

Division(s):

PERFORMANCE SCRUTINY – 25 JUNE 2015

S106 Allocation and Management

Report by Director for Environment & Economy

Introduction

1. This report provides an overview of the S106 process and the monitoring of the agreements as well as an overview of the management of risk of payback of contributions to developers and landowners. The Performance Scrutiny Committee is asked to:
 - (a) Note the summary of the developer contributions secured, held and spent; and
 - (b) Note the impacts of changes arising out of the introduction of the Community Infrastructure Levy Regulations

What are Developer Contributions?

2. Developer contributions are financial payments made to local planning authorities to ensure that appropriate development can be accommodated without unacceptable burdens being placed upon existing communities and the environment. They can help provide various items of infrastructure and service delivery (such as bus service provision) which help to support all of the Council's four strategic priorities and are crucial to achieving healthy and thriving communities. Contributions can be secured as part of planning obligations under s106 of the Town and County Planning Act 1990 or through the Community Infrastructure Levy (See below) under the Community Infrastructure Levy (CIL) Regulations 2010.
3. Contributions are secured by way of legal deeds known as planning obligations¹ (under the 1990 T&CPA) which are negotiated, in the context of planning applications, between local authorities and persons with an interest in a parcel of land (commonly developers or land owners). They can be attached to a planning permission to make acceptable a development proposal which would otherwise be unacceptable in planning terms.
4. Planning obligations can only be sought where they meet the three tests set out in Regulation 122 of the CIL Regulations 2010, in that they must be:
 - (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.

¹ Planning obligations are also referred to as S106 agreements, Section 106 agreements, developer funding agreements. The planning obligations may be either "agreements" where the local authority is a signatory or "unilateral undertakings" where the developer presents the deed to the local authority (but the local authority is not a signatory).

How do we secure and monitor the planning obligations?

5. The county council provides input into major² planning applications determined by the district councils through the 'Single Response' process. Consultations on planning applications are received by the county council's Major Planning Applications team (MPAT) which then distributes these to various service and Locality officer teams and the relevant local member(s) to comment on. A collated response identifying the infrastructure and other needs arising from the proposed development and any consequential financial contributions required to mitigate these is then returned to the District Council (as local Planning Authority – LPA) for consideration.
6. Where a Single Response includes the need for contributions (see Annex 1) to mitigate the impact of a development proposal those needs and any financial requirements need to be justified and accord with the tests outlined in paragraph 4.
7. Sometimes once the need for the identified contributions is advised to the LPA and the applicant they may be disputed. Where this happens, the county council's officers will seek to defend the requirements³, which may involve the appearance at planning appeals/public inquiries (See Annex 2).
8. Even where the need for the contributions is not disputed there will be a need to agree the terms of the payments, their use and potential repayment mechanisms. The lead teams at the County are Infrastructure Funding Team (IFT), Transport Development Management (TDM) officers and the Legal Unit (LU)⁴. The initial negotiations over the planning obligation requirements are carried out by the IFT and the TDM teams. They will, once agreement is reached in principle, instruct the LU. Thereafter, depending upon the complexity and scale of the proposals and the consequential needs, the three teams will work closely with the district councils and the applicant/developers to complete the s106 agreement.
9. Once the planning obligation is agreed⁵, IFT manages and administers the planning obligation for the county council. This work involves detailed use of several sophisticated and detailed spread sheets and databases (see Annex 3). The team calculates and invoices contributions payments and provides information to the various service areas so that the received monies can be used to deliver the appropriate infrastructure and services. The various receipts and expenditure are delivered through the IFT and subject to examination by both internal and external auditors.

² i.e. a planning application for 10 dwellings or more and/or an application for 1,000 sqm of non-residential development.

³ When the LPAs consider the applications and any requirement for contributions the relevant planning committee may consider the Single Response requirements but not necessarily agree to the need for the contributions.

