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## **S106 Agreements**

### **Purpose**

- 1.1 To give an overview of the use of S106 Agreements.
- 1.2 To give an update on the proposed Infrastructure Levy.

### **Recommendation**

- 2.1 To note the report.

### **Reason**

- 3.1 The report is for information.

### **Supporting information**

- 4.1 New development often creates a need for additional or improved community facilities and infrastructure. Without these, there can be a detrimental effect on local amenity and the quality of the environment. There is also a requirement for new residential development to provide affordable housing. Planning obligations, known as S106 Agreements, are the mechanism by which these are secured and they ensure that any unacceptable impacts of development are mitigated.

Section 106 of the Town and Country Planning Act 1990, as amended by Section 12 of the Planning and Compensation Act 1991, allows the Council to enter into a Section 106 Agreement. These are legal agreements tied to a planning permission which require a landowner to provide new infrastructure and facilities or pay a financial contribution to mitigate the impact of their development on local infrastructure and facilities. Mitigation must be in the form of physical works, with maintenance only being acceptable where the Council is taking on a new facility, for example open space.

The types of infrastructure that are sought through S106 Agreements are:

- Affordable Housing
- Highways infrastructure, including those that encourages use of public transport, cycling and walking
- Public open space and play areas
- Education
- Community Facilities, including community centres, sports facilities and health facilities
- Drainage and flood prevention

#### 4.2 **Policy Basis**

S106 Agreements are governed by a raft of legislation and Government policy. The National Planning Policy Framework (NPPF) sets three tests that all planning obligations must pass:

1. The obligation must be necessary to make the proposed development acceptable in planning terms;
2. The obligation must be directly related to the proposed development;
3. The obligation must be fairly and reasonably related in scale and kind to the proposed development.

These tests ensure that we only seek contributions that are directly related to the impacts created by each individual development.

As well as meeting these tests, all planning obligations that we require must have a policy basis at the local level. The City of Derby Local Plan Part 1 sets out a number of policies in relation to planning obligations. They set the types of contributions that we can require, the threshold for qualifying development and the basic parameters for those contributions. Further details, including formulas and costs are set out in the Planning Obligations Supplementary Planning Document (SPD).

#### 4.3 **Negotiation Process**

The Implementation Team in Planning negotiate all S106 Agreements for the Council. For any planning application that meets the thresholds, Heads of Terms (HoT) are drawn up based on the SPD and in discussion with the relevant benefitting departments. These HoT include details of the level of contribution/ types of works, timescales for works/payment and spend, and details of how/where payments will be spent. Members have the opportunity to feed into those HoT through the planning application process, with details of which applications have a S106 included in the Weekly List

These HoT are then discussed with the applicant until agreement is reached. In some cases the applicant will argue that the development cannot afford all the contributions that the Council are seeking. In these cases the applicant must submit a full viability appraisal that is then independently assessed by the District Valuer. If the District Valuer agrees that the development cannot afford all or some of the contributions, then those contributions that cannot be afforded are put into overage clauses within the S106 Agreement. This ensures that the actual costs and values of the development are assessed at the end of the construction period to see what the final viability position is. If that final assessment shows that the development made more profit than anticipated, part of the additional profit comes back to the Council to provide the mitigation that had previously been waived to allow the development to go ahead.

The HoT are agreed by Members of the Planning Control Committee (or by Chair and Vice Chair for delegated decisions). Once these are agreed, the legal agreement is drawn up and issued with the Planning Decision Notice.

#### 4.4 **Monitoring Process**

It is vital that agreements are monitored effectively to ensure that all contributions are paid and works completed. The Implementation Team provides an overarching monitoring framework, but it is up to individual benefitting departments to ensure that their contributions are spent within time and on the correct infrastructure.

Contributions must be spent within the parameters set out in each individual S106 Agreement. These are legally binding agreements and if the Council spends contributions on something outside these parameters, then the sums must be repaid to the developer, usually with interest. Contributions must also be repaid, with interest, to the developer if the Council does not spend them within the timescale set out in the agreements.

Quarterly reports are sent out to Members to inform them of what money is available to programme, what schemes departments are proposing for contributions and invite comments on those or alternative schemes. If agreement on what to spend contributions on cannot be made between Members and Officers, Cabinet will make the final decision.

