

Northfleet Central 1 Limited

Section 106 Agreement and Planning Conditions – Explanatory Note for the Inspector

1. Introduction and scope

- 1.1 The author of this Note is Martyn Jarvis, partner at Town Legal LLP. Martyn is a specialist planning lawyer with experience advising on the consenting and delivery of major mixed use regeneration schemes, including, inter alia, in respect of planning obligations and the operation of section 106 of the Town and Country Planning Act 1990 (the “**Act**”)¹.
- 1.2 This Note provides information in respect of the following matters for the purposes of the determination of the planning application with reference 220221064 following its call-in by the Secretary of state on 7 February 2025 (Planning Casework Unit reference: PCU/CONS/K2230/3355719) (the “**Application**”):
- (a) A general explanation of the operation of section 106 Act to bind land and of the approach that can be taken where land is not in the ownership of an applicant at the time planning permission is granted;
 - (b) The approach to the binding of land pursuant to section 106 of the Act at the point of the agreement securing planning obligations in connection with the Application (the “**Section 106 Agreement**”) being entered into;
 - (c) The restrictions proposed in connection with the commencement of development pursuant to any planning permission granted pursuant to the Application (the “**Planning Permission**”) on land which is not bound by the Section 106 Agreement;
 - (d) The approach to the binding of land pursuant to section 106 of the Act which is not bound at the time the Section 106 Agreement is entered into;
 - (e) Information in respect of the ‘blue pencil’ clause contained within the Section 106 Agreement;
 - (f) Information which is considered to be of help to the Inspector in respect of the status of the submitted draft Section 106 Agreement and draft planning conditions and further discussions in relation to those.

2. Operation of section 106 of the Act to bind land

- 2.1 Set out below are relevant subsections of section 106 of the Act which together operate to bind land and to make the planning obligations enforceable against the owners of such land and their successors in title.
- 2.2 Section 106 (1) of the Act provides as follows:

(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections

¹ S.I. 1990 c.8

106A to 106C [and] Schedule 7A as “a planning obligation”), enforceable to the extent mentioned in subsection (3)—

- (a) restricting the development or use of the land in any specified way;*
- (b) requiring specified operations or activities to be carried out in, on, under or over the land;*
- (c) requiring the land to be used in any specified way; or*
- (d) requiring a sum or sums to be paid to the authority (or, in a case where section 2E applies, to the Greater London Authority) on a specified date or dates or periodically.*

2.3 Section 106 (3) of the Act provides as follows:

- (3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—*
 - (a) against the person entering into the obligation; and*
 - (b) against any person deriving title from that person.*

2.4 Section 106 (9) of the Act provides as follows:

- (9) A planning obligation may not be entered into except by an instrument executed as a deed which—*
 - (a) states that the obligation is a planning obligation for the purposes of this section;*
 - (aa) if the obligation is a development consent obligation, contains a statement to that effect;*
 - (b) identifies the land in which the person entering into the obligation is interested;*
 - (c) identifies the person entering into the obligation and states what his interest in the land is; and*
 - (d) identifies the local planning authority by whom the obligation is enforceable and, in a case where section 2E applies, identifies the Mayor of London as an authority by whom the obligation is also enforceable.*

2.5 Section 106 (11) of the Act provides as follows:

- (11) A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.*

2.6 Accordingly, a person interested in land may enter into a planning obligation with a relevant local planning authority such that those planning obligations are enforceable against and run with that land until such time as they are satisfied or discharged (including as may be varied from time to time in accordance with section 106A of the Act) by that local planning authority.

- 2.7 In connection with a grant of planning permission the planning obligations that will be required to be entered into will be those which are identified by the parties to assist in mitigating the impacts of the development to make it acceptable in planning terms and which satisfy the tests in regulation 122 of the Community Infrastructure Levy Regulations 2010².
- 2.8 Whilst it is more common for all land which a planning permission benefits to be bound by the necessary planning obligations at the point in time that the planning permission is granted, it is also often the case (particularly so in respect of large scale regeneration schemes) that all such land will not be within the control of the applicant at the point in time when planning permission is granted.
- 2.9 In such circumstances an approach can be taken whereby an agreement is entered which binds some of the land which the planning permission will benefit which is held by the applicant, and other land is bound pursuant to section 106 of the Act later when an interest in land is acquired which allows for it to be. Where such an approach is taken, it will also be necessary to restrict the carrying out of development on land which is not bound, which must be done by way of planning obligations and planning conditions to ensure it is a legally enforceable restriction³.
- 2.10 It is also possible for an agreement to be entered into which secures the need to bind planning obligations to land which the planning permission benefits where no interest in the land is held by that person at the point in time that planning permission is granted. However, as will be seen this is not the circumstances of the Application, and so this is not discussed further in this Note.