⁴ These key coalface teams are reliant upon support from many teams across the County including such as CEF's pupil place planning team, and E&E's property team and Locality teams.

⁵ In the case of a unilateral undertaking the County may have little influence over the content

Developer Contributions for Year 2014/15

10. An overview of the year can be summarized as follows:
 - 104⁶ Planning obligations secured;
 - £56.29m Secured in those obligations. The vast majority of this secured money will be received in future years as the corresponding development takes place.
11. Looking at the actual monies received, spent and the balance remaining:
 - £28.51m Contributions received throughout the year;
 - £ 7.72m Contributions spent during the year;
 - £73.91m Total contributions held at close of 2014/15.

It is important to note that none of this money can be described as unallocated. The holding of S106 money should not be interpreted as councils sitting on finance that could be spent immediately and for any purpose. As discussed, all S106 money is, by its very definition, allocated and linked to specific schemes for specific purposes that have been negotiated through the planning process. These schemes are or will appear in the Capital Programme of councils. Many of these schemes are linked to developments planned to take place in future years and there are therefore time-lags between receipt of money and when it is spent on infrastructure linked to these developments. This is explained below. These time-lags explain why the council holds money waiting to be spent.

12. The contributions held will go towards various infrastructure including such as the provision of three new primary schools to be delivered by the end of December 2016. Annex 4 provides a summary of the number of planning obligations and value of contributions secured by the county council in 2014/15 across Oxfordshire. The standout contribution secured (£19.45m) relates to the Graven Hill proposal for 1,900 dwellings. The development will also include a new 2FE primary school⁷ which will be delivered by direct delivery⁸. The contributions are index linked to ensure that the real value is maintained in the case of deferred payment or slow progress of the development.
13. Annex 5 provides comparative context to the contribution amounts shown for 2014/15. It also has high level summaries of the income, expenditure and balances for S106 contributions.
14. Because the developer contributions secured under S106s are not paid at the issuing of planning permission, there is inevitably a time lag between the date at which the agreements are completed and the subsequent payment of contributions. Annex 6 compares the value of contributions secured and received against the numbers of dwellings granted planning permission and

⁶ This figure may increase marginally as completed deeds are summarised and logged.

⁷ A 2FE school with a 2.5FE core to allow for growth.

⁸ The full costs of the school delivery are not reflected in the scale of the secured contributions (only the “embedded costs” - £1.58m are included).

numbers of housing completions in each District. It also provides an illustration of the time-lag related to a strategic-scale development.

15. The receipt of the various contributions then enables detailed work to begin in organising for the received monies to deliver the infrastructure and services necessary to accommodate the development growth. In most cases this will involve another time-lag between the actual receipt of the contributions and the subsequent expenditure.

Allocation, Income & Expenditure of Contributions

16. Developer contributions are predominantly used to fund schemes identified in the Capital Programme as well as, for example; to support the delivery of bus services. The actual use of a contribution is primarily governed by the terms of the corresponding planning obligation from which the contribution derived. As the contributions are secured to mitigate the impacts of specific developments the subsequent use needs to accord with the terms of the provisions of the legal agreements. The specific allocation of developer contributions to individual projects is carried out through the periodic review and updating of the Capital Programme.
 - In March 2015 37.5% of S106 monies held by the Council related to schemes identified in the confirmed capital programme. At that time we held £79.5m⁹ in S106 contributions, which included £29.9m allocated to schemes in the confirmed Capital Programme. A significant portion of the remaining £49.7m will be used towards future capital schemes yet to appear in the programme.
 - The value of S106 funding commitments in the current capital programme totals £102.61m (Capital Programme Feb 2015). The reason we do not yet hold all of this money is that developments due to make the payments have not yet reached the stages which would trigger the requirements to pay.

Contributions spent by county service infrastructure type is provided in **Annex 5**.

Information provided to Members

17. Information on developer contributions is prepared for various Locality meetings. An example of the typical information provided is shown in **Annex 6**; this information is provided by the IFT. Similar information is also provided upon request to individual parish and town councils.