#### 4.5 **Community Infrastructure Levy**

The Community Infrastructure Levy (CIL) was introduced in 2010 and provided an alternative to S106 Agreements. It was a mechanism whereby some or all S106 contributions could be replaced by a simple levy set for Derby. This levy would be paid per house/sqm and could be spent on any infrastructure that the Council included within their Reg 123 list. In 2013 the Council carried out some in depth viability work to test whether it would be beneficial to implement CIL. The results of that work showed that if a CIL was introduced in Derby there would be a significant reduction in the amount of money secured from development. This is mainly due to the way that CIL is calculated as it has to be affordable to all development in an area. From experience we know that some developments in Derby can afford full S106 contributions, but some can afford none. Therefore to take into account those unviable sites CIL would have to be set so low to ensure it didn't stop development coming forward. This viability work was carried out again in 2016 and although the viability position had improved slightly, it was still significantly lower than the level that S106 can bring in. CIL has therefore never been adopted in Derby, as is the case with a large number of Local Authorities, especially those areas with lower land values.

#### 4.6 **The Levelling Up and Regeneration Bill – The Infrastructure Levy**

In an attempt to streamline and speed up housing delivery, the Government has proposed, through the Levelling Up and Regeneration Bill, the Infrastructure Levy (IL) as an alternative to S106 Agreements and CIL. This would introduce a mandatory locally set levy on all development based on the final value of the scheme, which would be used to fund infrastructure and affordable housing. The aim is to secure at least as much as is secured through the current system.

Although there has been a subsequent consultation from the Government on the IL in March 2023, the details of exactly how the levy would work are still unknown. This has led to a lot of uncertainty around how the IL would be set and administered as well as what the benefits and disadvantages might be.

As the plans have evolved since first announced, S106 will still have a role to play for in kind provision of infrastructure, for example the provision of an on-site primary school or for affordable housing. The money collected for off-site infrastructure will have to be spent on delivering infrastructure in accordance with an Infrastructure Delivery Strategy which will need to be drawn up alongside the creation of the IL. The Government's priority is to deliver the necessary infrastructure ahead of, or alongside, the development. This is hugely problematic as the way that the IL is calculated is on the final value of the scheme, and therefore contributions cannot be paid until the development is completed. The Government is expecting Local Authorities to borrow money to provide the infrastructure in advance of the IL payments. This is obviously extremely problematic for Local Authorities who are already under huge financial pressures.

There are a number of other concerns about the system including, but not limited to, how successful the delivery of on site affordable housing will be; whether the IL can be set at a level that secures as much as S106, but does not impact on development viability; Local Authority resources to devise and implement a new system whilst still negotiating S106s; and whether the IL will fund infrastructure to actually mitigate the impacts of new development

In recognition of the lack of detail and potential difficulties of implementing the IL, the Government is proposing a Test and Learn approach to its implementation. Therefore a small number of Local Authorities will volunteer to be tester authorities, with the system adapting as lessons are learnt. It is envisaged that the full roll out would take 10 years. There is still a question mark over whether the Government will pursue the IL at all, and of course with a General Election on the horizon, there could be a change in Government and a completely new direction for infrastructure delivery through the planning system.

### **Public/stakeholder engagement**

5.1 N/A

### **Other options**

6.1 None considered – report for information.

### Financial and value for money issues

7.1 S106 Agreements are used to secure financial contributions that are held by the Council to spend on specific pieces of infrastructure or defined areas.

### Legal implications

8.1 S106 Agreements are legal agreements that set out the precise details of how and when the Council can spend contributions.

### Climate implications

9.1 S106 Agreements can be used towards infrastructure that help mitigate the impacts of climate change, for example in the provision of new areas of open space or providing contributions to improved cycle and pedestrian facilities to reduce the reliance on the car.

### Socio-Economic implications

10.1 n/a

### Other significant implications

11.1 n/a

This report has been approved by the following people:

Role	Name	Date of sign-off
Legal Finance Service Director(s) Report sponsor Other(s)	Tammy Whittaker	
Background papers: List of appendices:		