3. Ownership

- 3.1 A plan showing the red line boundary for the Application is located at **Appendix 1** to this Note.
- 3.2 The following land interests within the Application boundary are held by persons related to Northfleet Central 1 Limited (the “**Applicant**”) and are to be bound by the Section 106 Agreement which is entered into in connection with the determination of the Application:
- (a) freehold land known as Ebbsfleet United Football Club Limited, Stonebridge Road, Northfleet, Gravesend DA11 9GN registered at HM Land Registry under title number K829241 and owned by Ebbsfleet United Football Club Limited (“**EUFC**”);
 - (b) freehold property at Unit 1, 13 & 14 Ebbsfleet Business Park, Stonebridge Road, Northfleet, Kent DA11 9DZ being all the property registered at HM Land Registry under title numbers K627840, K639790, K761377 and K899525 and owned by Northfleet Phase 1 Properties Limited (Company Registration Number 15536445) (“**NP1P**”)
 - (i) The registration of the transfer of the freehold property at Unit 1, 13 & 14 Ebbsfleet Business Park to NP1P is currently being progressed by the Land Registry. Should this not have completed by the point in time that the Section 106 Agreement a solicitors undertaking will be provided to the Council’s and County Council’s Solicitors to address the ‘registration gap’.
- 3.3 A plan showing those interests within the Application boundary is located at **Appendix 2** to this Note.

4. Approach to binding land at the outset and enforceability

² S.I. 2010 No.948

³ See Paragraph: 010 Reference ID: 21a-010-20190723 of [Planning Practice Guidance](#) on Use of Planning Conditions for further information on the use of negative planning conditions to require planning obligations to be entered into.

- 4.1 All land which is held by the Applicant or by the beneficial owners of the Applicant is to be bound by the Section 106 Agreement which is to be entered into in connection with the determination of the Application and the Section 106 Agreement will operate to bind those persons and their successors in title.
- 4.2 This is achieved as follows:
- (a) The proposed parties to the Section 106 Agreement are as follows:
- (i) Ebbsfleet United Football Club Limited;
 - (ii) Northfleet Phase 1 Properties Limited
(collectively the “Owner”)
 - (iii) Gravesham Borough Council in their capacity as a chargee in respect of title number K829241;
 - (iv) Faithdean PLC (Company Registration Number 01389235) in their capacity as chargee of title number title number K829241
 - (v) Vital Energi Utilities Limited (Company Registration Number 04050190) in their capacity as chargee of title numbers title numbers K627840, K639790, K761377 and K899525
 - (vi) Gravesham Borough Council, in their capacity as the local planning authority for the Application; and
 - (vii) Kent County Council, in their capacity as a local planning authority
- (b) Clauses 2.1 and 2.2 of the Section 106 Agreement provide as follows:
- “2.1 This Agreement is made pursuant to section 106 of the Planning Act and all other enabling powers.
- 2.2 To the extent they fall within the terms of section 106 of the Planning Act, the covenants, restrictions and obligations imposed on the Owner contained in this Agreement are all planning obligations for the purposes of section 106 of the Planning Act and are given with the intent that they bind the Owner’s interests in the Site as at the date of the Agreement.”
- (c) Clause 2.5 of the Section 106 Agreement provides as follows:
- “2.5 Subject to clause 2.6 below the covenants, restrictions and obligations contained in this Agreement are enforceable by the Council and the County Council against the Owner and for the avoidance of doubt the Council and the County Council shall be entitled to enforce any of the covenants, restrictions and obligations given by the Owner against any of its successors in title and assigns in respect of such covenants, obligations and restrictions which relate to the interest or estate for the time being held by that person.”
- 4.3 Accordingly, the planning obligations shall be enforceable by Gravesham Borough Council and (as relevant) Kent County Council against the Owner and their successors in title.
- 4.4 As Gravesham Borough Council have a registered charge against the land held in title number K829241 provision is included in Cause 2.6 which would ensure that should Gravehsam Borough

Council become the owner of any of the land in that title the obligations of the Owner which bind them shall be deemed to be given to the County Council and enforceable against them by the County Council.

