development consent obligations (to the extent that they are capable of so being) and bind National Highways' interest in the Land and are enforceable by the Council in its capacity as local planning authority and any covenants contained herein which are not planning obligations are entered into pursuant to section 111 of the 1972 Act and section 1 of the 2011 Act and are enforceable by the Council in its capacity as a local authority and a party to this Deed.

3 Conditionality

- 3.1 Subject to clause 3.2, the Parties agree that Clauses 4, 7 and 9 shall not have operative effect until the Development Consent Order has come into force and all other Clauses and Schedules in this Deed shall have operative effect upon the date of this Deed.
- 3.2 In the event that the Development Consent Order becomes the subject of any judicial review proceedings:
 - 3.2.1 until such time as such proceedings including any appeal have been finally determined, the terms and provisions of this Deed will remain without

operational effect unless the Authorised Development has been Commenced;

- 3.2.2 if following the final determination of such proceedings the Development Consent Order is quashed and, in the event that the court orders the Application to be remitted to the Secretary of State, the Application is subsequently refused, this Deed will cease to have any further effect and any money paid to the Council pursuant to the Schedules and not spent or committed by the Council shall be repaid in full within 56 days of the final determination of such proceedings;
 - 3.2.3 if following the final determination of such proceedings the Development Consent Order is quashed and, in the event that the court orders the Application to be remitted to the Secretary of State, the Application is granted, then the provisions of this clause will apply to the Development Consent Order made in that event; and
 - 3.2.4 if following the final determination of such proceedings the Authorised Development is capable of being Commenced, then this Deed will take effect in accordance with its terms.
- 3.3 For the purposes of this Deed, proceedings by way of judicial review are finally determined:
- 3.3.1 when permission to bring a claim for judicial review has been refused and no further application may be made;
 - 3.3.2 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
 - 3.3.3 when any appeal is finally determined and no further appeal may be made.

4 Development Consent Obligations

- 4.1 In carrying out the Authorised Development including the use of the Land as a construction site for the purposes thereof National Highways covenants with the Council to perform and observe:
 - 4.1.1 the development consent obligations contained within Schedule 1 [];
 - 4.1.2 any other obligations which are not development consent obligations contained in the Schedule 1 pursuant to section 111 of the 1972 Act and all other powers so enabling, in each case so far as they relate to National Highways' land interests in the Land from time to time.
- 4.2 The Parties agree that the development consent obligations contained in this Deed will not be enforceable against any owner of any land interest in the Land who is not a party to this Deed nor against any successors in title to or permitted assignees or any

person claiming through or under other such owner's interest in the Land (save for National Highways) unless that person itself undertakes the Authorised Development.

5 Release

5.1 Subject to Clause 5.2 National Highways and its successors in title and those deriving title from them shall, upon disposing of the whole or any part of their respective interests in the Land, be released from all obligations in this Deed in relation to that interest or the relevant part thereof (as the case may be) but without prejudice to the rights of the parties in relation to any antecedent breach of those obligations.

5.2 In the event that National Highways no longer has an interest in the Land but is still the undertaker for the purposes of the Development Consent Order, this Deed shall remain enforceable against it by the Council.

5.3 National Highways shall not transfer or grant all of the benefit of the Development Consent Order pursuant to article 8 thereof unless the party to which it proposes to effect the transfer or grant has first entered into a Deed with the Council on terms equivalent to this Deed.

6 Further Planning Permissions and Development Consent Orders

6.1 Nothing in this Deed shall be construed as prohibiting or limiting the rights of National Highways to use or develop any part of the Land in accordance with and to the extent permitted by, permitted development rights, planning permission, development consent or other statutory authority other than the Development Consent Order.

7 Obligations of the Council

7.1 The Council covenants with National Highways to observe and perform or cause to be observed and performed the obligations on the part of the Council contained in this Agreement at the times and in the manner provided therein.

8 Expiry or Revocation

8.1 If the Development Consent Order expires or is revoked prior to the Commencement Date then this Deed shall forthwith determine and cease to have effect.

8.2 Any monies paid to the Council pursuant to the Schedules and not spent or contractually committed at the time of termination of this Deed under this Clause shall be repaid in full within 56 Business Days of termination.

9 Certificates of Compliance

9.1 The Council will upon request by National Highways certify compliance or partial compliance with the provisions of this Deed subject to the Council being reimbursed its legal and administrative costs reasonably incurred in doing so.

9.2 If so requested by National Highways the Council in relation to a request under clause 9.1 will (subject to National Highways reimbursing legal costs properly and reasonably incurred by the Council in connection thereto) execute a deed of release or partial release from the relevant provisions of this Deed.

10 Resolution of Disputes

10.1 In the event of any Dispute arising between the Parties as regards this Agreement, the Parties will attempt to resolve that Dispute amicably including holding a meeting attended by at least one senior representative from each Party.

