

TONBRIDGE & MALLING BOROUGH COUNCIL
PLANNING and TRANSPORTATION ADVISORY BOARD

28 July 2020

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Information

1 SECTION 106 PROTOCOL AND MONITORING REPORT

Summary

This report provides an overview of planning obligations for the period 2018-2020 and provides an update on upcoming changes to how future monitoring of obligations will take place. It also seeks approval for the adoption of a Planning Obligations Protocol which is intended to provide a clear and transparent framework in respect of how the Service will negotiate and secure planning obligations under section 106 of the Town and Country Planning Act 1990 in order to mitigate the impacts of development taking place across the Borough. Successful negotiation of planning obligations requires effective management and monitoring to ensure timely and appropriate use of collected obligations.

1.1 Introduction

1.1.1 Matters relating to Section 106 monitoring were last reported to this Board in November 2018 following an internal audit having taken place. The report at that time undertook to provide the Board with regular updates on monitoring and that was predicated on structural changes across the service allowing for dedicated monitoring resources to be put in place. Those anticipated changes have yet to be implemented and in the interim period the government has introduced new legislation that will require all Local Planning Authorities to publish their monitoring statistics in a prescribed format by the end of the year.

1.1.2 Aligned with this, significant obligations and financial contributions are being secured through the grant of planning permissions for developments across the Borough and this trend will undoubtedly continue once the new Local Plan is adopted, particularly in connection with the strategic site allocations.

1.1.3 With these factors collectively in mind, this report intends to;

- Outline the nature of the obligations secured, received and used for applications received 2018 – June 2020 (predominately covering the period since the matter was last reported to the Board) and provide a synopsis of

some key obligations currently being sought through the Development Management process;

- Update Members on the upcoming national requirements relating to the publication of monitoring statistics and how it is intended to action these requirements going forward; and
- Introduce a new Protocol to be adopted seeking to provide a clear and concise framework setting out how officers will negotiate planning obligations, what expectations will be placed upon developers, including the introduction of a monitoring fee.

1.2 Relevant statutory and policy framework:

1.2.1 Section 106 agreements, also known as planning obligations or developer contributions, are typically undertakings by developers or agreements between a local planning authority and a developer in the context of granting planning permission. Their function is to make acceptable development which would otherwise be unacceptable in planning terms and they typically involve commitment to provide something in-kind on site in a particular form (e.g. affordable housing, community facilities) or money for the authority to undertake necessary work. Section 106 monies, by their nature, are mostly for capital works as they are for the provision of infrastructure necessary to mitigate the impact of the development (e.g. junction modifications, school extensions).

1.2.2 Planning obligations effectively are used for three main purposes:

- Prescribe the nature of development (for example, requiring a given portion of housing is affordable);
- Compensate for loss or damage created by a development;
- Mitigate the impact of a development.

1.2.3 As part of the planning process, a developer may be required to enter into a legal agreement to provide infrastructure and services on or off the development site, acting as a delivery mechanism for the matters that are necessary to make the development acceptable in planning terms.

1.2.4 Examples of types of infrastructure or services that planning obligations can include are:

- Transport infrastructure or services, including new or improvements to existing footpaths, cycle ways, roads and bus services and their associated infrastructure, to link development to surrounding areas and ensure it is accessible by all modes of travel;
- Affordable and specialist housing (where there is a proven local need);

- Education facilities to meet any expected demand in school places arising from the development;
- Community facilities, including buildings and play or open space, where existing provision is inadequate to provide for the new development;
- Environmental improvements where necessary to mitigate the impact of a development or integrate it with surrounding areas;
- Restrictions and obligations on the use of land.

1.2.5 The Community Infrastructure Regulations 2010 (CIL) that came in to force on 06 April 2010 set out the statutory tests on what can reasonably be sought under section 106 of the Act, replacing the circular 05/2005 guidance for all developments. Regulation 122 requires that a planning obligation cannot be taken into account in a decision on a planning application unless it is:

- (i) necessary to make the development acceptable in planning terms;
- (ii) directly related to the development; and
- (iii) fairly and reasonably related in scale and kind to the development.

1.2.6 Members should note that since section 106 obligations were last reported to this Board, the pooling restrictions previously enshrined within Regulation 123 of the CIL Regulations have been removed. This means that subject to meeting the three tests above, local authorities can use funds secured by obligations to pay towards the same piece of infrastructure regardless of how many planning obligations have already contributed towards that item, whereas previously this had been limited to a total of five obligations towards any one project.

1.3 Summary of section 106 obligations:

1.3.1 Planning obligations sought and secured will inevitably vary from year to year depending on the sites that are granted planning permission and necessitate mitigation in accordance with relevant policies. Furthermore, it should also be remembered that not all obligations/contributions secured via planning permissions will ultimately be received by the Council. For example, in cases where the developer chooses (for whatever reason) not to progress with the development. As such, Councils should not “rely” on developer contributions coming forward within a particular timeframe, or indeed at all, to fund projects they wish to progress. This is particularly important to remember given that obligations/contributions should only be sought where the statutory tests are met.