⁹ Following Year End the balance held has reduced as expenditure in 2014/15 has been removed.

Repayment of Contributions

18. Where contributions have been received for specific schemes it has occasionally been necessary to repay some or all of those contributions. This may occur when the scheme to which the contributions are tied has not progressed by the end of a specific period after the receipt of the monies. This period between receipt and potential repayment is referred to as the “longstop”. It is recommended practice to include a repayment provision. The IFT provides (through such as the Developer Funding Accounts Spreadsheet or DFACS – see **Annex 3**) to the service areas information, including such longstops, for all of the contributions received. This enables the management of scheme delivery with minimal repayment risk. However, there are situations when repayments are made. **Annex 8** shows the repayment history from 2006/07.
19. Given that most of the contributions received are contributions towards rather than full funding of specific schemes, there is a risk that pooled contributions as well as scheme specific contributions may need to be returned before they are used.
20. To mitigate the chances of repayment, S106 agreements have in the past been negotiated with as reasonably wide potential use as possible. However, that has not always been possible and given the introduction of the CIL regulations (see below and **Annex 5**) the emphasis/requirement is to have greater linkage between the sums of money and specific schemes.
21. To manage this repayment risk, the council regularly monitors contributions and, beginning at the end of Quarter One of the 2015/16 Financial Year, through the council’s performance monitoring process will flag up any contributions which are within two years of potential repayment.
22. The reasons for the repayment of contributions may include:
 - Where contributions are received for specific schemes which are delivered under budget;
 - Where contributions are received towards potential schemes (the need for which is subject to subsequent feasibility) which are, following reassessment, not considered to be necessary as the development progresses;
 - Where schemes are not deliverable within the longstop. This may be the case for single source funded schemes and for schemes reliant upon cumulative contributions from several developments (the timing of which is not in the control of the county council).

Community Infrastructure Levy (CIL) and changes to S106 regime

23. In April 2010, the CIL Regulations came into force and introduced a new planning charge, the Levy. The intention behind CIL was to bring greater certainty and transparency to developer contributions and speed up the process. CIL is a levy that local authorities (in Oxfordshire only district authorities can introduce CIL) can choose to charge on new developments in their area to help deliver infrastructure to support new development. The money raised can be used to fund a wide range of infrastructure, such as transport schemes, schools, parks, leisure and recreation, green spaces and healthcare infrastructure.
24. CIL charges are set by the Charging Authorities (Districts & City in Oxfordshire), based on the size and type of the new development and after taking the viability of development into account. . The setting of the charges is vetted through public examination but the proposed charges, the collection of the Levy as well as the subsequent distribution of the levy are all controlled by the relevant district council. The Levy may only be expended on infrastructure. The CIL regulations provide for local authorities to set out a list of those projects or types of infrastructure that it is contemplating funding through the levy; this is known as the Regulation 123 list. Once a list is provided district and county councils are no longer able to seek S106 contributions towards items on the list¹⁰. The levy is intended to provide infrastructure to support the development of an area, rather than making individual planning applications acceptable in planning terms. As a result, site specific impact mitigation via S106 provisions may still be necessary in order for a development to be granted planning permission.
25. However, in order to ensure that planning obligations and the levy can operate in a complementary way, the levy Regulations 122 and 123 place limits on the use of planning obligations in three respects:
- they put the Government’s tests on the use of planning obligations (see Paragraph 4) on a statutory basis, for developments that are capable of being charged the levy
 - they ensure the local use of the levy and planning obligations does not overlap – one cannot seek contributions through S106 process for infrastructure which is identified on the Charging Authority’s 123 List.; and
 - they impose a limit (5No. S106s) on pooled contributions from planning obligations towards infrastructure that may be funded by the levy. (See below)
26. Within Oxfordshire, only Oxford City Council currently has CIL in place¹¹; however, other districts are working towards introducing the Levy. **Annex 7**

¹⁰ To avoid “double dipping” i.e. developers paying twice once under S106 and once under CIL to secure the same infrastructure.

