Gravesham Borough Council S106 Developer Contributions Strategy and Guide- DRAFT

Foreword

Gravesham is a diverse and growing Borough which has seen many changes throughout its recorded history. In order to accommodate this growth, the services and infrastructure we have to support this growth needs to be sustained and enhanced.

Our Administration made a commitment to residents in its 2023 Manifesto to:

> *'ensuring that planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as S106 agreements are invested in the Borough and ensure, where development work occurs and is permitted, that the maximum benefit from developer contributions can be achieved, to provide the infrastructure the area currently needs, as well as that which will be required by the development itself. That all funding obtained is only to be spent in Gravesham to benefit the residents. This is to secure community infrastructure improvements from any developments for things such as affordable housing, schools, GP Surgeries, open spaces, outdoor play areas and other community facilities.'*

This strategy seeks to bring to life this manifesto commitment ensuring that Gravesham Borough Council has a duty to ensure that necessary development is not at the expense of existing residents and businesses and that all funding achieved is spent within the Borough on the priorities of local residents, except where there are cross boundary developments where we would work in partnership with others to achieve the necessary infrastructure.

We commit to seeking the maximum possible benefit from developers to the Borough and where this policy conflicts with existing Government or local policy we commit to seeking to change this through our own governance and policy process or by lobbying those that do have the power to make decisions so that schemes that do want to come forward should but should not be at the expense of local residents.

Cllr Shane Mochrie-Cox
Deputy Leader of the Council and Cabinet Member for Strategic Environment

Vision

The vision of the strategy is: That planning obligations and contributions commonly known as s106 shall be sought for all applications where this meets the tests set out in legislation and that the maximum is sought to ensure infrastructure and services at not impacted by new development. We shall also ensure that all obligations and funding gained will be spent in the Borough. Where this policy and strategy requires amendments to the local

development plan or legislation seek to amend these plans formally or lobby for the changes if they are in the gift of others such as HM Government.

Strategic Aims

1) That S106 agreements shall be sought for all developments providing they meet the legislative tests.
2) That the maximum shall be sought to mitigate the effects of any developments
3) That all obligations under s106 agreements are spent/enacted within the Borough
4) That locally defined infrastructure and service priorities take precedence.
5) That GBC shall lobby for legislative changes to ensure that there are powers and accountability for these obligations.

Governance Status of this Policy

This Strategy and Guide does not have the force of a statutory planning document as this is reserved to the local plan. However, Gravesham Borough will adopt it as policy subject to member views at the Strategic Environment Cabinet Committee and decision of the Cabinet Member and this policy will inform the direction of the Officers and partners towards amending the local plan in regards to s106 and associated planning obligations.

It states what is required to meet the local plan policy on infrastructure provision in respect of county services. KCC will use it as a basis for its responses to Local Planning authorities in relation to infrastructure planning for local plans and planning application consultations.

What are developer contributions

Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as 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 'developer contributions' along with highway contributions and the Community Infrastructure Levy. Such agreements cannot be used to address existing shortfalls in infrastructure or service provision.

A Unilateral Undertaking is a simplified version of a s.106 agreement and is entered into by the landowner and any other party with a legal interest in the development site. They can assist in ensuring that planning permissions are granted speedily, which benefits both applicants and the Council.

Separately, an applicant can also enter into a section 278 agreement (or s278) with Kent County Council. Section 278 refers to a section of the Highways Act 1980 that allows developers to enter into a legal agreement with the County council (in its capacity as the Highway Authority) to make permanent alterations or improvements to a public highway, as part of a planning approval.

The common uses of developer contributions are to secure affordable housing, and to specify the type and timing of this housing; and to secure financial contributions to provide infrastructure. However, these are not the only uses for a s106 obligation. A s106 obligation can (this is not an exhaustive list):

- restrict the development or use of the land in any specified way;
- require specified operations or activities to be carried out in, on, under or over the land;
- require the land to be used in any specified way; or
- require a sum or sums to be paid to a specific body, on a specified date or dates or periodically.

A s106 obligation can be subject to conditions, it can specify restrictions definitely or indefinitely, and in terms of payments the timing of these can be specified in the obligation.

If the s106 is not complied with, it is enforceable against the person that entered into the obligation and any subsequent owner. In case of a breach of the obligation the Council utilise mediation and legal clauses set out within the s.106 agreement to take relevant action and if appropriate can recover expenses incurred.