- 4.5 The Inspector should note that discussions regarding this position are continuing with Gravesham County Council in their capacity as a charge holder, and between Gravesham Borough Council and Kent County Council in their capacity as local planning authorities.

5. Restrictions on the commencement of development not bound by the Section 106 Agreement

- 5.1 Within the Section 106 Agreement the Owner covenants at clause 6.1.4:

"6.1.4 not to Commence or permit or cause or suffer Commencement in respect of a part of the Remaining Land unless and until the Owner (or other Group Company of the Owner) has acquired a freehold or leasehold interest in such relevant part of the Remaining Land and has entered into a Confirmatory Deed binding all relevant interests in the relevant part of the Remaining Land as may so be required by the Council and/or the County Council"

- 5.2 This covenant ensures that Gravesham Borough Council and (as relevant) Kent County Council will be able to enforce the Section 106 Agreement to prevent the Owner from undertaking development pursuant to the Planning Permission on land which is not bound by the Section 106 Agreement.

- 5.3 However, as the Section 106 Agreement is only entered into by the Owner that restriction is not effective in respect of any other persons, including the persons who are the owners of the land which is not bound following the grant of any Planning Permission.

- 5.4 Accordingly, to ensure that there is an enforceable restriction to prevent the development being carried out on land which is not bound by the Section 106 Agreement, it is necessary to restrict this by way of a planning condition. The breach of such a condition will be a breach of planning control, which the local planning authority may take enforcement action to stop and prevent in accordance with Part VII of the Act.

- 5.5 The relevant planning condition which is proposed to be included on any Planning Permission is condition 1, which reads as follows:

"1. No Phase of the Development shall commence (nor any part thereof) (except for surveying, testing, sampling, soil tests, ground investigations, and archaeological investigations) unless and until all parties with any legal or equitable interest within all parts of the relevant Phase (including but not limited to all freehold and leasehold owners and mortgagees and chargees) have entered into an agreement pursuant to section 106 of the Town and Country Planning Act 1990 (as amended) substantially in the form of the Confirmatory Deed included within the Section 106 Agreement with Gravesham Borough Council and Kent County Council with the effect that all of the land in that Phase is bound by the planning obligations contained in the Section 106 Agreement."

- 5.6 An approach has been taken whereby whole 'Phases' must be bound before development within them commences, which provides a proportionate level of flexibility for how the development may come forward over time once land is acquired by the Owner without creating the risk of too piecemeal an approach which does not provide for an acceptable approach to the regeneration of the site.

6. Approach to binding further interests in land

6.1 As detailed above, there are enforceable restrictions against all persons in respect of the commencement of development which is not bound by the Section 106 Agreement until such time as a 'Confirmatory Deed' has been entered into.

6.2 Moreover, clause 6.1.3 contains the following covenant by the Owner in respect of the need for 'Confirmatory Deeds' to be entered into:

"6.1.3 immediately upon the Owner (or any Group Company of the Owner) acquiring a freehold or leasehold interest in any part of the Remaining Land to:

(a) notify the Council and the County Council of such transaction;

(b) enter into a Confirmatory Deed with the Council and the County Council (together with any other parties with an interest as may so be required by the Council and/or the County Council) in respect of the relevant Remaining Land; and

(c) pay the Council and the County Council's reasonable and proper administrative and legal costs in connection with the negotiation and completion of each Confirmatory Deed;"

6.3 The form of 'Confirmatory Deed' which is required to be entered into in accordance with the Section 106 Agreement and planning condition is located at Appendix 4 to the Section 106 Agreement.

6.4 This 'Confirmatory Deed' contains the following provisions which are effective to bind the interests in land to which it relates pursuant to section 106 of the Act:

"The Owner undertakes to the Council [and County Council] so as to bind its interest in the Land that:

3.1 the Land will be bound by the Relevant Obligations on the same terms as if it had originally formed part of the land bound under the Original Deed and the relevant covenants in the Original Deed were set out herein in full; and

3.2 it will observe and perform the Relevant Obligations in the Original Deed so far as they relate to the Land and remain to be observed, performed and/or complied with, and further that, subject to the terms of the Original Deed, the Relevant Obligations shall be binding on successors in title and persons deriving title to the Land through them."

