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# Planning Obligations Protocol

February 2024

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**Contents:**

- 1 Introduction and context
- 2 Practice
- 3 Role of developers and applicants
- 4 Role of the county council
- 5 Involvement of councillors, town and parish councils and local community groups
- 6 Unilateral undertakings
- 7 Execution of the agreement
- 8 Legal costs
- 9 Implementation and monitoring

**Annexes:**

1. Guidance to promote local engagement
2. Collecting quantitative and qualitative evidence of need for provision and enhancement of community owned public open space

## **1. Introduction and context:**

- 1.1 This document is intended to provide best practice guidance on managing Section 106 Planning Obligations related to development taking place in the Borough of Tonbridge and Malling. 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 across the Borough. The Council believes it is essential that the means of securing such obligations takes place in a fair, open, transparent and reasonable manner in order to retain public confidence in the system and to provide greater clarity to all those involved.
- 1.2 The Council does not operate a Community Infrastructure Level (CIL) charging schedule. It was decided at the meeting of the Community Infrastructure Levy Panel on 19 December 2011 to not move forward with production of such a schedule, although this position is continually kept under review. In determining planning applications for new development, the Council therefore relies on the provisions of the Town and Country Planning Act 1990 to ensure that appropriate and successful mitigation of development takes place in all instances.
- 1.3 Under Section 106 of the Act any person interested in land in the area of a Local Planning Authority may, by agreement or unilaterally, enter into a planning obligation –
  - (a) restricting the development or use of land in any specified way;
  - (b) requiring specified operations or activities to be carried out on the land;
  - (c) requiring the land to be used in any specific way;
  - (d) requiring a sum or sums to be paid to the authority on a specified date for an agreed purpose.
- 1.4 Such agreements are effectively a mechanism designed to ensure a development proposal is acceptable in planning terms where it would not otherwise be acceptable. The statutory tests for such agreements are that the obligations must be:
  - necessary to make the development acceptable in planning terms;
  - directly related to the development; and
  - fairly and reasonably related in scale and kind to the development.
- 1.5 This is further supported in policy through the National Planning Policy Framework 2019 (NPPF) at paragraph 55.

1.6 Common examples of what may be sought as planning obligations in order to make development acceptable in this Borough are as follows:

- Affordable housing;
- Provision of public open space and public realm enhancements;
- Highways, transport and travel schemes including cycle and public transport improvements, highway infrastructure works, pedestrian links and facilities;
- Educational facilities;
- Libraries;
- Healthcare facilities;
- Provision of community facilities;
- Local environmental improvements including enhancement of designated nature conservation areas;
- Flood defence;
- Securing an acceptable mix of uses on development sites;
- Securing affordable business space;
- Archaeology and conservation schemes;
- Pollution mitigation;
- Fire and rescue facilities;
- Crime and disorder prevention activities;
- Town centre improvements; and
- Employment and training.

1.7 However, the above list is not exhaustive and the precise details of what will be sought by way of a planning obligation will be dependent on the scale and nature of the application and will be governed by relevant development plan policies in force in the area and any other material considerations. As such, prospective developers and applicants are advised to read this Protocol in conjunction with all relevant adopted development plan policies and are encouraged to enter into early pre-application discussions with the Council (as set out in more detail at Section 2).

- 1.8 In addition, the Infrastructure Delivery Plan (the “IDP”) identifies critical infrastructure and for strategic allocations the IDP identifies what, where, when and how critical new infrastructure will be provided. For strategic locations the IDP identifies likely infrastructure requirements and the measures needed to ensure their future delivery. As the process for bringing forward the sites progresses, this information will be updated and may identify other more minor infrastructure that is required.
- 1.9 The Council will always seek to explain to prospective applicants what mitigation will need to be provided by Section 106 agreement in the event that they seek pre- application advice. Requirements in this respect are set out in full within the suite of adopted policies contained within the Council’s adopted development plan, which are available on the Council’s website. All prospective applicants are strongly encouraged to engage with the Council through the pre-application advice service at the earliest opportunity.