The planning obligation 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 and their interest and the relevant local authority that would enforce the obligation. The obligation can be a unitary obligation or multi party agreement.

Purpose of this document

This document sets out the Council's approach to seeking developer contributions for infrastructure, service or environmental improvements required as a result of new development. It is aimed at developers, agents and the general public, and seeks to provide people with a better understanding of when planning contributions will be sought and how they will be used.

All development has the potential to impact on the environment, and place pressure on local infrastructure and services. Where the development itself cannot directly mitigate these impacts, the planning system can be used to ensure that developer contributions can be secured to mitigate against any adverse impacts, subject to viability considerations.

In Gravesham such planning contributions have typically been secured through legal agreements with developers (known as unilateral or Section 106 agreements) to secure provision towards necessary infrastructure or other benefits.

Legal Tests

The legal tests for when you can use a s106 agreement are set out in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended. The tests are:

- 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.

As well as the legal tests, the policy tests are contained in the National Planning Policy Framework (NPPF, September 2023):
57. Planning obligations must only be sought where they meet all of the following tests:
a) necessary to make the development acceptable in planning terms;
b) directly related to the development; and
c) fairly and reasonably related in scale and kind to the development.

58. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available.

This section of the NPPF is expanded upon by the Government's Planning Practice Guidance, in reference to Development Management decisions, the PPG sets out the scope for when viability assessments should be used in relation to decision making (Paragraph: 007 Reference ID: 10-007-20190509):

Where up-to-date policies have set out the contributions expected from development, planning applications that fully comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. Policy compliant in decision making means that the development fully complies with up to date plan policies. A decision maker can give appropriate weight to emerging policies.

Such circumstances could include, for example where development is proposed on unallocated sites of a wholly different type to those used in viability assessment that informed the plan; where further information on infrastructure or site costs is required; where particular types of development are proposed which may significantly vary from standard models of development for sale (for example build to rent or housing for older people); or where a recession or similar significant economic changes have occurred since the plan was brought into force.

This document therefore aims to provide developers, agents and applicants with:
- An overview of the Council's approach to securing mitigation through planning conditions, planning obligations (Section 106 agreements)
- Guidance on the type and nature of planning obligations that may be sought, and the basis for charges.

The document provides further information on the implementation of policies in the Local Plan Core Strategy (2014) which relate to the impacts of development and affordable housing. The key policies relating to infrastructure and affordable housing are:

- Policy CS10: Physical and Social Infrastructure
- Policy CS11: Transport
- Policy CS12: Green Infrastructure
- Policy CS13: Green Space, Sport and Recreation
- Policy CS16: Affordable Housing

Governance – Roles, Responsibilities and Procedures

s.106 agreements and any viability assessments produced to inform decision making will be made accessible via the Council's website. Unless there is commercially sensitive information or personal data within these documents, un-redacted versions will be published in accordance with government guidance.

The content of the S.106 agreement is agreed between the relevant parties and the Council, with a planning officer acting on behalf of the Council under delegated authority. The S.106 Legal Agreement is prepared by the council's solicitors on the instructions of a planning officer, and the applicant(s) for the relevant planning application will be required to pay the solicitor's fees, and the solicitor fees of other relevant parties. The council's solicitor may at times instruct an external solicitor to prepare a S.106 Legal Agreement on the Council's behalf, in such instances the applicant(s) will also be required to cover the external solicitor's fee.

Where an applicant submits a viability assessment to the Council as part of a planning application (including applications for varying agreed S.106 Legal Agreement's) the Council will appoint an independent assessor to scrutinise the viability assessment in line with RICS guidance on viability. This independent assessor will be commissioned at the applicant(s) expense, with the applicant(s) required to cover the independent assessor's fee.

For the avoidance of doubt should there be conflict in this strategy with any legislation or statutory guidance then the legalisation and statutory guidance has precedence however if it is not one of the above or as part of the local plan then this strategy has precedence and if in conflict with the local plan then this shall be sought to be changed.

Negotiation of s.106 agreements – Pre-application stage

Developers are encouraged to begin pre-application discussions with the local planning authority as soon as possible. The Council offers a paid pre-application advice service, details of which are available on our website.

