

TONBRIDGE & MALLING BOROUGH COUNCIL

OVERVIEW AND SCRUTINY COMMITTEE

26 January 2023

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Recommendation to Cabinet

1 **S106 MATTERS**

This report proposes an updated s106 protocol and a new monitoring structure for s106 monies, as well as updating Members on the recently published Infrastructure Delivery Statement.

1.1 **Background**

1.1.1 This report has been produced to set out the current situation and direction of travel TMBC seeks to undertake regarding several S106 related matters.

1.1.2 S106 agreements are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. S106 agreements are often referred to as 'planning obligations or developer contributions'.

1.1.3 Tonbridge and Malling Borough Council are presently not a CIL charging authority and therefore to mitigate the impact of a development a S106 agreement will be sought with the developer. The current S106 protocol (annex 1) was last updated and agreed by members in December 2011, to ensure the monitoring of the agreements TMBC has appointed a Senior Development Obligations Officer. TMBC is a signatory to the agreements within the local area and one of the receiving authorities of the funds alongside KCC in instances of reciprocal clauses within the S106.

1.1.4 Funds held by TMBC are allocated to projects within the locality of the development or those specified within the legal agreement, this includes parish owned sites to ensure they receive provision/enhancements to local facilities within the areas.

1.1.5 All parish councils have previously been notified of available funding held which they are eligible to use for potential projects. Any queries relating to what monies are currently held and whether a potential project would be eligible should be raised directly with the SDOO via planning.obligations@tmbc.gov.uk

Preparation and content

- 1.1.6 Reporting on the S106 funds held takes place on an annual basis via the Infrastructure Funding Statement (<https://www.tmbc.gov.uk/downloads/download/309/tmbc-planning-obligation-protocols-and-funding-statement>), which outlines what monies have been collected and spent in the last financial year, as well as which projects have been delivered and upcoming planning expenditure. A spreadsheet outlining the existing balances, and payments received within the financial year is published alongside the statement (<https://www.tmbc.gov.uk/downloads/download/309/tmbc-planning-obligation-protocols-and-funding-statement>). This includes information on any contributions that have been directed to Parish Councils.
- 1.1.7 The S106 protocol has been reviewed to ensure the protocol is efficient and up to date (see Annex 1 and 2), any changes have taken into account the interest of all parties involved to ensure sufficient monitoring of the agreements can be completed.
- 1.1.8 The main proposed change to be implemented under the new S106 protocol is the removal of the County Council as a signatory to most agreements. This is proposed to ensure greater control by TMBC over the delivery of the mitigation and payment of the relevant funds, more oversight can be spent on the S106 agreements whilst also minimising the time it takes to complete and sign the agreement. It would impact the process by ensuring most payments are made and directed through the local authority who can then ensure the projects being undertaken by all parties meet the requirement of the S106 contribution and the monies are being used towards the specified purpose.
- 1.1.9 It must be noted that the removal of KCC as a signatory to S106 agreements does not mean KCC will not be signatories to all agreements, there are certain instances that the County Council will still be required as a signatory, such as where the relevant obligation would require the Country to give reciprocal covenants to TMBC and/or the developer.
- 1.1.10 There is an element of risk by removing KCC as a signatory to the majority of agreements, most payments will be channelled through the local authority and the total sum of S106 monies held by TMBC will increase Most S106 agreements have time limited spend requirements (usually 5/10 years). Therefore, it is important to ensure our monitoring is stringent whilst ensuring the mitigation is being provided. The risks and mitigation have been carefully considered by TMBC and outlined within a Risk Assessment (Annex 3).
- 1.1.11 The proposed changes to the protocol will also make changes to the current process undertaken when S106 agreements are being negotiated the removal of KCC as a signatory to most agreements will also minimise the length of time taken to negotiate, agree and sign an agreement, however KCC will still be a signatory in circumstances where the obligation would require KCC to give reciprocal

covenants to TMBC and/or the relevant developer, for instance where the transfer of land is required to build a new school. In instances where KCC is not a signatory to the agreement and as part of the risk mitigation a draft copy of the agreement will be distributed to KCC for noting. The existing and proposed process changes (annexe 4) show the differences in approach to ensure a thorough engagement process is undertaken with the S106.

