

Report To: **STRATEGIC PLANNING AND CAPITAL MONITORING PANEL**

Date: 30 November 2015

Reporting Officer: Damien Bourke, Assistant Executive Director (Development, Growth and Investment)

Subject: **DEVELOPER OBLIGATIONS SMART POOLING, CONTRIBUTIONS AND S106 AGREEMENTS**

Report Summary: The report summarises the current position with regard to receipts received from section 106 Agreements and Developer Contributions and contains recommendations on the release of receipts.

The report also provides an updated position on progress made in implementing a section 106 smart pooling system as a result of changes to the Community Infrastructure Levy Regulations and National Planning Policy.

Recommendations:

1. To note the contents of the report;
2. Provide appropriate resource as requested.

Links to Community Strategy: Successfully implementing schemes funded through s106 agreements could assist in supporting Community Strategy priorities concerning supportive communities, safe environment, prosperous society, learning community and attractive borough.

Policy Implications: Works completed through obligations contribute to mitigating the impact of developments in three policy areas.

The approach set out provides an update on implementing a revised policy approach to the seeking of developer obligations through the smart pooling of S106 agreements.

Financial Implications: It is important that regular monitoring is undertaken to ensure that monies are paid to the Council when due; as per the individual S106 agreements. The S106 contributions and Developer Contributions must be spent within the agreed timescales and on the purposes specified within the individual agreements. A summary position of the S106 contributions and developer contributions is included in the report.

(Authorised By Section 151 Officer)

Legal Implications: It is important that all the schemes proposed are reviewed to consider whether they meet the strategic priorities of the Council. Any receipts that are non-specific in nature should be applied in line with the Council's wider priorities, rather than being earmarked to the immediate district. It is critical that Members receive a report that sets out the new legislative framework for infrastructure costs

(Authorised By The Borough Solicitor)

Governance Arrangements: Section 106 obligations requested are done so following the policy framework set out to support this approach contained within the Councils adopted Unitary Development Plan.

Risk Management: Developers will be entitled to claw back any contributions if they are not spent within the agreed timescales as per the

agreements.

Contributions may not be received on time or at all without adequate monitoring. Any specific conditions included with S106 agreements must also be considered in the use of these resources to reduce developer challenges.

The continued implementation of the approach outlined beyond April 2015 is guided by professional judgement and as such is open to challenge. Keeping abreast of relevant legal cases and modifying the Councils approach accordingly will assist in minimising risk.

Background Papers:

The background papers can be obtained from the author of the report, Graham Holland by



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1. INTRODUCTION

- 1.1 This report summarises the position at the period 31 October 2015 with regard to receipts for Section 106 agreements and developer contributions and makes comments for each service area. This is followed by a section on new agreements concluded up until publication of the report.
- 1.2 Additionally it provides an update following the implementation of section 106 Smart Pooling following the April 2015 deadline which brought to a close requesting developer contributions via the Councils tariff based pooling system as outlined within its Developer Contributions Supplementary Planning Document (SPD).

2. S106 UPDATE

- 2.1 The summary position statement at 31 October 2015 for section106 agreements and developer contributions is as follows:

Section 106 agreements:

Section 106		Community Services	Engineering Services	Services for Children & Young People	Other	Total
		£000	£000	£000	£000	£000
S106 - Applied - Budget Transferred to Service	Balance Transferred Previous Years (2006/07 - 2014/15)	795	1,632	1,250	16	3,693
	Applied Periods 1 - 3					0
	Applied Periods 4 - 7					0
	Applied Periods 8 - 10					0
	Applied Periods 10 - Outturn					0
	Total	795	1,632	1,250	16	3,693
S106 - Schemes devised not yet signed off	Brought Forward from 2014/15	0	0	0	0	0
	Received Periods 1 - 3					0
	Received Periods 4 - 7					0
	Received Periods 8 - 10					0
	Received Periods 10 - Outturn					0
	Transferred to Service Area					0
Total	0	0	0	0	0	
S106 - Not yet earmarked	Brought Forward from 2014/15	(43)	(10)	(124)	0	(177)
	Received Periods 1 - 3					0
	Received Periods 4 - 7		(13)			(13)
	Received Periods 8 - 10					0
	Received Periods 10 - Outturn					0
	Transferred to Service Area					0