As part of the pre-application advice system, the Council strongly urges the use of Planning Performance Agreements (PPA) for major schemes (including new housing, employment and mixed use schemes). These are voluntary agreements between the local planning authority and an applicant, aimed at delivering high quality, sustainable development that is based on a clear vision and set of development objectives.

A PPA will deal with several issues including s106 agreement negotiations. It is the ideal avenue for considering what a s.106 agreement should include (or the unilateral undertaking should offer if the developer chooses that route), considering the CIL regulations tests. Entering a PPA does not, of course, guarantee the outcome of a planning application, but it does guarantee the availability of resources via an agreed project plan and work programme.

If a developer does not wish to enter a PPA, paid pre-application discussions with the Council can still take place. However, discussions related to s.106 agreements would be charged separately, and in addition to the pre-application fee set out on the Council's website.

Negotiation of s.106 agreements – Planning application stage

If an applicant has chosen not to pursue a pre-application and PPA, once a planning application has been submitted to the Council and validated, a case officer will be appointed. The case officer will work with the developer and other relevant parties, to identify what obligations need to be included in the s106 agreement. Officers will have due regard to the strategic and policy framework of the council in regards to negotiations and identification of obligations. This is currently a delegated power under the constitution but will be kept under review.

Initially, the obligations will be expressed as Heads of Terms. These are the issues on which contributions are based and around which the details of the obligations are negotiated by the interested parties.

Heads of Terms and their justification in accordance with the CIL regulations tests will be set out in any delegated/committee report written by the case officer. The report will set out a Indicative timescale for completion of the s106 agreement. If a unilateral undertaking has been submitted, it will similarly be assessed against the CIL regulations tests in the committee report.

An obligation, whether set out in an s106 agreement or a unilateral undertaking, can only be a material planning consideration if it meets the CIL regulations tests. When a planning application has been resolved to be granted subject to a s106 agreement, the Council will send appropriate formal instructions to its solicitor. If not already provided, the developer will need to provide certain information to the Council's solicitor so that the legal agreement can be agreed between the applicant(s) legal representative, and the legal representatives of other relevant parties. The information required is:

- Name and contact details of the applicant
- Name and contact details of the applicant's solicitor.
- Name and contact details of the land owner's solicitor (if different).
- Address and post code of the land involved.
- A current copy of the title to the land involved (i.e. all the land within the application's red line).
- A solicitor's undertaking to meet the Council's costs of preparing the agreement.

If the application is for outline planning permission, it may not be possible at that stage to

fully detail the obligation particularly, say, if it is a payment relating to the number of homes provided. At that time the Council will want to agree with the applicant how the obligation payment will be calculated, with the precise calculation left until full details of the development are provided at the reserved matters stage.

It should be noted that failure to complete the s106 agreement within the given timescale will result in the application being refused.

Template agreements

The Council provides an s106 agreement template on its website (s106 Templates). The Council strongly advises developers to use the standard wording to avoid delay in the negotiation process. If the standard wording is used, this should help the developer to submit a draft s106 agreement with the planning application.

Charges for monitoring of obligations

The Council has a schedule of monitoring charges, which is set out on the Council's website. In relation to strategic sites and mixed-use sites, bespoke monitoring charges will be negotiated.

Timing and triggers for action or payment

The s106 agreement or unilateral undertaking will set out the relevant timings and trigger points. Development related trigger points should be used (such as prior to commencement or prior to first occupation) rather than fixed dates. Fixed dates can become irrelevant if there is slippage in the development programme. On larger developments, the phasing of payments (such as for the provision of school places) may be acceptable where this is compatible with infrastructure delivery.

If a developer considers that there is a case either for later or lower payment or later on-site delivery, this needs to be supported by evidence at the planning application stage. The case officer will need to set out a reasoned and evidenced justification in their delegated or committee report. Similar justifications will be required from any infrastructure or service provider if it considers earlier or higher payment or earlier on-site delivery is necessary.

Monitoring

The Council's monitoring officer is responsible for logging all obligations and associated trigger points. The monitoring officer will act on all trigger points to ensure that obligations are met. The monitoring officer will check that all payments are made in a timely manner, are that third parties are notified of relevant trigger points being reached where required. Each party to the s.106 agreement will be accountable for ensuring any planning obligations they obtain via a s.106 agreement is spent in accordance with the CIL regulations and the requirements set out within the s.106 agreement.