6.5 Accordingly, where any further interests in land within the Application boundary are acquired by the Owner (or any Group Company of the Owner) they must be bound pursuant to section 106 of the Act in the same terms as the land owned by the Owner is bound by the Section 106 Agreement, such that the planning obligations are then enforceable against the owners of that land in connection with the carrying out of the development on it.

7. The 'blue pencil' clause

7.1 As part of determining the Application the Secretary of State will need to satisfy herself that all planning obligations to be secured within the Section 106 Agreement comply in all respects with regulation 122 of the Community Infrastructure Levy Regulations 2010.

7.2 To allow for the Secretary of State to grant a Planning Permission which is not the subject of planning obligations which are not considered to comply in all respects with regulation 122 of the Community Infrastructure Levy Regulations 2010 the following clause 3.2 is included within the

Section 106 Agreement that will have been entered into by the parties by the close of the call-in inquiry:

“3.2 Each planning obligation in this Agreement is also conditional upon the Secretary of State being satisfied that it complies in all respects with regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) and in the event that the Secretary of State expressly states in their Decision Letter that any individual planning obligation (or any part of an obligation) contained within this Agreement is not compliant with Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended), or should otherwise not carry weight in the determination of the Application, then that planning obligation (or any part of an obligation) or those planning obligations so identified by the Secretary of State will cease to have effect and shall be void for the purposes of this Agreement and the parties shall be under no obligation to comply with the obligation or obligations PROVIDED ALWAYS THAT the remaining provisions of this Agreement (if any) shall remain legally effective and binding.”

7.3 Flexibility is also provided for the Secretary of State to secure matters by way of planning conditions as a replacement for any planning obligations contained within the Section 106 Agreement by virtue of clause 3.4 of the Section 106 Agreement:

“3.4 In the event that the Secretary of State imposes a condition on the Planning Permission as a replacement for one or more of the obligations in this Agreement, and this is specified within the Decision Letter, then the said provisions of this Agreement shall thereafter have no legal effect to the extent determined by the Secretary of State in her decision.”

8. Update on the status of the draft Section 106 Agreement and Planning Conditions

8.1 Both the draft Section 106 Agreement and draft planning conditions submitted to the Planning Inspectorate on today's date are substantially agreed with both Gravesham Borough Council and Kent County Council. The Applicant is very grateful to both for their constructive engagement to reach this position.

