

# TONBRIDGE & MALLING BOROUGH COUNCIL

## CABINET

04 April 2023

### Report of the Director of Planning, Housing and Environmental Health

#### Part 1- Public

#### Executive Non Key Decisions

#### 1 S106 MATTERS

**Updated S106 Protocol and a new monitoring structure for S106 monies including an update on the recently published Infrastructure Delivery Statement.**

#### 1.1 Background

1.1.1 The S106 matters report attached as **Annex 1** was presented to Overview and Scrutiny Committee on 26 January 2023.

1.1.2 At that meeting, officers advised members that communication had been received from the KCC Infrastructure Team concerning matters set out in the report and requesting further discussions take place before a final decision was taken. Officers requested that if members were minded to agree the recommendations to Cabinet, that this be subject to further discussions being entered into with KCC.

1.1.3 Members resolved that:

- subject to further discussions with Kent County Council, the revised S106 Protocol and process, including the new monitoring structure, be commended to Cabinet for approval (in due course)
- the new monitoring structure, as set out in the report, be commended to Cabinet for approval (in due course)
- the recently approved and published Infrastructure Funding Statement 21/22 and spreadsheet be noted.

1.1.4 A meeting was then convened on the 9 February with officers from the Infrastructure Team at KCC and the Head of Planning to discuss the issues and concerns raised by KCC over the revised Protocol which seeks to:

*In most circumstances, we would not expect Kent County Council to need to be a signatory to any section 106 agreement. However, in circumstances where the*

*relevant obligation would require the County to give reciprocal covenants to TMBC and/or the relevant developer, then the County will be required to be a signatory.*

1.1.5 The key concerns raised by KCC Infrastructure Team relate to:

- KCC preference to remain as a signatory on all legal agreements in order to ensure that KCC is satisfied that the impacts of any proposed development on country infrastructure are adequately managed.
- That KCC can directly enforce developer obligations to provide mitigation in relation to country matters.

1.1.6 At the meeting, KCC also presented their proposed solutions to address some potential outcomes which they consider could arise if for instance, where KCC contributions are not transferred into the S106 agreement and mitigation is not forthcoming.

1.1.7 **Annex 2** sets out the concerns raised by KCC in full including their proposed solutions.

## 1.2 Considerations

1.2.1 Officers have responded to the concerns raised and in principle, subject to further discussions taking place, there are areas where agreement is likely to be reached. This could be around producing a specimen draft S106 agreement (which once completed would be accessible on the website), where TMBC would be willing to share a draft of the template before it is finalised with a view to seeking agreement on some standard wording that KCC may wish to be included. There are also other areas where agreement may be reached in terms of the information required to request the S106 monies held by TMBC for infrastructure related projects. These more operational matters are not intended to be included in the amended Protocol and any agreements reached would be formalised through changes to the current process i.e. pro-forma, process notes, specimen draft S106 template etc. This would not prevent Cabinet from agreeing to the amended Protocol as currently proposed in **Annex 1**.

1.2.2 However, whilst there may be some areas where further discussions and agreement can be reached, there are also others which officers feel are non-negotiable. For instance, KCC's request for an inclusion that ensures all KCC requests are included and for KCC to be included as a signatory for the highest value contribution sites (the suggestion is a threshold of above 150 units or more but this could be higher). The reason for not including such request is that there can be no guarantee that all KCC requests are included in a S106. There may be various reasons relating to this including viability or other more pressing priorities

which the decision maker will need to justify. There may also be disagreements over whether the contribution request is Regulation 122 compliant.

- 1.2.3 It has also been considered (and set out in the amended Protocol) that only those *obligations which require the County to give reciprocal covenants to TMBC and/or the relevant developer*, would require KCC to be a signatory. This is intended to ensure that only the most strategic of developments, where land transfers are likely to be required, would require KCC to be a signatory to the S106 agreement. Introducing a threshold based system for highest value contributions sites does not fulfil the objective as set out in the main body of the report to O&S, paragraphs 1.2.3, which confirms that the main reason for the removal of KCC as a signatory to most agreements is to *ensure greater control by TMBC over the delivery of the mitigation and payment of the relevant funds, more oversight spent on the S106 agreements whilst also minimising the time it takes to complete and sign the agreement*.
- 1.2.4 Having considered the KCC representations in detail, there are areas where likely agreement can be reached on the process and information required and areas where agreement cannot be reached. This level of detail is not required to be included in the amended Protocol and can be included as set out above, where agreement is reached, through changes to processes, pro forma's and a specimen draft S106 template.
- 1.2.5 There are therefore no changes recommended to the amended Protocol which was agreed in principle by O&S Committee.

### **1.3 Legal Implications**

- 1.3.1 The impacts of the updated S106 protocol and process changes will only impact on new agreements. All previously signed or under negotiation agreements will continue to be monitored by TMBC however the payments will be made to the relevant authorities as set out within the S106 agreement.

### **1.4 Financial and Value for Money Considerations**

- 1.4.1 There will be direct financial and value for money considerations associated with S106 funds held, the monies received from S106 agreements make a significant difference to the local vicinity of the development. The funds are required to go towards the specified contributions as defined within the agreement, deviation from this could result in severe consequences with the council having to pay back the monies.
- 1.4.2 The proposed changes of removing the County Council as a signatory to agreements will mean most contribution payments will be paid to TMBC and any project and payment requests from KCC will be checked and agreed by the local authority before any payments can be transferred. For those agreement where reciprocal covenants to TMBC and/or the relevant developer are required, KCC will still be signatory to the agreement.

- 1.4.3 The new reports and protocol will give Councillors a clear view on what monies are held, how they are allocated and what projects they have been spent on, the live data enables an up to date insight on our current process and the ability to raise any concerns.

## 1.5 Risk Assessment

- 1.5.1 Whilst agreement on certain matters as set out above are likely between TMBC and KCC, there can be no guarantee that KCC will find these acceptable. There is a potential risk as set out in the comments from KCC that a Judicial Review may arise either to the decision on the amended Protocol or in relation to individual planning applications. The impact of this cannot be quantified as there are many variables, however TMBC will work pro-actively with KCC to seek areas where agreement can be reached to mitigate the risks of Judicial Review proceeding being instigated.

## 1.6 Equality Impact Assessment

- 1.6.1 The decisions recommended through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on end users.

## 1.7 Recommendations

Cabinet is requested to seek:

- 1.7.1 **APPROVAL** of the revised S106 protocol and process, including the new monitoring structure.
- 1.7.2 **NOTING** of the recently approved and published Infrastructure Funding Statement (21/22) and spreadsheet.

Background papers:

contact: James Bailey

Annex 1 - O&S Report

Annex 2 – KCC Concerns/Solutions

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