

Approach to remove KCC as a signatory to Section 106 agreements

1. The Starting point for KCC's preference is to remain as signatory on all legal agreements in order to ensure that:
 - (a) KCC is satisfied the impacts of any proposed development on county infrastructure are adequately mitigated (or alternatively that reduced contributions are justified to maintain the development's viability with review mechanisms to capture potential uplift);

KCC proposed solutions:

We understand the protocol allows for KCC to review S106 documents, but:

1. **Seek an inclusion that ensures all KCC requests are included with notice being provided should viability be a factor, and:**
2. **KCC be invited to discuss priorities should that be a factor.**

Potential inclusion of Invicta Law's (IL) cost with an undertaking of TMBC to pay due regard and for IL to provide initial comments within a defined time.

Outcome:

Avoid a scenario where KCC contributions are not transferred into the agreement and mitigation is not forthcoming in T & M, the consequence of which KCC may be required to consider Judicial Review (not something that we wish to do but which must be considered).

- (b) KCC can directly enforce developer obligations to provide mitigation in relation to county matters;

KCC proposed solutions:

1. **Use of wording that is commonly used in other agreements with other Kent LPAs, through which there is a unilateral undertaking with S106's to all KCC obligations to enable enforcement.**
2. **Suggest that a template TMBC S106 be passed to IL initially for review and get to a point of agreement before adoption. Through that one off initial engagement KCC would define exactly what needs to be included in terms of KCC needs, e.g. indexation, interest rate, preferred payment triggers dependent on size of development, phrasing on disputes, etc.**
3. **Potential to include KCC as a signatory for the highest value contributions sites – for example, those above a development threshold of 150 units or more (potential for a higher number depending on TMBC analysis). This has affected only 6 developments in the last 3 years**

Outcome:

To avoid a scenario of KCC contributions not being enforced or enforceable and reduced mitigation coming forward within T & M. Using learnt standard KCC phrasing to reduce the risk of the above. Larger more contentious and complicated sites retain absolute transparency and KCC a party only to the higher risk 106's.

Approach to contribution monitoring

We understand from TMBC's committee that members had frustration of mitigation delay and sought for flexibility within Sec106 drafting. KCC is firmly of the view that the proposed gatekeeping of funding secured for KCC services is unjustified, the proposed process is unworkable and creates duplication and avoidable revenue resource for both authorities.

Contributions secured are for the provision of KCC services and infrastructure for which TMBC is not accountable. It should not be that case that one local authority indefinitely holds and controls money that is required for mitigation delivered by another.

When considering that KCC spent £5.6m last year (details attached as an appendix), more than on any other Authority in Kent on infrastructure in T & M in the last financial year, on the proposal seems to be moving from a desirable situation for both to one that is far less desirable.

KCC is unable to forward fund and then seek payment back. Delays in funding transfer from TMBC to KCC results in reducing KCC's ability to earn interest on the contributions that would naturally be applied towards the development, and may result in us needing to recoup the interest during the period that TMBC holds onto the contributions. Overall, this would result in zero mitigation and the exact opposite to what TMBC members seem to be seeking.

TMBC's proposed process is dependent on an unreasonable and unworkable impact upon KCC resources. The level of information being sought is not held by the Developer Contributions Team, who would have to liaise with multiple infrastructure delivery departments at KCC to obtain the level of 'evidence' suggested by TMBC. We understand this to be the provision of receipts and evidence for every single application, monthly attendance of meetings and zero cost recovery currently received for monitoring and legal inspection. The KCC Developer Contributions Team would be administratively paralysed just by TMBC if this occurred, who would be an outlier in requesting this level of detail. It will naturally also have huge revenue implications for TMBC. One authority had previously used such a pro-forma but has subsequently agreed a far less onerous

process whereby KCC only completes the details of project names and values. This reduced Pro-Forma is attached as an appendix.

1. In most s106 agreements there will be a clause entitling the developer to request details of how financial contributions have been used, and if KCC does not spend as intended or within a given timeframe, contributions would understandably be refunded in line with the agreement. The current process for evidencing spend operates effectively.

KCC proposed solutions:

Continue to include a clause in S106 agreements that allows developers to request how financial contributions have been spent.

Potential outcome to avoid:

In a scenario whereby KCC has no guarantee of receipt of funding at the time of application approval, it would have to consider either:

- A. Judicial Review due no guarantee of the site meeting the basic need tests, or**
- B. Independent Unilateral Undertakings, as was required to be the case for another Kent Authority.**

KCC proposed solution 1:

1. **TMBC transfer the contributions to KCC at the agreed triggers, with KCC in return providing TMBC with regular information via our SMS reports on money it is in receipt of and what it has spent money on.**
2. **Potentially also provide this detail through an annual presentation of the IFS. All information being sought is generally readily available without the proposed process and seemingly would address TMBC members concerns on where the money is and what it's been spent on with greater transparency and far less resource implications for both authorities.**

KCC proposed solution 1:

1. **KCC agrees to completing a pro-forma for releasing funds that only necessitates the detail of the project name, amount, development application number and anticipated delivery date or phase at which the project is at (Feasibility, Planned, In Delivery, Delivered). TMBC in return provides regular information on all funding held on behalf of KCC.**