From: **Derek Murphy, Cabinet Member for Economic Development**

Simon Jones, Corporate Director of Growth, Environment & Transport

To: **Growth, Economic Development and Communities Cabinet Committee – 17 November 2021**

Subject: **Development Contributions**

Classification: **Unrestricted**

Past Pathway of report: **None**

Electoral Division: **All**

Summary: This paper explains the background to developer contributions and our approach along with outlining some of the challenges we face and emerging issues. It is intended to be an introductory paper for cabinet committee.

Recommendation:
The Growth, Economic Development and Communities Cabinet Committee is asked to note this introductory paper and agree to receive future in-depth papers exploring challenges and opportunities for KCC regarding developer contributions, and KCC's existing and evolving approach.

1. Introduction

1.1 Since 2014 KCC has secured a total of £299,665,504 in contributions from developers towards a number of our specified services. This figure represents a cumulative achievement rate of 97% against KCC's asks for total contributions from developers (these figures are exclusive of the value of land transferred and Highways Section 278 agreements). However, this is not achieved without significant challenges as outlined later.

1.2 Performance is reported quarterly to Cabinet, but performance can fluctuate in year depending upon site specific issues. The appendices to this report show: 1) the ratio of amount sought and in turn agreed by individual Districts; 2) total amount agreed by District; and 3) amount agreed per KCC service, respectively.

2. Section 106 (s106) / Developer Contributions

2.1 Districts as the Local Planning Authorities have the statutory duty to balance competing considerations when determining planning applications. Therefore, in order to secure contributions, the County Council must set out evidence of our services' need and make a clear case that the development should not proceed without mitigation to the County Council through a S106 agreement.

2.2 There are three legal tests for determining when a s106 agreement can be used; the s106 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

2.3 Developer contributions are most commonly used by Kent County Council to secure financial contributions towards increasing infrastructure capacity to support services which we have a responsibility to provide. The County Council seeks to secure contributions primarily towards the following services:

- Highways
- Primary & Secondary Education[1]
- Adult Social Care[2]
- Libraries
- Community Learning
- Youth Services
- Waste
- Broadband (mainly through planning conditions)

3. Community Infrastructure Levy (CIL)

3.1 The Community Infrastructure Levy (CIL) is a tariff-based system introduced by Government in 2010 intended to largely replace the existing s106 regime. Under CIL, the Local Planning Authority sets a contribution rate per m² which developers are obliged to pay without negotiation. The tariff is administered by the district authority which can choose to allocate the receipts to related infrastructure; under CIL the County Council will bid for funding from the district CIL funds rather than seeking contributions from individual planning applications. The districts which have adopted CIL are Dartford, Sevenoaks, Folkestone and Hythe, Maidstone, and Canterbury, although even where CIL has been introduced s106 agreements are still sometimes used for larger sites. The Government initially announced a review of how CIL operates in the Autumn budget of 2018, although there have been further announcements since then including, most recently, proposals within the Planning White Paper (August 2020) to replace the existing s106/CIL system with a new 'Infrastructure Levy'. See also under 'Challenges to securing development contributions' outlined in section 5 below.

4. Highways Section 278 (s278) Agreements

[1] *The DfE allocates Basic Need funding each year to local authorities to ensure there are sufficient school places in areas of need. Local authorities are able to use this funding to expand existing schools, including maintained and non-maintained, and fund the establishment of new Free Schools in areas of need. This does not negate housing developers' responsibility to mitigate the impact of their development on education and developers are still expected to make an appropriate contribution to the cost of the project.*

[2] *The responsibility for seeking contributions for **health services** (including increasing capacity at Doctors' surgeries, hospitals etc.) lies primarily with the NHS/CCGs. The priority for Adult Social Care is to support people who need help with daily living to live as independently as possible in the place of their choice, within the resources available.*

4.1 Highways s278 agreements allow developers to enter into a legal agreement to make alterations or improvements to a public highway as part of a planning application. Therefore, highways works associated with new development are largely subject to s278 agreements and provided as direct works by the developer rather than funded through s106 agreements, as the preferred mechanism to deliver infrastructure and minimise risk to the County Council. Therefore, whilst they provide for the delivery of essential highways infrastructure, the figures in this report are exclusive of s278 agreements.