10.2 If the Parties are unable to resolve the Dispute amicably pursuant to Clause 10.1, one Party may by serving notice on the other ('the Notice') refer the Dispute to an Expert for determination.

10.3 The Notice must specify:

10.3.1 the nature, basis and brief description of the Dispute;

10.3.2 the Clause or Paragraph of this Deed pursuant to which the Dispute has arisen; and

10.3.3 the proposed Expert.

10.4 In the event that the Parties are unable to agree whom should be appointed as the Expert within 10 Business Days after the date of the Notice then any disputant Party may request the President of the Law Society to nominate the Expert at the joint expense of the Parties in Dispute, and the Party making the request shall further request that such a nomination should be made within 10 Business Days of the request, and any failure of such nomination to be made within 10 Business Days shall entitle any Party to withdraw from the process of appointing an Expert and to refer the Dispute to the courts of England and Wales instead.

10.5 The Expert shall act as an expert and not as an arbitrator and the Expert's decision will (in the absence of manifest error) be final and binding on the Parties and the Parties shall bear the costs associated with the Expert's determination of the Dispute:

10.5.1 in such manner as the Expert may determine and in doing so the Expert shall take into account the reasonableness of the Parties' respective positions leading to the Dispute arising between them and thereafter before its determination; or

10.5.2 in the event that the Expert makes no determination as to costs, such costs will be borne by the Parties in equal shares.

10.6 The Expert will be appointed subject to an express requirement that he or she reaches a decision and communicates it to the Parties within the minimum practicable timescale allowing for the nature and complexity of the Dispute and in any event not more than 28 Business Days from the date of the Expert's appointment to act.

- 10.7 The Expert will be required to give notice to both Parties inviting each of them to submit to the Expert within 10 Business Days written submissions and supporting material and will afford to each of the Parties an opportunity to make counter submissions within a further 5 Business Days in respect of any such submission and material.

11 Notices

- 11.1 Any notice, consent or approval required to be given under this Deed shall be in writing (in each case annotated with the reference 'Lower Thames Crossing') and shall be sent to the address and marked for the attention of the persons identified below or instead to such other persons or address as may be notified by the relevant Party from time to time.
- 11.2 Any such notice must be delivered by hand or sent by first class post, registered delivery or courier service and shall conclusively be deemed, in the absence of evidence of earlier receipt, to have been received:
- 11.2.1 if delivered by hand, on the next Business Day after the day of delivery; and
- 11.2.2 if sent by first class post, registered delivery or courier service within the United Kingdom, on the day falling 2 Business Days after the day posting or dispatch, exclusive of the day of posting or dispatch.
- 11.3 The address for service of any such notice, consent or approval as aforesaid is:
- 11.3.1 in the case of service upon the Council, the address provided at the front of this Deed or such other address for service as the Council may from time to time designate by written notice to the other Party and any such notice shall be marked for the attention of [];
- 11.3.2 in the case of service upon National Highways, the address provided at the front of this Deed or such other address for service as National Highways may from time to time designate by written notice to the Council and any such notice shall be marked for the attention of [].
- 11.4 A Party or its successor may from time to time expressly give notice by reference to this sub clause that it will accept service of notices, consents or approvals by electronic means, as specified in the notice and if it has done so, service upon that Party may (but need not) be affected in the manner so specified in the last such notice in addition to, or instead of, service by hand or by any other means set out in Clause 11.2 and a document served by electronic means shall be deemed served on the next Business Day after sending.

12 Notice of Authorised Development

- 12.1 National Highways shall provide notice to the Council:
- 12.1.1 not later than 30 Business Days prior to:

- (a) the intended Commencement Date; and
- (b) the obligations in this Clause 12.1.1 shall re-apply in the event that Commencement does not occur on the intended date.

12.1.2 within 30 Business Days of the occurrence of each of the following:

- (a) the Commencement Date; and
- (b) the day on which the Construction Period ends.

12.1.3 no earlier than nine months before the anticipated Commencement Date and no later than eight months before the anticipated Commencement Date of the anticipated Commencement Date (and such notice having been given should the anticipated Commencement Date change then notice of the changed anticipated Commencement Date shall be given promptly).

13 Community Infrastructure Levy

13.1 The Parties hereby acknowledge and agree that this Deed has been negotiated and agreed on the assumption that liability to CIL does not arise in respect of the Authorised Development on account of the proposed dis-application of the CIL Regulations by way of article 53(6) of the Development Consent Order.

14 VAT

14.1 If this Deed or anything contained in it gives rise to a taxable supply for VAT purposes by the Council to National Highways then the Council shall use all reasonable endeavours to recover VAT in the first instance.

