



## **REPORT of THE CHIEF EXECUTIVE**

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**to  
OVERVIEW AND SCRUTINY COMMITTEE  
30 August 2017**

### **SECTION 106 AGREEMENTS**

#### **1. PURPOSE OF THE REPORT**

- 1.1 To provide an update on the arrangements for the collection of Section 106 contributions; trigger points and how money is billed; what sums have been received and how they are held; and what the decision making process is for the allocation of funds. This report is an update to the report considered by the Committee on 8 February 2017.

#### **2. RECOMMENDATIONS**

Members are asked to give their views and comments on the information in this report.

#### **3. SUMMARY OF KEY ISSUES**

- 3.1 At the Overview and Scrutiny Committee meeting on 21 June 2017, the Committee agreed include in its Work Programme Update confirmation of:
- *‘Arrangements for collection of Section 106 [and Section 52] contributions’*
    - *Trigger points, billing etc*
    - *Sums received and held*
  - *Decision making process for allocation’*
- 3.2 Section 106 of the Town and Country Planning Act replaced Section 52 of the 1971 Act. They are agreements between the local planning authority and developers and/or landowners which are attached to a planning permission to make a development which without the agreement would not be acceptable in planning terms. They are commonly known as Planning Obligations.
- 3.3 The Council’s monitoring system presently only includes Section 106 agreements. Work is on-going with regards to any outstanding Section 52 obligations and a verbal update will be given at the Committee.
- 3.4 Planning Obligations must relate directly to the development. They provide three purposes:

- To prescribe the nature of development, which could, for example, include the level, location and type of affordable housing
  - To compensate for the loss or damage by a development, such a new open space or natural landscapes
  - To mitigate the impact of the development which could include new highway works, school and health contributions or flood mitigation
- 3.5 In 2010 the Community Infrastructure Levy Regulations came into force and restricted the use of S106 obligations. Paragraph 2 of Regulation 122 introduced three tests for planning obligations:
- ‘A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—*
- (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. Mitigate a development’s impact (for example, through increased public transport provision).’*
- 3.6 Section 106 agreements should not duplicate planning conditions, which regulate the delivery of development. Planning conditions are also included in Committee Reports.
- 3.7 The Council employs a Section 106 Monitoring Officer. This post has recently been vacated, but an offer has been made to fill the post. The role of the post is to establish and maintain a monitoring system and coordinate the various obligations between the Council, the developer/Landowners and third party recipients of funds, works or facilities.
- 3.8 As set out in Paragraph 3.1.5 of the 8 February 2017 report to the Committee *‘one of the main responsibilities of the monitoring process involves the timely collection of financial contributions ensuring that any payments are subjected to indexation for the stated period. Once payments are received it is important to ensure the money is spent within the agreed timeframe and in line with the terms of the S106 Agreement. This is normally within ten years from receipt, but there can be exceptions to this depending on what has been negotiated.’*
- 3.9 The Section 106 process starts at the pre-application stage. The developer presents their proposals to the Council and where potential obligations are identified these are discussed with the developer. The developer can elect to include the obligations within the planning application itself, the delivery of which are controlled by conditions.
- 3.10 The first stage in drafting the S106 is the Heads of Terms. If the Section 106 is to include third parties – such as the health bodies or Essex County Council – they are involved early in the discussion to ensure that the heads of terms reflect their requirements. All parties agree the Heads of Terms before the decision on the application. If no agreement is reached, the application risks being refused.

- 3.11 The planning application normally includes a list of Heads of Terms, but the details are negotiated up to the planning committee decision and set out in the Officer's report. Therefore, Members are aware of the obligations when considering planning applications.
- 3.12 The Heads of Term form the basis for finalising the Section 106 agreement. Any variations to the heads of terms during the finalisation period need to be considered against the Council's scheme of delegation and if they affect, for example, the amount of monies the Council receives, then the decision to vary the heads of terms may need to be referred back to Members.
- 3.13 **Arrangement for the collection of Section 106 contributions**
- 3.13.1 The Section 106 agreement set out the mechanism for the collection of contributions. In this regard the provision in the agreement typically includes:
- Details of the contribution, including any monies, and what it will be used for.
  - Details of who the recipient will be. The recipient could be a party to the Section 106 – for example Essex County Council.
  - The trigger for the payment or payments. Payments can be made as a single lump sum or at various stages throughout the development as demand arises.
  - What actions the Council and developer take to ensure payments are properly requested and made.
  - Time periods for the request and making of payments.
  - The time period during which the recipient must complete the works and the mechanism for the repayment of any unspent money to the developer.
  - The mechanisms in the event of payments not being made or if payments are disputed.
- 3.13.2 How these various matters are dealt within the Section 106 do vary between agreements depending on circumstances, although the Council tries to secure a standard approach.
- 3.13.3 As an example the Head of Terms could read that through a section 106 a developer has agreed to make a payment towards a new community centre on or before the occupation of the 50<sup>th</sup> dwelling. No further units can be occupied until the payment is received. This is a one off lump sum payment which must be spent within 5 years and any unspent money after that time period returned to the developer unless otherwise agreed.
- 3.13.4 Often the Section 106 will also provide details of any commuted sum payments towards the maintenance of new works and facilities.
- 3.13.5 Once signed the details of the Section 106 are incorporated into a monitoring system which identifies when the triggers apply, monitors payment (in conjunction with the Council's Finance Team) and how the money is spent. The S106 officer liaises with the recipients on a regular basis to monitor progress and the expenditure. Should a recipient exceed the financial contribution received through the Section 106 Agreement, they do so at their own risk with no obligation on the Council or the developer.