5. Challenges to Securing Developer Contributions

5.1 A fundamental requirement of s106 contributions is that they must be used towards capital projects and cannot be applied as revenue. For many services this means that the true impact of additional demand from development can never be fully recovered through s106, which is also particularly important as some services providers move increasingly towards revenue-based service delivery models. Additionally, s106 monies cannot be used towards replacement or maintenance of existing assets, running costs or staffing. All projects where s106 monies are applied must demonstrate that they are providing <u>additional</u> capacity.

5.2 Development viability is the most common reason that the full amount requested by the County Council is not secured. This is when the developer makes a case to the Planning Authority that they cannot afford all the requests being made of them, planning regulations allow a prioritisation of requests to then take place by the Planning Authority. In such cases and where appropriate KCC will seek to mitigate impact through a number of potential measures including requesting viability assessments, considering deferred or overage payments (which provide for additional payment if viability improves) and, where appropriate, shared use of space (community hub for example). Major strategic sites and multiple sites present their own challenges. Often very significant up-front infrastructure costs create cash flow problems for the developer and can create viability issues particularly in the early stages where a development proposal is heavily reliant upon house sales for income.

5.3 Regulations relating to s106 agreements have become more and more complex in recent years; including (although not exclusively) the Community Infrastructure Levy (CIL) Regulations, which first came into force in April 2010 and have been subject to a number of amendments since then.

5.4 These regulations were introduced by Government to encourage districts to move towards charging the Community Infrastructure Levy; however, they have had a significant impact on authorities such as County Councils that deliver strategic infrastructure. The County Council has successfully limited the impact through a range of measures, including promoting the continued use of s106 agreements.

5.5 More recently the Planning White Paper (Aug 2020) introduces proposals to replace the existing s106/CIL system with a new 'Infrastructure Levy', see paragraph 7.2

6. Financial, Legal, Equalities and Data Protection Implications

6.1 As stated in paragraph 2.3 KCC seeks developer contributions to secure financial contributions towards increasing infrastructure capacity to support services which it has a responsibility to provide.

6.2 The s106 agreement is a formal document, a deed, which states that it is an obligation for planning purposes, identifies the relevant land, the person entering the obligation; it also becomes a land charge and the relevant local authority can enforce against it as a legal contract

6.3 There are no identified equality issues arising from the process for securing developer contributions.

6.4 There is no processing of personal data.

7 Looking Ahead

7.1 Kent has a growing population and KCC services continue to pursue projects to meet future demand across the whole of the county, including funding and provision at major development projects such as Ebbsfleet (Dartford/Gravesham), Chilmington Green (Ashford), Whitfield (Dover), Sturry/Broadoak (Canterbury) and Otterpool Park (Folkestone & Hythe). In this respect we will continue to maximise contributions for essential community infrastructure within the current system across the whole of the county, in order to improve outcomes for the people and communities of Kent and ensure the sustainability of delivery in the future.

7.2 However, the system remains imperfect currently and presents several significant challenges, as outlined above, including viability and planning policy restrictions such as the current Community Infrastructure Levy Regulations. Most recently the Planning White Paper (Aug 2020) introduced proposals to replace the existing s106/CIL system with a new 'Infrastructure Levy', which in-itself presented a multitude of potentials issues/risks. The new Secretary of State is currently considering the extensive representations made in response to those proposals in summer of 2020, including by Kent County Council. We are currently awaiting further announcements from Central Government (expected later this year/2022) regarding revisions of the existing system.

7.3 We will continue to make representations and lobby Central Government in this respect towards implementing changes to current funding arrangements in the future, protecting the County Council's position and maintaining the significant level of infrastructure funding required, as outlined above.

7.4 In the meantime, all Local Authorities have a responsibility to provide a summary of all financial and non-financial developer contributions over the course of a given financial year. This summary is published annually in the form of an Infrastructure Funding Statement (IFS). Whilst this year's annual updated IFS is due to be published shortly, reference to the existing publication (for 2019/20) can be found at https://www.kent.gov.uk/about-the-council/strategies-and-policies/environment-waste-and-planning-policies/infrastructure-funding-statement-2019-2020. It is also the subject of a sister paper at today's Growth, Economic Development and Communities

Cabinet Committee Agenda Item 6.

8. **Recommendations**

Recommendation: The Growth, Economic Development and Communities Cabinet Committee is asked to note this introductory paper and agree to receive future in-depth papers exploring challenges and opportunities for KCC regarding developer contributions, and KCC's existing and evolving approach.

9. **Background Documents**

9.1 Appendix 1: Ratio of amount sought and in turn agreed by individual Districts
Appendix 2 Total amount agreed by District
Appendix 3: Amount agreed per KCC service, respectively.

10. Contact details

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