14.2 If this Deed or anything contained in it gives rise to a taxable supply for VAT purposes by the Council to National Highways then, subject to the Council complying with Clause 14.1 National Highways shall pay to the Council or third party an amount equal to the VAT chargeable in addition to and at the same time as any payment or the provision of any other consideration for such supply upon provision of a valid VAT invoice addressed to National Highways.

15 Good Faith

15.1 The Parties agree with each other to act reasonably and in good faith in the discharge of the obligations contained in this Deed.

16 Rights of Third Parties

16.1 It is not intended that any person who is not a party to this Deed shall have any right under the Contracts (Third Parties) Act 1999 to enforce any term of this Deed.

17 Jurisdiction

- 17.1 This Deed including its construction, validity, performance and enforcement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law.
- 17.2 The Parties agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Deed or its subject matter or formation (including non-contractual disputes or claims).

18 Variations

- 18.1 No variation of this Deed shall be effective unless it is in writing and duly executed on behalf of the Parties.

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

SCHEDULE 1

Officer Support Contributions

PART 1

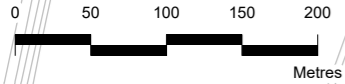
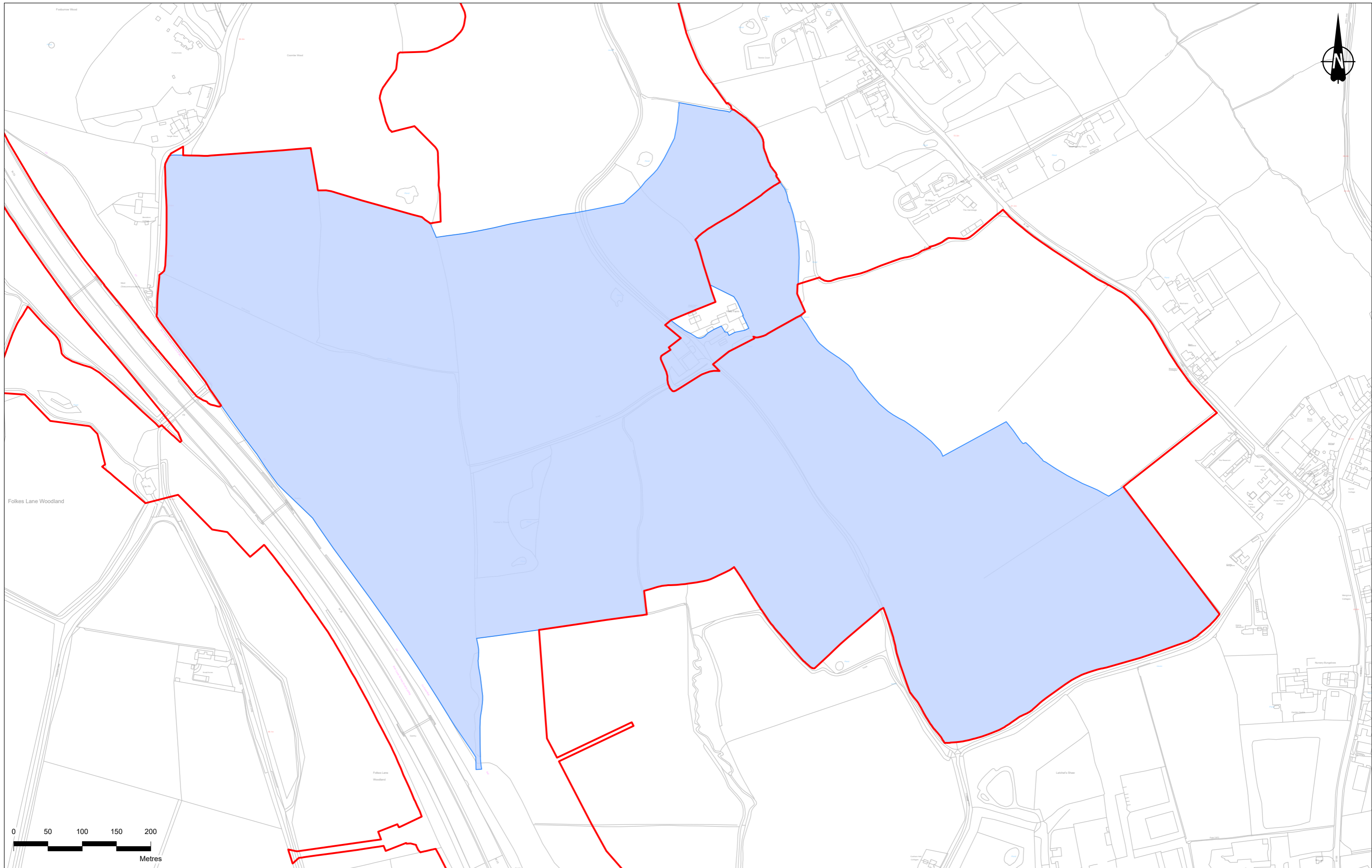
- 1 National Highways shall make annual payments to the Council for the duration of the Construction Period according to the table in Part 2 of this Schedule (the "Table") to assist the Council in meeting their obligations arising on account of the Authorised Development on the basis that doing so imposes on them additional cost burdens over and above their general duties and responsibilities and in particular discharging the obligations mentioned in the Table and any other responsibilities within that role that arise directly from the Authorised Development.
- 2 The payments shall be made annually, the first payment being due on the date which is six months before the anticipated Commencement Date as notified by National Highways under clause 12.1.3 with the final payment being reduced pro rata if the timing of it is such that it would cover less than a full 12 month period.
- 3 The payments made under this Schedule shall be applied by the Council for the purposes described in this Schedule and for no other purposes.
- 4 If any part of any annual payment made under this Schedule has not been applied in accordance with paragraph 1 of this part of this Schedule by the anniversary of that payment then a sum equal to that part shall be repaid to National Highways within 56 Business Days whether or not requested by National Highways and National Highways shall be entitled to request and promptly receive from the Council at any time after the relevant anniversary full details and supporting evidence of how sums paid by National Highways under this Schedule have been applied.
- 5 The payments made under this Schedule shall be index linked as from the date of this agreement by reference to the Retail Prices Index and should that index cease to exist at any time then by reference to another index to be agreed between the Parties acting reasonably, failing which by reference to the disputes procedure in clause 10.
- 6 If a local authority considers that the Development has caused or will cause it to incur costs over and above those mentioned in the Table that is a cost burden over and above its general duties and responsibilities then it may make a fully reasoned request to National Highways in writing for reimbursement of those costs from National Highways and National Highways will use its reasonable discretion in deciding whether or not to reimburse any such costs requested in full or in part.
- 7 If works on the Authorised Development should cease either permanently or temporarily the payments due to the Council under this Schedule shall be suspended until such time works resume (if the works resume at all) and the period of suspension shall be added to the interval at which the next payment is due.