¹¹ At 1 out of the five Oxfordshire district authorities this level echoes the national picture of about 22% of LPAs having introduced CIL by 6th April 2015.

provides the current information on the amount of money generated through CIL in Oxford.

What other changes do the regulations bring?

27. From 6th April 2015, pooling regulations came into force. To encourage adoption of CIL the CIL Regulations 2010 have placed limits (pooling restrictions) on the use of planning obligations¹² through S106 agreements. Since 6th April no more s106 obligations may be entered into in respect of a specific infrastructure project or a type of infrastructure, if five or more obligations for that project or type of infrastructure have already been entered into since 6th April 2010..
28. The pooling restriction has already curtailed (and will continue to do so) our ability to seek various “pooled contributions” to address the cumulative impact of developments.. The pooling restrictions are likely also to have a significant impact upon the securing of developer contributions towards such facilities as secondary schools where the infrastructure (the school) to be expanded/provided addresses the needs arising from many more than 5 developments.

How can Members influence what is collected and what is spent in future?

29. The relevant Local Member(s) is/are consulted on major applications in their area as a matter of course through our Single Response process, so when they provide their comments on an application they can use this opportunity to press the case for related infrastructure improvements they feel are necessary. If they are unsure about the rules on what they can and can't seek, the IFT and Locality Managers are always available for help and advice.
30. Allocation of funding and approval to spend follows the County Council's capital programme process.
31. Due to regulation 123 of the CIL Regulations coming into force, the County Council will no longer be able to request contributions for generic infrastructure types (e.g. education), or specific infrastructure projects if five or more obligations for that infrastructure type or project have been entered into since 6th April 2010. The infrastructure needs arising from development are therefore likely to be sought to funded through CIL which is collected by the District Councils. Specific infrastructure projects can also be identified in County Council policies and strategies and these can be used to provide evidence to support not only the negotiation of contributions but also District Council's Regulation 123 lists and local plans. For example, specific transport

¹² Where a local authority has introduced CIL and has a Regulation 123 list which lists a generic type of infrastructure (such as 'education' or 'transport'), s106 contributions should not be sought on any specific projects in that category. (from the NPPG)

projects may be identified through the preparation of the Local Transport Plan 4.

32. Where a s106 agreement is secured for specific infrastructure projects arising from site specific mitigation, the contributions secured can only be spent on that project e.g. the need for a new school arising from the impacts a large housing development. The County Council will need to work closely with District Councils in the preparation of their local plans and through the planning application process to identify such site specific infrastructure projects.

Can Parish and Town Councils decide to spend any of the money on things they consider important? If so, how?

33. They can prepare a Neighbourhood Plan; significant funding for infrastructure can follow from these. They can also bring their infrastructure priorities to the attention of their local County Councillor, so the latter can take their views into account in commenting on planning applications through the Single Response process. And they can respond to consultations on key policy documents produced by others (e.g. District Local Plans, CIL Schedules, LTP4), and try to get important local schemes reflected in those.
34. If and when Parish/town councils receive a proportion¹³ of the CIL they can spend the money on what they wish; but there will be an expectation that it is spent to deliver the infrastructure priorities for that area identified in the Neighbourhood Plans, Local Plans or the Regulation 123 lists.

Conclusion and recommendations

35. There is a substantial balance of developer contributions (£73.91m) held. The monitoring and managing of the contributions and the optimisation of their use are key factors in delivering infrastructure to support growth. The Performance Scrutiny Committee is asked to:
 - (a) Note the summary of the developer contributions secured, held and spent; and
 - (b) Note the impacts of changes arising out of the introduction of Community Infrastructure Levy Regulations

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Background papers:

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¹³ 25% from CIL paid upon development in the corresponding parish/town area if a Neighbourhood Plan exists; otherwise 15%.