



**Tonbridge & Malling Borough Council  
Cabinet**

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## **Proposed changes to approach for S106 agreements and contribution monitoring.**

Dear Members,

I write in relation to Item 11 (s106 Matters) of the agenda for the Cabinet Meeting of 4 April 2023.

Kent County Council (KCC) is grateful for the discussions with your Council officers following the Overview and Scrutiny Committee of 26 January at which this item was last considered.

The acknowledgement of the continued need for engagement with KCC on draft s106 agreements and for the inclusion of KCC as a party to agreements containing reciprocal covenants for land transfer is encouraging. However, KCC's concerns regarding the new s106 protocol still remain, particularly the change to remove KCC as a signatory from the majority of s106 agreements.

The papers prepared by your officers have kindly informed you of our concerns set out through our officers note included as your second "Annex 2" and the KCC risk assessment prepared by your officers at "Annex 3" to item 11.

Paragraph 1.2.3 of the Cabinet report identifies that the main change to be implemented under the new protocol is the removal of KCC as a signatory to the majority of section 106 agreements. The reason given for making this change is to ensure greater control by TMBC over the delivery of mitigation and payment of funds whilst minimising the time taken to sign and complete the agreements.

This will not be the case. TMBC & KCC have separate statutory responsibilities over which each have singular jurisdiction, working

collaboratively for the benefit of our residents. The changes cannot give TMBC any greater control over the delivery of mitigation for which they have no statutory responsibility or accountability, they do however:

- i.) prevent the direct payment of contributions from developers to KCC adding unnecessary bureaucracy for both authorities to manage transfers of funding;
- ii.) reduce the level of KCC's legal scrutiny to the areas of higher financial value;
- iii.) risk KCC being unable to enforce planning obligations relating to County matters and to rely solely on TMBC to do so on their behalf – a matter that does not appear have been risk assessed by TMBC;
- iv.) potentially delay the delivery of KCC delivering mitigating infrastructure.

The effect of the proposed new approach would appear to be that TMBC limits the level of KCC officer engagement for County matters, controls financial contributions required for KCC mitigation and introduces an unnecessary additional assessment of CIL compliance. CIL compliance is required to be confirmed at the time the planning application is considered and the necessary planning obligation then constitutes a reason for granting planning permission. There is no legal justification for TMBC to require KCC to produce evidential documentation at the time payment of a contribution is due. Currently in completed s106 agreements, developers and TMBC have the benefit of reciprocal obligations from KCC to apply contributions towards the specific county projects and to return uncommitted contributions within an agreed period. In addition, as is the case for TMBC, KCC also has a statutory obligation to produce an annual Infrastructure Funding Statement demonstrating exactly how much funding is secured, the areas it is assigned to and what has been spent. These existing statements and records provide sufficient evidence as required by statute.

We do not agree that the current approach needs to be changed and are therefore concerned that the new protocol will introduce an unnecessary level of bureaucracy and could significantly delay County infrastructure being put in place at the time it is needed.

It is standard national practice that a County Council is a party to a s106 agreement where it secures County obligations. A recent Planning Appeal (Appeal ref **APP/W1905/W/22/3300254**) in Hertfordshire tested the question as to whether funding for Education should go to the Borough Council (as Local Planning Authority) or the County Council (as Education Authority). The inspector made it very clear in this case that as the County Council was the accountable body for delivering the mitigation, then funding should go directly to them.

We recognise that the Borough and District members seek greater clarity on KCC delivered mitigation in their areas and there are mechanisms within the proposals that will assist with this. We will be happy to continue to work with your officers to find an agreeable solution to this.

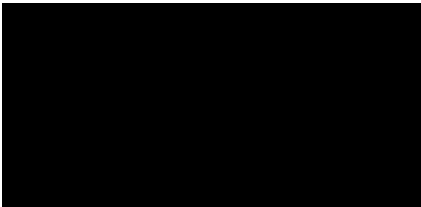
In your assessment of the papers and this item we would respectfully ask that you note our concerns.

KCC seeks to work collaboratively with its partner planning authorities and should you remain of the opinion that the proposal put to you should be approved, we request the consideration of the following undertakings.

1. That officers of both authorities and their legal representatives work together to produce a legal template s106 to reduce risks of non-payment by developers and “where required”, mechanisms for the payment of KCC legal representatives to check developer drafted agreements.
2. Confirmation that any adopted s106 protocol will provide that where County obligations are to be secured in a s106 agreement that such agreement shall include appropriate unilateral undertakings by the landowner to KCC to allow for KCC to enforce against any non-compliance of such obligations and alleviating any perceived delay with KCC being a signatory to the s106.
3. In the interest of the joint delivery of mitigation that the proposed TMBC s106 protocol is approved only as an interim measure, whilst a joint KCC/TMBC s106 is established that works for the benefit of the infrastructure delivery of both authorities, rather than one authority over another.

We believe we have a very positive and co-operative relationship with the planning department at TMBC and are concerned that the proposals are contrary to our positive partnership and have unnecessary and detrimental consequences to the delivery of services and infrastructure within Tonbridge and Malling. Should you agree to our suggested undertakings we are confident that there is an amicable approach available to us that can meet the primary stated objectives and we are keen to work with you to achieve it.

Yours Sincerely,



**Derek Murphy**

**KCC Cabinet Member for Economic Development**

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