APPENDIX A

Tameside Planning Obligations Commuted Sums and Monitoring Fees

1.1 Since the implementation of the Town and Country Planning Act 1990 (as amended), Local Planning Authorities (LPAs) have been allowed to require developers to make contributions to mitigate the impact of the development in accordance with provisions of national and local policy. These contributions are known as planning obligations and as the mechanism for allowing these is covered by Section 106 (s.106) of the said Act, these are also referred to as s.106 contributions, and are delivered by the LPA entering into s.106 agreements with developers. According to the National Planning Policy Framework (paragraph 57), planning obligations should only be sought when the following three test are met – the contributions are:

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.

1.2 This report sets outs the Council's position relating to aspects of s.106 agreements. The first area covered is the accepting of commuted sums in lieu of Affordable Housing delivered on site, and the spending off all commuted sums in general and includes recovery of project management costs and fees where the Council delivers projects and programmes directly. The second area is the charging of monitoring and reporting fees related to s.106 agreements to cover the cost of monitoring and reporting on delivery of that s.106 obligation for the lifetime of that obligation.

2. COMMUTED SUMS IN LIEU OF AFFORDABLE HOUSING CURRENT SITUATION

2.1 The Council adopted its Unitary Development Plan in 2004 which has a policy, H4, covering Affordable Housing. and states the following - **In areas of the Borough where there is a demonstrable lack of affordable, supported or particular types of market housing to meet local needs, the Council will require developers to provide an element of subsidised or low cost market housing on suitable residential sites of 25 or more dwellings or 1 hectare or more in size.** The policy was not put into practice as it was considered there was no affordable housing imbalance for 14 years until late 2018, when utilising the findings of a Housing Needs Assessment, the Council began asking for 15% affordable housing on developments with 10 or more dwellings.

2.2 The default position under policy H4 is for affordable housing to be delivered onsite by the developer, however - **In exceptional circumstances it may be acceptable for the element of affordable housing to be located on another site in the locality. In these instances the Council will require the developer to provide an appropriate financial contribution towards such provision**. The National Planning Policy Framework (NPPF) also allows some flexibility to accept commuted sums instead of onsite provision, with paragraph 63 stating - **Where a need for affordable housing is identified, planning policies should specify the type of affordable housing required, and expect it to be met on-site unless:**
a) off-site provision or an appropriate financial contribution in lieu can be robustly justified; and
b) the agreed approach contributes to the objective of creating mixed and balanced communities.

2.3 Given the information in 2.2 the Council is confident that accepting commuted sums in lieu of onsite affordable housing is permitted in certain circumstances, and whilst these would be considered on a case by case basis, section 3 outlines situations that the Council would be minded to accept a commuted sums, and how the sums may be allocated.

3. AGREEING TO ACCEPTING COMMUTED SUMS AND THEIR USE

3.1 Whilst it is often more efficient and effective taking affordable housing on site and what policy directs, it may not always be practical, or in the best interests of the housing offer, and in these circumstances the Council may on a case by case basis where exceptional circumstances can be robustly justified take a flexible approach in meeting its affordable housing priorities. The situations in which the Council may consider commuted sums in lieu of affordable housing are stated in table 1 below, however not limited to them:

Table 1 – Commuted Sums in Lieu of Onsite Delivery Circumstances

Circumstance	Reasoned Justification
A development wholly consisting or substantial consisting of blocks of flats.	A Registered Provider (RP) will not take s.106 units where there is another party managing the flats or a freeholder. Where flats form part of a site there may be circumstances where the Council takes the delivery of houses on site and a commuted sum for the flats in equal proportions.
The numbers of Affordable Units to be delivered are in low single figures.	RPs generally do not wish to take very low numbers of units, especially if they have no other stock in the vicinity, as they would potentially be hard to manage and more expensive to maintain.
Where the nature of the development may make it more beneficial for the Council to take a commuted sum. E.g. 4 and 5 bedroom detached houses.	If the commuted sum is based on the overall sites Gross Development Value (GDV) then a higher affordable housing contribution would be received rather than delivery on site.
If there is a recent oversupply or demand issues in an exact location and the benefits of a commuted sum could have a greater impact somewhere else in the vicinity.	In the interests of balanced housing markets, there could be circumstances where a parcel of land subject to a s.106 is next to or surrounded by parcels with a high concentration of affordable housing, and therefore a commuted sum may be preferable as opposed to a higher concentration of social housing in that specific area.
Cascading provision within a s.106 agreement when onsite affordable housing cannot be transferred to an RP	This is a common provision, however it should not be generous so the developer ensures that an RP won't take the units by not acting reasonably or inflating the value of the properties.
Low demand for Affordable Home Ownership (AHO) units.	With current interest rates Shared Ownership properties are not as attractive to many first time buyers, and discounted sale present an in perpetuity burden on the Council. Therefore on some sites it may be appropriate to deliver the rented affordable housing on site and take a commuted sum in lieu of any AHO units.