## **2. Practice**

- 2.1 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 wherever 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.
- 2.2 The Council will advise developers and applicants at the earliest opportunity if a planning obligation is required in connection with their development proposal as well as the reasons for this. Ideally this will form part of the pre-application discussions and further advice on this is provided in the pre-application protocol which is available on the Council’s website. In addition, applicants will be informed as soon as possible if it is likely that there is a potential reason for refusal which could be overcome through a planning obligation arising from engagement and consultation with the relevant infrastructure delivery bodies (both internal to the Council and external providers such as the County Council).
- 2.3 The need for and calculation of financial contributions will be applied consistently by the Council but may, occasionally, be subject to negotiation with the Development Management case officer dealing with the application in consultation with relevant colleagues both within and outside the Council, Where any departure from adopted policy is being proposed this will be made

explicit and fully justified and in full accordance with the planning practice guidance.

- 2.4 The Development Management case officer in their report (whether delegated or committee) will include a detailed analysis setting out the requirements within the section 106 agreement explaining why it is necessary to make the development acceptable in planning terms, stating how the requirements are directly related to the development being proposed and demonstrating how they are fairly and reasonably related in scale and kind. This section of the officer report can then be referred to in any future enquiries or planning appeals.
- 2.5 Wherever possible, all parties should use their best endeavors to ensure by the time applications are reported to the relevant Planning Committee, the legal agreement has either
  - a) been signed by all necessary parties; or
  - b) detailed drafting of the legal agreement has been agreed and execution of the agreement is imminent.
- 2.6 In terms of the latter, when a Planning Committee determines an application for planning permission subject to the completion of the legal agreement, the permission will not be issued until the legal agreement has been completed and signed. Officer reports will, in all cases, make recommendations as to the length of time reasonable to ensure the agreement is completed and signed with recourse to either allow for further time to be built into the process if negotiations are continuing proactively, or to allow for delegated authority to refuse planning permission if it becomes clear that the obligations are not going to be met and there is a clear and justified reason for doing so.

### **3. Role of developers and applicants**

- 3.1 Wherever possible to do so, and in particular where the applicant has engaged in pre-application discussions with the Council, it is preferable that detailed Heads of Terms or fully drafted agreements are submitted with planning applications where policy triggers are met in accordance with adopted development plan policy or where pre-application advice has indicated that obligations will be required from external providers (including the County Council). Failure to provide either of these at the submission stage may result in the planning application being made invalid and possibly returned to the applicant. This is in accordance with the Council's published Local Validation Requirements.
- 3.2 Once a valid application has been received, in all instances, the Development Management case officer will be responsible for leading on and coordinating all negotiations pertaining to planning obligations. At this point, applicants and

agents should not directly contact individual service providers but rather allow the case officer to collate, consider and coordinate any requests for obligations to ensure an effective and consistent approach. This is consistent with the ways of working of the Development Management Team and internal and external stakeholders are aware of this requirement.

- 3.3 In the event that the development is considered unviable by the applicant because of the level of contributions being requested then the Council will always seek detailed evidence from the applicant in accordance with the national Planning Practice Guidance (the “PPG”). Again, this should be provided at the submission stage because the applicant would have understood all policy requirements as part of effective pre- application discussions. In the event that no such evidence is provided and the application is not subject to a Planning Performance Agreement (PPA), the applicant will be given one opportunity to withdraw the application within a prescribed time period after which the Council will refuse planning permission.
- 3.4 In circumstances where viability evidence is put forward, the applicant must provide a full financial appraisal of the scheme (which accords with the requirements set out in the Planning Practice Guidance) and allow the appraisal to be verified, at their expense, by an independent agent chosen by the Council. In these instances, such a process should wherever possible be enshrined within an agreed PPA.

#### **4. Role of the county council**

- 4.1 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.
- 4.2 Kent County Council is a key service and infrastructure provider within Tonbridge and Malling Borough. As such, it is important to recognize the need for a collaborative working approach between the County and Borough Council in securing necessary planning obligations. As part of this, Tonbridge and Malling Borough Council undertakes to:
- Highlight to developers at the pre-application stage the need to engage with the County Council to establish what requirements they might have in order to incorporate into the finalised proposal and application submission (and for this to be enshrined within the planning performance agreement where applicable and possible to do so);
  - Consult the County Council on all applications for major development across the Borough and invite views on likely infrastructure and services required;

- Request that the County Council at all times clearly sets out the basis on which infrastructure or other contributions are required and provides this information by a specified deadline;
- Fully consider any representations from Town Councils, Parish Councils and other community groups seeking contributions where they are in accordance with the adopted development plan and have been fully evidenced.
- Ensure the County council has sight of, and were able to provide comments on, draft agreements where we are collecting contributions on items which would ultimately be delivered by the County Council.