1.1.12 The creation of two monitoring groups would ensure an open line of communication with various departments and KCC. One monitoring group would include internal department colleagues and KCC, the second group would be a strategic group and comprise of internal TMBC staff and Councillors. This enables TMBC to receive direct information, provide a transparent line of communication in relation to the monies being spent between the two Councils as well as members, and answer any queries prior to final comments being provided.

1.1.13 It is proposed that the monitoring groups would be structured as follows and outlined within Annex 5 and 6;

S106 Operational Monitoring Group	S106 Strategic Monitoring Group
Senior Development Obligations Officer (Chair)	Director of Planning, Housing & Environmental Health (Chair)
Development Obligations officer	Head of Planning
Planning Policy team member – IDP based	Planning Policy Manager and Development Management Manager
Team Leader– Major Projects and Senior Planning Officer (Majors)	Cabinet Member for Strategic Planning & Infrastructure
Leisure Services Manager (once appointed)	Chair of Housing and Planning Scrutiny Select Committee
Legal	Head of Legal & Democratic Services
Finance	Councillors x 4 (politically balanced)
KCC representatives x2	Team Leader – Major Projects

1.1.14 If this proposed structure is agreed, it is proposed that the Operational Monitoring Group is established as soon as possible and that the Strategic Group is established after Annual Council in May 2023. At the first meeting of each group, terms of reference will need to be agreed.

1.1.15 At the time of writing KCC is undergoing consultation on their Development Contribution Guide which expires in February 2022, TMBC is currently reviewing

the information supplied and drafting a response to this consultation, however the initial view is that the KCC consultation will not alter the proposed changes to our S106 protocol.

- 1.1.16 The protocol changes include the use of the recently completed and annually updated Parish Infrastructure Statements. When undertaking any negotiations relating to S106 agreements TMBC officers will use this as a tool to request contributions for specific purposes to mitigate the impact of the development and make improvements for the prospective and existing local communities.
- 1.1.17 All parish councils within the borough were requested to complete a Parish Infrastructure Statement which outlined potential projects they would like to undertake, and which could be potentially funded via the use of S106 contributions. We received a very positive responses with 20 parish councils participating and providing a detailed statement. The statements provided include various projects ranging from upgrades to existing facilities to provision of new open space and parks within the area. The statements have been collated into a spreadsheet and will be used by Planning Officers as evidence to aide in future negotiations with developers and allocate monies to parish projects. It is the intention that the Parishes who have not yet engaged with this process will be contacted by the Director of Planning, Housing & Environmental Health to offer some additional support. Consideration is also underway regarding how locally based projects in the non-Parished area of the borough can best be captured.
- 1.1.18 A PowerBI report is currently in development similar to the previously development Enforcement case review report, this will enable Councillors to access and have an overview of live data held in relation to S106 monies. This will enable councillors to review funds held and raise queries in relation to payments directly with the Senior Development Obligations Officer. Once the PowerBI report development has been completed it will be for internal use only as the Infrastructure Funding Statement will be published on an annual basis as legally required to give an overview of allocation and spending for the reporting period.

Financial and Value for Money Considerations

- 1.1.19 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
- 1.1.20 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.

- 1.1.21 It was agreed by Cabinet on the 8 November 2022 to uplift the monitoring fees set out within S106 agreements by 10% on the 1 April 2023 a change from £300 per contribution to £330 per contribution. This change will be put into effect and all agreements drafted and completed after the 1 April 2023 will include the new higher fees. These fees are utilised to offset salary costs in the Planning service, principally the role of the Senior Development Obligations Officer.
- 1.1.22 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.

Legal Matters

- 1.1.23 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.

Risk Assessment

- 1.1.24 The risks of removing KCC have been identified in Annex 3, this outlines the potential risks and mitigation proposed by TMBC.
- 1.1.25 The use of S106 funds on the appropriate projects to be completed in line with the legal agreement, if the funds are not used as required or within the time limit outlined within the S106, a developer is within their right to request a refund of the funds. Stringent monitoring of how the money is spent takes place to ensure correct usage. If money is returned to developers for any reason this could cause a reputational risk.

Recommendations

The Committee is asked to recommend to Cabinet:

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

Background papers:

- Annex 1 - Current S106 protocol
- Annex 2 - Proposed new S106 protocol
- Annex 3 – Protocol changes risk assessment
- Annex 4 – Existing and proposed S106 process
- Annex 5 – TMBC S106 monitoring group proposal
- Annex 6 – TMBC S106 members monitoring group proposal

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