TONBRIDGE & MALLING BOROUGH COUNCIL

PLANNING and TRANSPORTATION ADVISORY BOARD

11 November 2020

Report of the Director of Planning, Housing and Environmental Health

Part 1- Public

Matters for Recommendation to Cabinet - Key Decision

1 SECTION 106 PROTOCOL AND MONITORING

Summary: This report seeks approval for the adoption of a Planning Obligations Protocol (and associated monitoring fee) 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 Section 106 related matters were last reported to this Board in July 2020. The focus of that report was to provide the following:

- Summary of the obligations secured, received and used for applications received 2018 – June 2020 along with a synopsis of some key obligations being sought through the Development Management process;
- Update for 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
- Introduction of a new Protocol and consideration of the introduction of a monitoring fee (which had yet to be determined at the time of reporting).

1.1.2 At that time, officers undertook at that time to develop the protocol in detail and as a result of that further work, this report is intended to cover:

- Development of the Protocol and associated guidance with a particular emphasis on how the process should seek to engage with local communities;
- Benchmarking and analysis to establish fees to ensure monitoring can be appropriately and robustly resourced going forward.

1.1.3 In addition, Members can note that officers are continuing to prepare for the new monitoring and publishing requirements by containing to liaise with IT to establish how our existing systems can best be utilised to record and report the necessary data. It is suggested that a further report to this Board early next year specifically address this following the December 2020 deadline in this respect.

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.

1.3 The Protocol:

1.3.1 The Protocol 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.

1.3.2 The Protocol is intended to sit alongside the pre-application advice service the Council currently provides and the use of Planning Performance Agreements, (both of which are subject to separate reports provided elsewhere on this agenda).

1.3.3 It also 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.

1.3.4 The Protocol itself along with a series of associated annexes is set out in at **Annex 1** to this report. Since July, officers have focused in particular on ensuring that Town and Parish Councils along with other local community groups can

robustly and effectively identify projects within their communities to which contributions may be directed via the collation of evidence bases to ultimately assist in making representations on individual planning applications. A directing aim of this guidance is to ensure such groups understand the statutory and policy context within which such contributions should be sought along with the importance of providing clear evidence.

1.3.5 The intention being that in parallel to this guidance being published, officers facilitate focused workshops with these groups to discuss the guidance and provide practical and informative advice where needed.

1.3.6 Officers have also undertaken further analysis of monitoring fees benchmarking, with a particular focus on the ways in which immediately neighbouring authorities already structure their fees. In general terms, authorities either tend to adopt a "fixed fee" approach on a per obligation basis whereas some do distinguish between on and off site obligations, with the latter tending to equate to a percentage of the total value of a financial contribution.

1.3.7 As Members are aware, 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.

1.3.8 Currently, monitoring is undertaken by a combination of officers, rather than having a dedicated resource although (linked to the national requirements coming into effect by the end of this calendar year) it is anticipated that such a resource should be identified and secured. Monitoring fees would understandably assist in facilitating such a resource. Until that comes forward and detailed time and motion work can be undertaken and further analysed, it is suggested that a flat fee of £300 per obligation be required. This follows the Sevenoaks District Council approach and is a more straightforward means of prescribing a fee at this time than some others. Furthermore, the relative values between the two authorities are readily comparable. I can advise that on this basis for the agreements pertaining to 2019 applications (determined and pending determination for the course of that year), such a fee would equate to a total of £16,800. Whilst this is a somewhat arbitrary calculation it is intended to provide Members with a general understanding of the potential fees that could be generated in order to ensure ongoing robust monitoring can take place.

1.4 Potential implications of Planning Reforms:

1.4.1 Members will already be aware that the Planning for the Future White Paper includes the proposal to replace the Community Infrastructure Levy ("CIL") and section 106 obligations with a new Infrastructure Levy. Views are currently being sought on whether levels should be set nationally or locally; whether the rates should be higher or stay the same; and whether it should be extended to changes of use through permitted development. The Council's own response to the consultation has already been discussed by this Board and I do not intend to repeat those discussions here. However, this does set an important context for this piece of work as any adopted protocol, and in particular the guidance we offer to local community groups, should be framed in such a manner that it stands the test of time in the event that reforms do come forward. There will inevitably be a need to adapt the work when any such changes are made nationally to ensure it remains fit for purpose but with an underlying understanding of what those changes might involve particularly so that any work to compile localised evidence bases at this time remain robust and useful in the future.

1.5 Infrastructure Funding Statements:

1.5.1 Members may also be aware that there is a new requirement for Local Planning Authorities to publish an annual Infrastructure Funding Statement in a manner carefully prescribed nationally. Officers are currently working on producing this document which must be published by 31 December 2020. Briefly, these statements are required to identify infrastructure needs, the total cost of this infrastructure, anticipated funding from developer contributions, and the choices the authority has made about how these contributions will be used.

1.5.2 Given the timescales involved, it has not been possible to provide a draft of this document with this report and as such it is recommended that authority to publish the final statement be delegated to the Director of Planning, Housing and Environmental Health in consultation with the Cabinet Member for Strategic Planning and Infrastructure. This is included within the recommendation that follows.

1.6 Legal Implications

1.6.1 The Local Government Act 2003 provides the power for local authorities to charge for discretionary services (as defined in the Local Government Act 1999). Discretionary services are those services that an authority has the power but not a duty to provide. An authority may charge where the person who receives the service has agreed to its provision. The power to charge under this provision does not apply where the power to provide the service in question already benefits from a charging power or is subject to an express prohibition from charging.

1.6.2 The Local Government Act 2003 places a duty on authorities to ensure that, taken one year with another, the income from charges for each kind of discretionary service does not exceed the costs of provision. An authority may set charges as it

thinks fit, and may, in particular, charge only certain people for a service or charge different people different amounts.

1.6.3 Local authorities are required to have regard for any guidance that may be issued by the Secretary of State in terms of carrying out their functions under the 2003 Act. Section 93(7) of the Act provides that certain prohibitions in other legislation preventing authorities from raising money are specifically dis-applied in relation to the exercise of the charging power.

1.6.4 Local Planning Authorities therefore have powers to recover the costs of monitoring work in recognition of the time officers have to spend ensuring compliance with obligations.

1.7 Financial and Value for Money Considerations

1.7.1 It is appropriate to review the protocol and charging schedule every year, to ensure the evidence base is up to date and that the monitoring is fairly applied.

1.8 Risk Assessment

1.8.1 Robust monitoring should be carried out every year to ensure the protocol and charging schedule in place is based on up to date evidence.

1.9 Equality Impact Assessment

1.9.1 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.

1.10 Recommendations

1.10.1 It is **RECOMMENDED TO CABINET** to **APPROVE** the following:

- Adopt the Planning Obligations Protocol and associated monitoring fee as attached at **Annex 1**.

1.10.2 It be **AGREED** that production and publication of the Infrastructure Funding Statement by the deadline of 31 December 2020 be delegated to the Director of Planning, Housing and Environmental Health in consultation with the Cabinet Member for Strategic Planning and Infrastructure.

Background papers: contact: Emma Keefe

Annex 1: Section 106 Protocol (with associated Annexes)

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