	Total	(43)	(23)	(124)	0	(190)
S106 - Not yet reached trigger point	(499)	(370)	(672)	(23)	(1,564)	

Developer Contributions (based on SPD prior to CIL changes):

Developer Contributions	Green Space Contribution	Community Education Contribution	Integrated Transport Contribution	Totals
	£000	£000	£000	£000
Brought Forward from 2014/15	(206)	(311)	(11)	(528)
Received Periods 1 - 3	(2)	(2)	(1)	(5)
Received Periods 4 - 7	(43)	(34)	(1)	(81)
Received Periods 8 - 10	0	0	0	0
Received Periods 10 - Outturn	0	0	0	0
Transferred to Service Area	0	0	0	0
Approved at previous SCP for release at year end	80	301	0	381
Total	(171)	(46)	(13)	(233)

Overall position

2.2 The current position for s106 agreements is £190,000 as at 31 October 2015 with developer contributions standing at £233,000.

2.3 Services for Children and Young People

- The balance of unallocated s106 funds stands at £124,000 on 31 October 2015
- Developer contributions stands at £46,000 on 31 October 2015

2.4 Community Services (Operations)

- The balance of unallocated s106 funds stands at £43,000 on 31 October 2015
- Developer contributions stands at £171,000 on 31 October 2015

2.5 Engineering Services

- The balance of unallocated s106 funds stands at £23,000 on 31 October 2015
- Developer contributions stands at £13,000 on 31 October 2015

New Section 106 Agreements

2.6 A section 106 agreement has been made for the Wharf Mill scheme 15/00631/FUL at Dukinfield Road, Hyde. The application, comprising of 66 dwellings and associated with Bellway Homes Limited provides commuted sums to mitigate against any impact the proposal may have on off-site Open Space and Education provision. The sums of £44,461 for Education will go towards facilities at both the new Flowery Field Primary School and Hyde Community College. There will also be £79,059 for Open Spaced towards maintenance and environmental improvements at Hyde Park.

3. SMART POOLING UPDATE

3.1 As presented at Strategic Capital Panel (SCP) on 1 July 2013, 'Item 12 – Community Infrastructure Levy – Consultation on further reforms' the mechanisms for collecting developer contributions were revised by the introduction of the Community Infrastructure Levy (CIL) Regulations April 2010. The CIL Regulations introduced a new method for

collecting developer contributions via a CIL Charging Schedule. CIL is intended to run alongside the use of s106 agreements, with CIL being used for **general infrastructure** contributions and s106 for obligations for **site-specific mitigation**.

- 3.2 The aim of CIL is to allow local authorities to raise funds from developers to fund both the initial and ongoing costs of general infrastructure which is needed as a result of planned new development such as flood defences, roads and transport facilities for instance. However as outlined within the CIL regulations, a Council is unable to adopt a CIL Charging Schedule without an up to date Local Plan. This process ensures there is a clear relationship between an authority's plan and the infrastructure required to deliver this. In turn the identified infrastructure requirements would form the basis of a CIL Regulation 123 list. The process of introducing a CIL Charging Schedule also necessitates an assessment of development viability to ensure proposed levy rates do not put at jeopardy development viability. Many authorities have found instances where zero rates are chargeable.
- 3.3 The CIL Regulations also have the effect how s106 funds can be used, limiting local planning authorities to pooling no more than 5 obligations for site specific mitigation projects or infrastructure items. This became applicable in April 2015 and applied to retrospective agreements, dated back to April 2010.
- 3.4 Because the council made use of a tariff based Developer Contributions SPD and generic s106 agreements during this time, from April 2015 the pooling limits imposed by CIL had been reached.

Policy position

- 3.5 As noted at SCP on 8 September 2014 and 2 March 2015, the Council from the 6 April 2015 is now only able to collect developer obligations for **site specific mitigation** via s106 agreements. It has to smartly pool them to avoid the 5 project limit restrictions until such time that it may consider supplementing this with a CIL Charging Schedule for general infrastructure items.
- 3.6 Following approval at SCP on 2 March 2015 to develop a smart pooling system, a number of necessary steps have been taken to ensure procedural compliance with the CIL regulations. As noted at the same SCP this necessitated revocation of the existing Developer Contributions SPD. This has subsequently been actioned following Executive Decision on 8 April 2015 with a number of associated changes having taken place on the Councils web pages to reflect this.
- 3.7 For the avoidance of doubt, all obligations now requested are take the form of s106 agreements. The policy framework set out to support this approach is contained within the adopted Unitary Development Plan (UDP), specifically policies;
- H5 – Greenspace;
 - H6 – Education;
 - T13 – Highways.
- 3.8 This approach is not a significant departure to that used in the past where developers were able to request the use of s106 agreements as opposed to the upfront charges associated with the Developer Contributions SPD, which would aid development financing. The more significant change relates to how projects funded through the obligation need to be specific in nature to avoid reaching the pooling limits.