4.3 Tonbridge and Malling Borough Council are the local planning authority that will have the ultimate responsibility for the determination of planning applications across the Borough. To assist the Council's assessment of any proposals and the need for planning obligations, the County Council will be expected to clearly stipulate the type of infrastructure contributions required to make the development acceptable in planning terms having regard to adopted policy and established evidence base and reasoned justification for the contributions sought.

4.4 The Borough Council's Development Management case officer will be responsible for leading and coordinating all negotiations regarding planning obligations. Where developer approaches are made at a pre-application stage direct to the County Council, the Borough Council should be copied in to any advice given. Once an application has been formally submitted, any such approaches should be directed back to the relevant case officer with any appropriate advice or guidance to assist negotiations.

## **5. Involvement of borough councillors, town and parish councils and local community groups**

5.1 Developers promoting larger and strategic schemes are often keen to meet with local Councillors to discuss local needs and the issue of wider community benefits that may come forward as planning obligations. There is an opportunity for Councillors to do this without pre-determining the outcome of the application process through structured and organised Member briefings. Presentations by prospective developers are also possible but officers should also be in attendance at these.

5.2 The need for such Member briefings is a matter best addressed through developers and applicants entering into a formal PPA where parameters and timeframes can be agreed between the parties. However, in all instances Council officers would take the lead in providing such briefings, utilising where necessary material provided by the developer.



- 5.3 Where obligations are required and where it is considered necessary to identify and evidence suitable local projects in accordance with policy requirements, the case officer will discuss with the relevant Ward members at the earliest opportunity.
- 5.4 Similarly, it is recognised that town and parish councils and other local community groups can positively engage in this process via the completion of the Parish Infrastructure statements in order to identify and outline potential projects within their communities that may be funded through contributions. Such contributions may only be spent on new facilities or improvements to facilities where the new development has been identified as contributing to the need for that facility or will have an impact on the existing facilities. It should however be remembered that costs related to revenue expenditure or costs which primarily relate to the maintenance of existing facilities such as minor repairs, replacement or redecoration will not meet the necessary tests.
- 5.5 The Council would expect such groups to clearly identify and robustly evidence any such projects at the time they make their representations on a planning application to enable the Council to make an assessment of the project and take it forward as part of the negotiations with the developer. Submitting this evidence in this manner will in no way prejudice any objections raised within the wider representations made. Where such projects are taken forward, the terms of the obligations will be shared with the group in question so they understand the relative requirements prior to the agreement being finalised. Similarly, if it is not considered that the project can be taken forward, an explanation as to the reasons will be provided within the officer's report.
- 5.6 Further guidance on how to compile such evidence can be found at Annexes 1 and 2 of the Protocol.
- 5.7 It should be remembered that Town and Parish Councils must prepare a report for any financial year in which it receives levy receipts. The information that parish councils should report on is prescribed in Regulation 121B of the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019. The report must be published online. A copy of the report should be sent to the charging authority from which it received levy receipts (the Borough or County Council), no later than 31 December following the reported financial year, unless the report is, or is to be, published on the charging authority's website.

## **6. Unilateral undertakings**

- 6.1 The submission of unilateral undertakings on behalf of applicants may be acceptable. If this approach is being considered on behalf of the applicant then it is important that it is discussed at the pre-application stage with the relevant Development Management case officer before any work is done on the

proposed undertaking. A unilateral undertaking must comply with the same statutory and policy requirements as a bilateral agreement. Where a unilateral undertaking is submitted and it meets the relevant tests then it will be taken into account as a material consideration when determining the application. However, if the obligation does not meet those tests and the proposed development is unacceptable without it, then the planning application will be recommended for refusal. If an alteration to the undertaking would overcome the reason for refusal then the Council will advise the developer prior to determining the application.