1.3.2 **[Annex 1]** provides a summary of all obligations secured for applications covering the period 2018 – June 2020, including details of the site, relevant planning application and nature of the obligation itself. Clearly, Members will have knowledge of other, individual schemes that are in the process of undergoing

assessment and negotiation to secure obligations by way of agreement and at the point of the decision, these will be inputted into the spreadsheet. Members should acknowledge that the data has been directly lifted from the monitoring spreadsheet which is a working tool used by officers to record obligations secured and activity to ensure compliance with the terms of legal agreements. Equally, it should be noted that this will necessarily change once the standardised means of publishing our statistics comes into effect. This is discussed in more detail at Section 1.4 below.

1.4 Changes to monitoring and standardised means of publication

- 1.4.1 The Planning Practice Guidance (the “PPG”) recognises that reporting on developer contributions helps local communities and developers see how contributions have been spent and understand what future funds will be spent on, ensuring a transparent and accountable system.
- 1.4.2 As such, the PPG sets out that, in accordance with the Community Infrastructure Levy Regulations, any authority that receives a contribution from development through the levy or section 106 planning obligations must prepare an infrastructure funding statement. This is a requirement on Borough, County and Parish Councils (separate advice is contained within the PPG pertaining to Parishes in particular).
- 1.4.3 Where authorities pass funds to other bodies, this should be on the condition that the other body will provide information back to the authority on how contributions have been spent that reported year, and how they intend to spend future contributions, to inform infrastructure funding statements.
- 1.4.4 Local planning authorities are already required to keep a copy of any planning obligation together with details of any modification or discharge of the planning obligation and make these publicly available on their planning register. Any local authority that has received developer contributions is required to publish an infrastructure funding statement at least annually. To collect data for the infrastructure funding statement, it is recommended that local authorities monitor data on section 106 planning obligations and the levy in line with the government’s prescribed data format. Advice to local authorities on how to record the data is set out within the PPG, an extract of which is provided at **[Annex 2]** for Members further information. This data should include details of the development and site, what infrastructure is to be provided including any information on affordable housing, and any trigger points or deadlines for contributions. Local authorities should also record when developer contributions are received and when contributions have been spent or transferred to other parties.
- 1.4.5 The PPG highlights that local planning authorities are expected to use all of the funding they receive through planning obligations in accordance with the terms of the individual planning obligation agreement. This will ensure that new

developments are acceptable in planning terms; benefit local communities and support the provision of local infrastructure.

- 1.4.6 For the financial year 2019/2020 onwards, any local authority that has received developer contributions (section 106 planning obligations or Community Infrastructure Levy) must publish online an infrastructure funding statement by 31 December 2020 and by the 31 December each year thereafter. Infrastructure funding statements must cover the previous financial year from 1 April to 31 March (note this is different to the tax year which runs from 6 April to 5 April).
- 1.4.7 In terms of resourcing, authorities can charge a monitoring fee through section 106 planning obligations, to cover the cost of monitoring and reporting on delivery of that section 106 obligation. Monitoring fees can be used to monitor and report on any type of planning obligation, for the lifetime of that obligation. Monitoring fees should not be sought retrospectively for historic agreements. The PPG advises that fees could be a fixed percentage of the total value of the section 106 agreement or individual obligation; or could be a fixed monetary amount per agreement obligation (for example, for in-kind contributions). However, in all cases, monitoring fees must be proportionate and reasonable and reflect the actual cost of monitoring. Authorities could consider setting a cap to ensure that any fees are not excessive. Authorities must report on monitoring fees in their infrastructure funding statements.
- 1.4.8 Officers are presently working to prepare for this requirement coming into force by taking part in training events with IT to establish how our existing systems can best be utilised to record and report the necessary data. Consideration is also being given to how this work is best resourced going forward in order that the work is undertaken in a structured, consistent and regular manner. In all likelihood, the role will sit within the technical team of Development Management and part of the consideration as to how that is best resourced will be linked to necessary benchmarking, effective time monitoring and the ability of the Council to charge secure monitoring fees.

1.5 Key themes of the Protocol

- 1.5.1 Officers have been developing a Section 106 protocol which is intended to provide best practice guidance on managing Section 106 Planning Obligations related to development taking place in the Borough. It is intended to amplify adopted local and national requirements whilst looking towards a collaborative approach to the provision of affordable housing, infrastructure projects and public services. It is essential that the means of securing such obligations takes place in a fair, open, transparent and reasonable in order to retain public confidence in the system and to provide greater clarity to all those involved.
- 1.5.2 The Protocol is intended to sit alongside the pre-application advice service the Council currently provides (which is subject to ongoing review and likely to be reported to this Board in November) and the use of Planning Performance

Agreements, which are being actively promoted following the adoption of a similar protocol and fee charging schedule earlier this year.