3.2 As well as the above there could be other examples when the Council may wish to consider the provision of a commuted sum via a s.106, and these, as well as all cases, will be discussed between Development Management and Housing Growth and submitted as part of the Planning Officers recommendations in the report to the Speakers Panel (Planning) for consideration/approval. It is important that the Council make the final choice of whether an exemption is made and it's not a matter for the developer to pick and choose whether affordable housing is provided on site or not.

3.3 A clause in the s.106 agreement normally specifies where and how the commuted sum should spent, and if the money is not spent as agreed the applicant/developer can claim the

money back. In some cases Local Authorities have been made to pay back £ millions when the sums have not been spent within the terms of the agreement which usually have a five year time period, but this can be longer. Whilst commuted sums should be spent in the 'vicinity' of the development, it is established, and common practice that for affordable housing this can mean the whole borough, additionally supported by the fact that the Housing Act 1996 Part VI & VII duties and obligations are fulfilled by providing housing in Tameside, and therefore housing need is met anywhere in the borough regardless of the exact location the need arose.

3.4 To be transparent and enable the Council freedom to spend Affordable Housing Commuted sums to support its own affordable housing priorities and delivery, it is proposed that the following is contained in a clause in s.106 agreements: - **For the provision of Affordable Housing within the administrative area of Tameside Metropolitan Borough Council, for initiatives including but not limited to the following;**

- **Assembly of land to support affordable housing delivery;**
- **Gap funding for affordable housing provision by RPs;**
- **Funding to support Council approved affordable housing products;**
- **Empty properties being brought back into use as affordable housing;**
- **Any suitable means to support affordable housing as per objectives within the housing strategy (or equivalent).**

3.5 For avoidance of doubt commuted sums would be spent on projects with an affordable housing outcome, and the meaning of affordable housing is as per the definition in the NPPF, which currently require all tenures of affordable housing to remain affordable in perpetuity except for Starter Homes. With all projects there will be revenue costs necessary to enable affordable housing outcomes to be achieved, such as staff time spent on project management and delivery, which will also be eligible for the commuted sum expenditure along with capital costs. The expenditure of the commuted sums may be utilised by the Council, a Registered Provider partner, or any Housing Company, Joint Venture, Special Purpose Delivery Vehicle or other initiative that best meets the Council's affordable housing objectives.

3.6 The ability to be able to use commuted sums in lieu of affordable housing provides for flexibility, provides a number opportunities to support the priorities of the Housing Strategy, and enables the Council to meet general housing needs more effectively in some circumstances, as well as allowing for specialist needs of client groups whose needs are not normally met though s.106 onsite provision. The Council can look to utilise accommodation provided through s.106 to reduce high cost and inappropriate housing placement of some customers. The s.106 capital fund can be used to match and lever in other funding which will allow the Council to consider and undertake a number and range of future and ambitious housing projects. In order to ensure full value and benefit is obtained from commuted sums, it is becoming more common for s106 agreements to contain a 'reconciliation tool', this is a clause which allows for overage to be secured after development/sale of the housing on the site to capture the potential increase in the gross development value of units where this cannot be forecast at the time of entering the s.106 agreement.

3.7 Across the Council, with regards to all types of commuted sums, costs associated with project management that the Council has incurred have previously not been paid for by the commuted sum, however any third party carrying out the work would in include this expenditure in the overall cost of delivering the infrastructure or Affordable Housing. This is a missed opportunity for the Council to recover eligible costs incurred. Project design management, development and associated costs are fully recoverable, appropriate and the Council can introduce a mechanism to ensure it is properly compensated for time spend on projects related to s.106 commuted sums across the board by the end of 2021.

4. MONITORING FEES CURRENT SITUATION

4.1 Since the introduction of the Community Infrastructure Levy (CIL) Regulations 2010 (as amended) there had been a degree of uncertainty regarding the legality of Local Planning Authorities charging fees for recording and monitoring s.106 agreements. The Court of Appeal confirmed in the case of R (Khodari) v Kensington and Chelsea RLBC [2017] such fees are acceptable, providing that the monitoring fee is not indicated in the planning officer's report as reason for granting planning permission. Therefore, a clear distinction was drawn between planning obligations necessary to make the development acceptable in planning terms, and fees to cover the actual cost of recording and monitoring the s.106 agreements.

4.2 Following the case above, Planning Practice Guidance was updated from 1st September 2019 and now states - **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.** - and - **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). Authorities may decide to set fees using other methods. 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**.

4.3 Currently the Council does not charge fees for recording and monitoring s.106 agreements. Given the case law and clear direction in Planning Practice Guidance it is proposed that monitoring fees are introduced.