The monitoring officer will also check that the transfer of land and/or buildings to third parties takes place on time and any agreed contributions paid (such as for future maintenance).

Most s106 agreements include a “pay back” clause. This means that if the money is not spent within a set period, it must be paid back to the developer with interest. Prior to releasing any initial money to a third party, the Council will require evidence of impending project delivery.

If the developer becomes aware of any reason why trigger points may not be able to be met, it is the developer’s responsibility to contact the monitoring officer immediately.

Index-linking of payments

Unless otherwise agreed, all payments will be index-linked. Indexation will be calculated from the date the relevant project / service costs were ascertained to the date of payment. The Council’s monitoring officer will be able to provide details of the amount due.

Development viability

Planning obligations are negotiated between the Council and developers, on a case by case basis. Where developers believe that viability is an issue, applicants will need to make a submission to the Council which should include the following:

- A financial viability appraisal setting out how they are not able to meet the full policy requirements (including the amount and tenure of affordable housing) deemed necessary to be secured through a Section 106 agreement. The viability appraisal should be completed in accordance with RICS guidance on Financial viability in planning: conduct and reporting and should include:
    - Quantity surveyors cost assessment
    - Market evidence of sales rate and site value
    - Development and sales programme (where relevant)
    - Details of any exceptional development costs
- A statement outlining the benefits and risks of not meeting the policy requirements and the site being delivered immediately.

The issue of viability will normally be dealt with at application stage. However, applicants can request that the Council review the financial viability of a development following planning permission being granted. An example of which is where developments are expected to be phased over a number of years and circumstances may have changed since planning permission was granted.

The Council will seek independent advice to review the financial appraisal which has been provided (the cost of which will be met by the applicant). The Council will consider potential benefits of a scheme by weighing these against the resulting harm from the potential under provision or delayed provision of infrastructure (including affordable housing).

Based on independent financial viability findings and other evidence, planning obligations may be deferred/phased, or discounted, where this would not make the development unacceptable in planning terms.

The due weight of viability decisions are made by the authority and the authority reserves the right to determine this weight given on a case by case basis on an open and transparent basis but requires this same openness from those seeking to enter into agreements.

Overages policy

It is the policy of this authority that should any developer that wishes to mitigate or minimise their S106 obligations then we shall seek to add, where applicable and at our discretion, an overages clause so that in the event that the viability assessment is incorrect and that viability changes on an open book basis then the authority shall seek to recoup additional payments on a taper basis.

Planning Obligations – FURTHER DETAIL TO BE ADDED

This section aims to set out the variety of contributions that might need to be considered as part of negotiations on planning applications that require a s106 obligation. They are not meant as an exhaustive list, but as a means of a guide to assist in those conversations. Each application and scheme will be different and therefore innovative design and place making will still be needed.

These guidelines should be seen as a starting point or a minimum standard, which is open to negotiation based on each individual case. This recognises the complexities that some sites have over others and the planning balance that the local planning authority must weigh up.

The information below sets out a summary of what may be required from a typical major development scheme. This is provided as an illustration only:

- Air quality, noise, odour (Mitigation and/or monitoring)
- Affordable housing
- Affordable workspaces
- Burial land / facilities
- Community safety
- Community facilities (including increasing and/or enhancing the provision of or within libraries, community buildings, art facilities and museums)
- Economic development (initiatives to contribute towards the local economy and employment)
- Education (consideration of requests made by Kent County Council in respect of special needs, primary and secondary school provision)
- Environment
    - SAMMS Tariff (The North Kent Strategic Access Management and Monitoring Scheme)
    - Biodiversity net gain
    - Habitat/nature/heritage requirements
- Flood defence and drainage (Infrastructure related improvements to offset the impact of the development and/or to mitigate risks to the proposed development including SUDS)
- Healthcare (consideration of requests made by NHS Kent and Medway ICB to enhance healthcare provision to meet needs of the proposed development)

- Open Space, sports and recreation (Provision of onsite or offsite open space and/or facilities)
- Transport, highways and parking (public, local road network, strategic road network, walking and cycling routes improvements, sustainable travel planning, parking reviews and provision, management plans)
- Site / public real management plans
- Social care
- Waste management