- 8 If the Lower Thames Crossing project (being the subject of the prospective Development Consent Order) is cancelled before works upon it Commence then no payments or further payments under this Schedule shall be payable by National Highways and any unexpended sums provided to the Council under this Schedule shall be returned forthwith to National Highways.

PART 2

Role	Purpose of Payment: (Assessment of Additional Burden to Council)	Annual Cost of Additional Burden / Capacity P/A
Network Management Officer	<p>Undertaking local highway authority New Roads and Street Works Act (NRSWA) obligations under Part 3 of the Development Consent Order.</p> <p>Responding to applications for traffic regulation orders (TROs).</p> <p>Review and provide comments on the traffic management plans and travel plans produced by the Contractors.</p> <p>Attendance and participation at the Traffic Management Forum (being the forum described in paragraph 3.3.15 of the outline Traffic Management Plan for Construction that forms document REP6-048 in the examination library relating to the Application).</p>	£4,800
Highways Development Manager	<p>Participation in the detailed design process.</p> <p>Implementation of the side agreement with local highway authorities.</p> <p>Agreeing a local operating agreement.</p> <p>Works to the local highway network (including signage, barriers, safety measures and visibility).</p> <p>Site inspections (during works and prior to issuing of final certificate), including testing of materials at National Highways' expense.</p> <p>Road Safety Audits (Stages 3 and 4).</p> <p>Issuing of provisional certificates and final certificates.</p>	£7,350

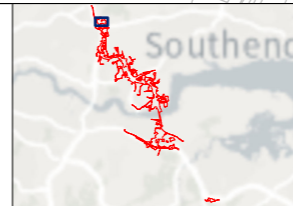
Annex - Plan showing land owned by National Highways



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- Legend**
- Order Limits
 - Outline of Land Parcels

P01	S2	28/09/2023	For information	DS	LS	ZS
Rev	Status	Rev. Date	Purpose of revision	Drawn	Chkd	Appr'd



Client
national highways

Project
LOWER THAMES CROSSING

Status	For information	Original Size	A3	Revision	P01
Scale	1:5,000				
Drawing Title	Section 106 Essex County Council EX671077				
Drawing Number	HE540039-CJV-VGN-GEN-DRA-LAP-08629				

Executed as a deed by affixing the)
common seal of ESSEX COUNTY)
COUNCIL)
in the presence of:

[COMMON SEAL]

.....
Authorised Signatory

Executed as a deed by affixing the)
common seal of NATIONAL HIGHWAYS)
in the presence of)

[COMMON SEAL]

.....
Authorised Signatory

In the presence of a Witness:

Witness name:

Witness Address:

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