4.4 The reporting and monitoring of fees can be applied for all types of s.106 obligations, the most common being works or financial contributions for green space, public open space, education, highways, affordable housing and any miscellaneous provisions that may be included in s.106 Agreements. The Guidance and case law do not prescribe a charging method, with no common approach adopted across the country. Local Planning Authorities can develop and adopt their own methods for charging s.106 monitoring fees providing as noted in 4.2 that they are proportionate, reasonable and reflect the actual cost of monitoring.

5. MONITORING FEE PROPOSED CHARGING SCHEDULE

5.1 In developing a charging approach and method for Tameside, charging schedules applied by other LPAs from across the country, including a Greater Manchester authority, have been considered and compared. The benchmarking exercise shows a wide variety of approaches being taken by LPAs when devising schedules, and even where LPAs used similar methods each have their own variances. The benchmarking highlights that LPAs use four broad methodologies for setting charges as follows;

1. Rates based on the number of covenants, obligations or triggers in the agreements
2. Fees set at a percentage of commuted sums charged
3. Using numbers of dwellings on site to set charging bands
4. Fees based on a percentage of planning application fees

Some LPAs use two or more of the methods above.

5.2 Setting a straight percentage based on commuted sums on their own was not considered, as this method does not take into account the amount of monitoring that is required when affordable housing is delivered onsite.

5.3 Four different site sizes for housing development were used in the benchmarking and the charging schedules from the 39 LPAs and 3 TMBC proposals were run through to enable

comparisons to be made for both affordable housing delivered on site, and affordable housing with a commuted sum. Based on the information and considering the requirement for the charging to be proportionate, reasonable and reflect the actual cost of monitoring it is proposed that the Council adopt a charging schedule based on Table 2 below. In addition it is recommended that to ensure any fees are not excessive a cap as set out in 5.4 of the report is also adopted.

Table 2 - TMBC Charging Schedule Proposal

Type of Obligation	Monitoring Fee	Comment
Commuted Sum (not Affordable Housing Related)	5% of each payment instalment	This will be included within each invoice requesting payment
Affordable Housing Commuted Sum	1% of each payment instalment	This will be included within each invoice requesting payment
Land Contribution	£1,000 per development site	This payment is to be made at the time that the land transfer takes place
On-site Affordable Housing	£1,000 for every 20 homes of any tenure on site up to a maximum of £5000	Payment is to be made on the first occupation of the affordable units
Other obligation	£1,000 per obligation	This is to ensure compliance with obligations such as providing a woodland management strategy etc.
Overage Clause	At least £1,000 or 1% of any additional payments due	This is to report on any commuted sum payments arising from greater profits.

5.4 It is proposed that a cap of £25,000 for each s.106 agreement is used for the above proposal, which is in line with the maximum caps used by other LPAs. The above proposal have been devised after having regard for the Planning Practice Guidance, the estimated cost of monitoring agreements, as well as benchmarking with other LPAs published schedules of charges.

5.5 There are unlimited permutations for charging schedules. The actual cost of monitoring and recording is currently unknown, and will increase as the Council seeks to put in place an increased number of Affordable Housing s.106 agreements delivered onsite. Having considered the actual payments made through planning obligation in 2020/21 and using the charging proposals above, a monitoring and reporting fee could have been generated of up to £0.040m in the year as set out in table 3 below. On the basis that there is now a greater focus to secure and implement more s.106 agreements in the future this fee income may rise.

Table 3 - TMBC Charging Schedule Proposal - 2020/21 Illustration

Type of contribution	Contribution/Sites	Fee
None housing commuted sum 5%	£551,000	£27,550
Sites 20-39 units	2	£2,000
Sites 40-59 units	1	£2,000
Sites 60 – 79 units	1	£3,000
Sites 100+ units	1	£5,000
Total fee estimate		**£39,550**

6. CONCLUSION

6.1 Allowing the Council to receive commuted sums in appropriate circumstances is planning policy compliant and common practice. The spending of the commuted sums on affordable housing projects will support the priorities of the Council's Housing Strategy and the aims of the corporate plan, giving the Council flexibility to improve the housing offer in a targeted way. It is expected that the Council will be able to deliver a greater variety of affordable housing given the flexibility. The cost of project related activity for commuted sum expenditure will be fully recoverable from the relevant commuted sum in the future, and the Council will be able to avoid incurring direct cost for areas of current expenditure in this area going forward.

6.2 The charging of monitoring and reporting fees, as established by case law and Planning Practice Guidance, is proposed following a benchmarking exercise, the proposed charging schedule is set out at 5.3, table 2 of this report. The proposal has been brought forward as part of the Councils desire to improve the delivery of s.106 provision, its monitoring and reporting. In order to ensure that fees remain proportionate and reasonable, it is proposed they are monitored, along with the relevant work load, and be reviewed annually by the Council. All monitoring will be carried out by officers employed by the Council