8.2 Whilst that is the case, the Inspector should be aware of the following:

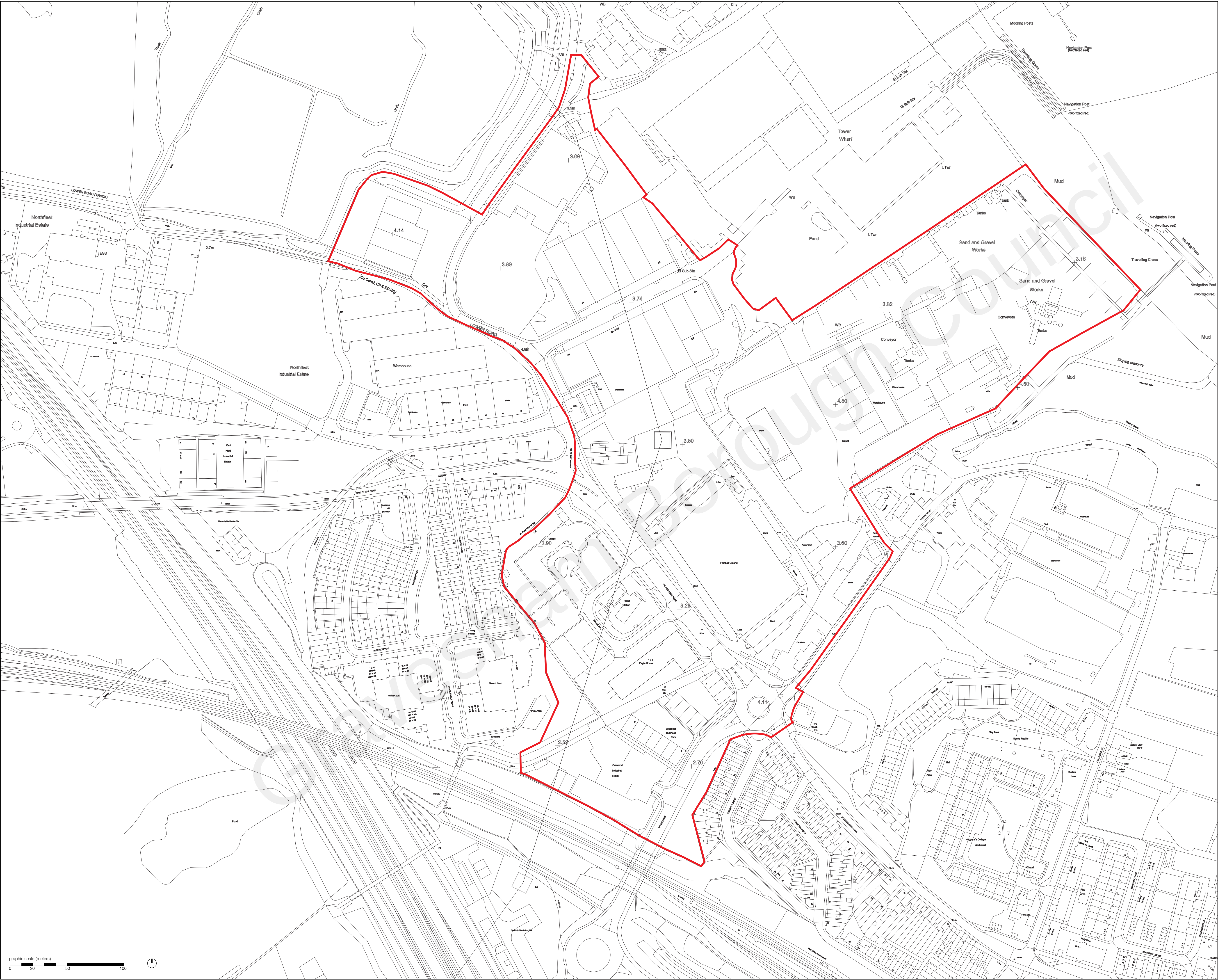
- (a) updates will be made and checks will be completed to confirm the title position prior to the completion of the Section 106 Agreement;
- (b) Schedule 4 to the Section 106 Agreement which contains the Planning Obligations relating to Primary Healthcare remains subject to further discussions with the NHS Trust and the Councils;
- (c) the Applicant is continuing discussions with the NHS Kent and Medway in respect of a request for a contribution of £6.7m towards acute care infrastructure. The Applicant does not agree that the request has been evidenced to be compliant with Regulation 122 of the Community Infrastructure Levy Regulations 2010 and moreover, the Applicant identifies that the contribution also cannot be support having regard to scheme viability. The Applicant last corresponded with the NHS on 7th May 2025. An update will be provided on how these discussions are progressing in advance of the roundtable to discuss the Section 106 Agreement, and otherwise where requested by the Inspector;

- (d) Schedule 17 to the Section 106 Agreement, which is to reference the obligations which specifically relate to a Phase, Sub-Phase or Plot and which shall only be enforceable against all persons who hold any interest or estate in the relevant Sub-Phase, Phase or Plot to which the obligations relate, remains to be populated and agreed;
 - (e) notice requirements within Clause 6 to the Section 106 Agreement will require to be reviewed and updated;
 - (f) the plans which are to be appended to the Section 106 Agreement at Appendix 2 remain to be agreed, and these will be confirmed as soon as possible and an update provided;
 - (g) execution blocks for all parties to the Section 106 Agreement remain to be inserted;
 - (h) some condition wording in draft conditions 37 and 38 relating to works in the vicinity of National Grid infrastructure is not agreed. The Applicant is requesting wording which reflects National Grid's Technical Guidance Note 287: Third-party guidance for working near National Grid Electricity Transmission Equipment. As it has not been agreed by National Grid, Gravesham Borough Council has not agreed to its inclusion;
 - (i) on the afternoon of 09 May 2025 representatives of Gravesham Borough Council and Kent County Council were not available to approve some final amendments to the draft planning conditions and planning obligations, and accordingly there is the potential for some additional matters to be raised; and
 - (j) both the Section 106 Agreement and planning conditions are in a draft form and require proof-reading and cross-referencing etc. and minor points may arise during that process.
- 8.3 The parties shall endeavour to address all of the above matters as soon as possible, and an update may be provided to the Inspector at the opening of the inquiry.