- 1.5.3 The Protocol recognises that it is important that the negotiation of planning obligations does not unnecessarily delay the planning process, thereby holding up development delivery. It is therefore essential that all parties proceed as quickly as possible towards the resolution of meaningful and enforceable obligations in parallel to planning applications (including through pre-application discussions where appropriate) and in a spirit of early engagement and co-operation, with deadlines and working practices agreed in advance as far as possible (via formal planning performance agreements wherever possible to do so) in order to shape better quality schemes and improve the outcomes of a proposed development. It is considered that a protocol will embed within it the roles and responsibilities of each party in order to achieve this in practical terms.
- 1.5.4 Linked to the earlier sections of this report, it is recognised that key part of the Protocol must address implementation and monitoring of agreements once they have been secured via the Development Management process. It is necessary to embark upon a period of time recording and benchmarking to establish what any monitoring fee schedule should be, particularly as we look to update our systems to reflect national requirements for publishing data and consider resourcing implications for this.
- 1.5.5 The Protocol itself is set out in draft form at **[Annex 3]** to this report and a series of examples of monitoring fees adopted by a range of other Local Planning Authorities is contained at **[Annex 4]**. This information is not provided with the intention to replicate or endorse any one given approach but rather to provide Members with an understanding that there are a number of ways by which fees can be categorised and structured. The final Protocol along with the schedule of monitoring fees will be reported again to this Board in November for approval.
- 1.5.6 Members will also note that the Protocol seeks to address how Parish and Town Councils can engage with the process in order to identify projects within their communities to which contributions should be directed. In the recent past, contributions have been passed to Parish Councils where projects have been identified as falling within the scope of formal obligations secured, as follows:
- Addington PC: £18,755 towards new play equipment in the vicinity of a new development;
 - Hadlow PC: £18,125 towards facilities at Williams Field in the vicinity of a new development.
- 1.5.7 Presently, liaison is taking place with colleagues in Leisure Services with a view to compiling information to assist Parish and Town Councils in evidencing where need may arise from developments in the vicinity of their facilities at an earlier stage of the process. The key in all instances will be identifying that any such projects meet the statutory and policy tests in the same way the Borough and

County Councils are required to do. It is likely that the most helpful way to provide this guidance will be as an Annex to the main Protocol.

1.6 Legal Implications

- 1.6.1 There is a statutory requirement for local planning authorities to use all of the funding received by way of planning obligations, as set out in individual agreements, in order to make development acceptable in planning terms. Agreements should normally include clauses stating when and how the funds will be used by and allow for their return, after an agreed period of time, where they are not. Similarly, there is a need to adhere to the new requirement to publish our data in the prescribed format within the periods set out in the PPG.

1.7 Financial and Value for Money Considerations

- 1.7.1 Failure to effectively secure planning obligations that successfully mitigate the impact of new development could give rise to unacceptable planning harm arising on an individual or cumulative basis across the Borough.
- 1.7.2 Failure to effectively monitor how and where those planning obligations are secured could necessitate the repayment of financial obligations received. Both scenarios would compromise our ability to mitigate impacts in a positive way.
- 1.7.3 Failure to introduce a monitoring fees that fully reflect the actual cost of monitoring agreements would have potential resourcing implications.

1.8 Risk Assessment

- 1.8.1 It should be recognised that if individual planning permissions are not implemented, then the obligations secured as part of the permission do not come forward. As such, and particularly when linked to the statutory tests that we are required to apply, it is important to understand that planning obligations cannot be seen as a mechanism to fix pre-existing problems or as an opportunity to use developers as an additional revenue stream.
- 1.8.2 Additionally, it should be understood that even once an obligation has been secured through a planning agreement and tied to a permission there is provision within the Act for parties to the agreement to seek formal variations. Commonly this would occur in situations where developers wish to demonstrate that the viability of a scheme has altered over time and we have some limited experience of that happening in certain cases. However, it is equally relevant that in such cases, there would still be a requirement to assess the scheme afresh without the secured obligations and mitigation in place. If it is consequently considered that the impact would be harmful and there was no alternative means of ensuring effective mitigation that could be a justification to refuse to agree a variation.

1.9 Recommendations

- 1.9.1 That the contents of the report, in particular the intention to report back to this Board in November with the finalised Planning Obligations Protocol and associated monitoring fee charging schedule along with a further update on progress on changes to the recording and monitoring of new agreements in accordance with government requirements be **NOTED**.

Background papers:

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Annex 1: Section 106 monitoring data

Annex 2: Planning Practice Guidance Extract

Annex 3: Draft Planning Obligations Protocol

Annex 4: Examples of monitoring fee schedules

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