- 3.13.6 Appended to this Report is a schedule of the Section 106 Agreements that are included within the existing monitoring system. These date back as far as 1996. The schedule highlights where invoices have been raised and any contributions owed. It briefly details the trigger points and who the recipients for the contributions are. The data is constantly reviewed and works alongside the Council's Uniform and Civica systems to ensure accessible records are kept. Further data is added as soon as it is available.
- 3.13.7 As soon as a trigger is reached an invoice is raised to the developer. The invoice will specify the amount (which is indexed linked back to the date of the S106 Agreement if applicable), the purpose of the payment and when payment is due. The developer is often contacted separately before the invoice is due so that they are aware that it will be forthcoming. Where officers have regular meetings with developers, the Section 106 Agreement is part of those discussions.
- 3.13.8 In the event that the developer does not make the payment within the specified time period, the S106 Monitoring Officer will contact the developer to discuss the invoice and request immediate payment. In the event that the payment is not made, the relevant clauses under the Section 106 apply which may result in the developer being in default and enforceable action can be taken. In addition, the Council could also pursue the debt via its normal debt recovery processes.
- 3.13.9 Notwithstanding the above, payments are normally made within the specified period.

#### **3.14 Decision making process for allocation**

- 3.14.1 As outlined above the discussions on planning obligations start at the pre-application stage and the Heads of Terms are only confirmed when the decision on the planning application is made.
- 3.14.2 It is through the Heads of Terms that the various provisions in the Section 106 are allocated and agreed. This includes:
- The scope of any works
  - Who the recipient of facilities, works and financial contributions will be
  - The broad terms for the triggers
  - Time periods for the completion of the works and pay back of any unspent money
- 3.14.3 Section 106 Agreements normally contain a Clawback Date where financial contributions are made. These are 5 or 10 years after the payment has been received by the Council (or Essex County Council), although they can sometimes be longer. On some occasions there is no clawback date.
- 3.14.4 The clawback date establishes the end date by which time the recipient must spend the contribution. If that contribution is not spent in full or part, there are obligations to refund the developer. An application can be made to the developer to extend the time period.

3.14.5 The monitoring system includes details of the Clawback date and contact details of the manager responsible for the contribution – including any third parties. Any contributions held by the Council against specific projects are built into service budgets, albeit ring fenced. Regular contact between the S106 Monitoring Officer and the relevant service manager informs the monitoring process and managers are advised of the risks of not completing spending the contribution on time.

3.14.6 Where Essex County Council is a signatory to a Section 106 Agreement and they receive money directly, whilst expenditure is monitored through the Section 106 Monitoring Officer, it is for the County Council to ensure that the contribution is spent for the specified purposes and within the timeframe set out in the Section 106.

### **3.15 Officer Working Group**

3.15.1 It was noted in the report to the Committee on 8 February 2017, that a Corporate Working Group would be set up to complement the work of the S106 Officer and coordinate projects to ensure delivery. This will be undertaken by the Officers Implementation Group, which will be chaired by the Planning Policy Manager in-lieu of the appointment of a new Director of Planning and Regulatory Services.

3.15.2 Section 106 Agreements are a standing item on the Implementation Group meeting agendas. This will cover any agreements in negotiation, any prospective agreements, forthcoming triggers and expenditure of financial contributions.

## **4. CONCLUSION**

4.1 Section 106 Agreements are a successful means through which the Council secures financial contributions, facilities or works to prescribe, compensate or mitigate the impacts of development.

4.2 Officers have put in place a process for negotiation, decision, monitoring and enforcement of the agreements. As a learning authority, the processes are kept under review by officers and reported to this Committee and any improvements identified will be reviewed and implemented.

## **5. IMPACT ON CORPORATE GOALS**

5.1 The work of the Overview and Scrutiny Committee supports the corporate goal of ‘delivering good quality, cost effective and valued services.’ The use of Section 106 Agreements to prescribe, compensate and mitigate the impacts of development enables the Council to enhance services to meet new local demands.

## **6. IMPLICATIONS**

- (i) **Impact on Customers** –Scrutiny aids improvement to services to the public by the Council and external authorities

- (ii) **Impact on Equalities** – Facilities and works secured through Section 106 agreements are subject to specifications that meet known national standards and available to all sectors of the community.
- (iii) **Impact on Risk** – Recommendations arising from scrutiny could assist in mitigating corporate risks. The Section 106 process identified in this report aims to be transparent, minimise risk and ensure that developments are viable and deliverable.
- (iv) **Impact on Resources (financial and human)** – The negotiations of section 106 agreements is part of the planning services core budgets. The developer pays for the Council's costs in drafting and completing the agreements.
- (i) **Impact on the Environment** – Agreements can seek to compensate and mitigate for the impacts of development on the local environment.

Background Papers:

None

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