Town Legal LLP
9 May 2025

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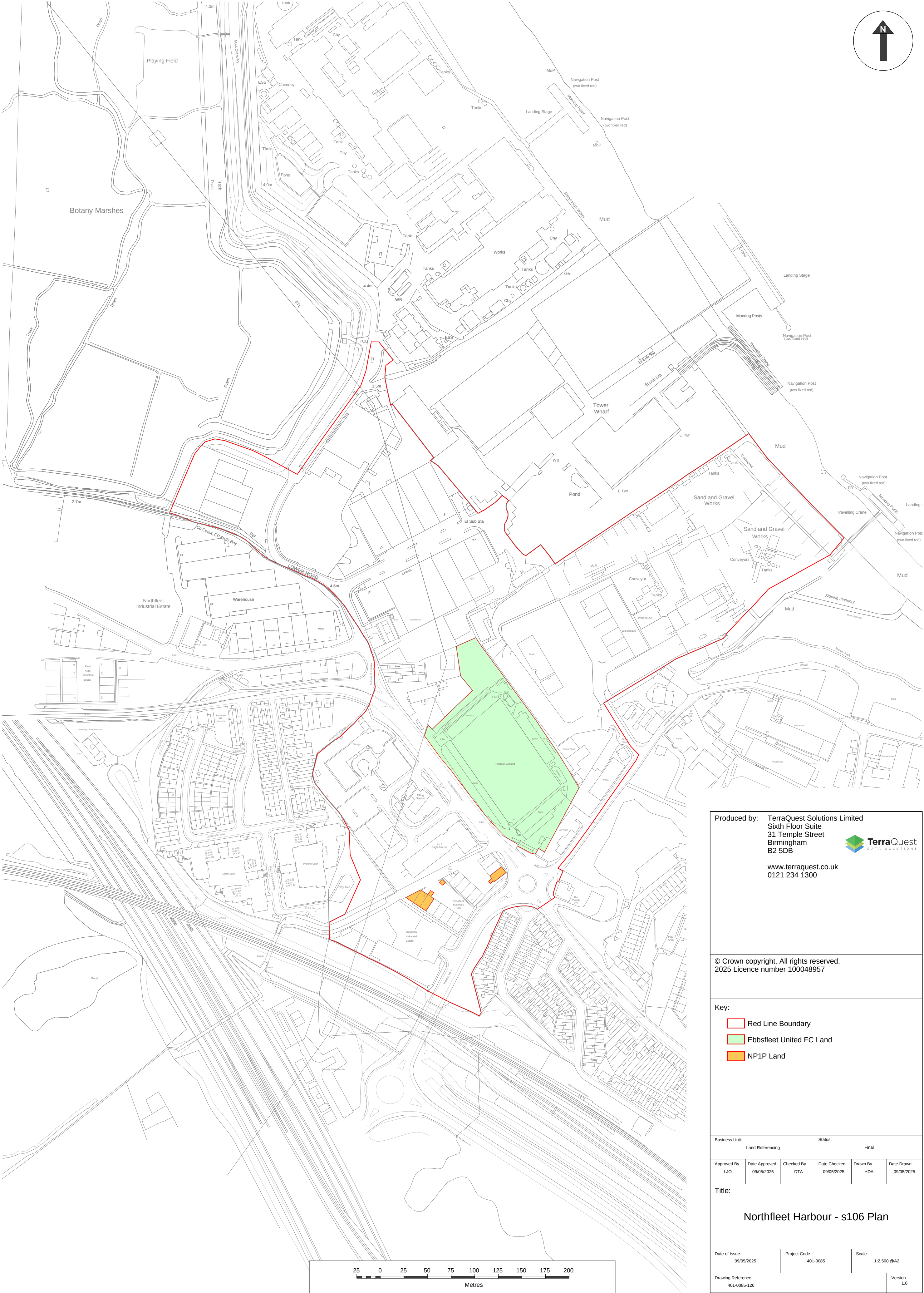
Appendix 1
Application Site Boundary Plan



description / disclaimer

Appendix 2
Owner's Land Plan

Northfleet Harbour - s106 Plan



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Key:

Red Line Boundary

Ebbsfleet United FC Land

NP1P Land

Business Unit: Land Referencing			Status: Final		
Approved By LJO	Date Approved 09/05/2025	Checked By DTA	Date Checked 09/05/2025	Drawn By HDA	Date Drawn 09/05/2025

Title:

Northfleet Harbour - s106 Plan

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