## **7. Preparation and execution of the agreement**

- 7.1 If the Council has resolved to grant planning permission subject to the execution of a planning obligation, the planning permission will only be issued once the agreement has been executed by all parties and dated by the Council. The Council will ask for evidence that the owner has capacity to enter into the agreement and that any persons signing the agreement on behalf of the owner are authorised to do so. Ideally, this should be provided at the submission stage along with the Heads of Terms/draft agreement.
- 7.2 Applicants requiring a s.106 agreement or undertaking are expected to instruct a specialist solicitor to assist them with the preparation and completion of these documents. These are important and contractually binding documents which are often legally complex. The Council does not produce or expect a “standard format” of agreement to be followed, as this cannot account for every eventuality which a planning obligation may need to address.
- 7.3 All obligations and conditions contained within the agreement will become legally binding once the agreement has been signed. The obligations and conditions contained within the agreement cannot subsequently be changed unless the consent of the owner is obtained together with further approval by Planning Committee or the Director of Planning, Housing and Environmental Housing as is appropriate or necessary. If any such variation is subsequently sought, the developer will be expected to provide a full, reasoned and evidenced justification for such a variation.
- 7.4 Once completed, legal agreements form part of the planning permission and are a public document. As such, anyone may see a copy of it by viewing the documents on Public Access.

## **8. Legal costs**

- 8.1 The Council will require the developer to pay the Council’s legal fees of preparing the planning obligation or checking any draft agreement or unilateral undertaking. These costs vary according to the type of agreement or unilateral undertaking and the scale or complexity of the associated development. The Council’s Legal Department will be able to advise on the cost of dealing with

the agreement once they have received instructions from the Planning Department.

- 8.2 The majority of the Council's section 106 agreements are outsourced to the Council's appointed external advisers save in a minority of cases where they are legally unable to act for the Council, in which case the matter will be dealt with by the Council's internal legal team.

## **9. Implementation and monitoring**

- 9.1 Once planning obligations have been agreed it is important that they are implemented, monitored and, where necessary, enforced in an efficient and transparent way. This is to ensure that contributions are spent on their intended purpose and that the associated development contributes to the sustainability of the area. This will require monitoring which, in turn, may involve joint-working by different parts of the Council.

- 9.2 Following the finalization of a planning obligation there are a range of different activities that need to be undertaken by a variety of different parties, to different timetables, sometimes extending over a number of years. Some of these tasks include:

- ensuring the delivery of on-site obligations by the developer to the required standard and timetable;
- ensuring that the necessary infrastructure that the Council or another public body has agreed to provide (wholly or in part, funded by contributions) is delivered;
- ensuring receipt of financial contributions at appropriate times;
- monitoring adherence to restrictions on all parties, including the Council, imposed through planning obligations;
- managing applications for the modification or discharge of agreements; and
- any necessary enforcement action.

- 9.3 If the Council's monitoring work indicates that contributions from developers have not been spent for their specified purpose within an agreed timeframe, which will be set out in the obligation and depend on the level of the contribution and its proposed end use, they will be returned to the developer. The time periods during which financial contributions are to be spent will run from the date the contribution is received by the Council once the trigger point is reached as opposed to the date of the agreement or obligation.

- 9.4 If the contribution cannot be spent for the originally specified purpose within the

timescale set out in the agreement the Council will first seek to negotiate with the developer, or their successor in title, an alternative purpose for the financial contribution.

- 9.5 In order that the monitoring and enforcement of planning obligations is carried out efficiently and effectively for the benefit of communities affected by development, the Council will levy a monitoring fee on each planning obligation (rate of £400 for each obligation contained within the agreement). This monitoring fee will be enshrined within the planning obligation and must be paid by the developer or other parties as may be specified in the obligation on signing the section106 agreement. The fee will be applied to all obligations whether these are by agreement or submitted as unilateral undertakings. Similarly, the monitoring fee applies to all obligations including those payable to the County Council (and notwithstanding any fees they may levy in addition) because the Borough Council as determining local planning authority is under a duty to monitor compliance with those obligations as a matter of course too.