Legal Challenge to Government Policy

- 3.9 At Strategic Capital Panel on 2 March 2015, announcements made via Written Ministerial Statement by Brandon Lewis MP on 28 November 2014 were noted. The statement introduced a lower development threshold limit when requesting both tariff based developer contributions and affordable housing.

- 3.10 The specifics prohibited contributions from residential schemes of 10 units or less and which had a combined gross floorspace of no more than 1,000sqm. At the time of the announcement the implication for the Council (as it made use of a tariff based scheme) meant it could only source contributions from larger residential developments. Commercial proposals were unaffected and the 250sqm threshold set out within the SPD still applied.
- 3.11 The aforementioned revocation of the Developer Contributions SPD on the 8 April 2015 brought to a close the Councils use of its tariff based system and as a result the restrictions brought about by the Ministerial statement no longer applied.
- 3.12 Subsequently the affordable housing limits as part of the same statement were subject to legal challenge (West Berkshire District Council and another v Department for Communities and Local Government [2015] EWHC 2222 (Admin)) being quashed by the High Court on the 31 July 2015. The Court of appeal however on 28 September 2015 has granted DCLG permission to appeal.

Consultees

- 3.13 As of April, the securing of obligations has been for specifically identified projects that help mitigate against the impact of a particular development. Specifically the s106 obligation must now meet the following legal tests set out in both the CIL regulations and NPPF, being:
1. Necessary to make the development acceptable in planning terms;
 2. Directly related to the development; and
 3. Fairly and reasonable related in kind and scale to the development.
- 3.14 Projects continue to be identified by the three relevant service areas, given they are best place to understand priorities. To ensure that obligations are fair and reasonable, related in kind and scale to the development, the developer contribution calculator which underpinned the revoked SPD has been retained. This ensures s106 obligations take into account likely pupil numbers generated and pressure placed on existing greenspaces for instance. To ensure the values the calculator generates continue to be fair and reasonable it is suggested inputs are reviewed on periodic basis.
- 3.15 A number of working group meetings have taken place with the relevant service stakeholders both prior to the April 2015 changes and on a continuing basis thereafter to inform of the implications of the CIL regulations and how the Council now seeks developer contributions. A third such consultee working group meeting occurred on 6 November 2015 with the initial stages of a projects register coming together. It is proposed a finalised list of potential projects is drawn up at the next working group meeting scheduled for Monday 11 January 2016 and be brought to SCP for noting at a future date. A process diagram provided at **Appendix 2** assists in showing how the consultee working group feeds into the s106 agreement process.
- 3.16 To assist, consultees have been provided with evidence of residential development sites likely to come forward sourced from the Councils adopted Strategic Housing Land Availability Assessment (SHLAA). The SHLAA details estimate dwelling yields for sites and timescales for delivery. Estimate s106 contribution amounts have been worked through the online obligation generator to inform consultees possible contribution amounts. This has assisted consultees in project planning future infrastructure requirements.
- 3.17 Additionally discussion have taken place with Highways consultees around the use of planning conditions to secure the relevant site specific mitigation measures required.

- 3.18 It is suggested the working group continues to meet on a quarterly basis to establish, review and update the projects register and understand the locations and impacts of future development to effectively plan future infrastructure project requirements.

Monitoring

- 3.19 As reported at SCP in March 2015, to effectively manage the post April 2015 s106 smart pooling system, the Council will need to implement a number of changes including establishing a robust monitoring system. A number of these elements have been completed, some are in the process of being implemented, however as detailed below there a number of longer term outstanding actions.

Progressed	Priority
Managing the projects register and officer working group with 'Education', 'Transport' and 'Greenspace', ensuring maximum benefit of obligations.	High
Assist in the gathering of approximate costs of projects and ensuring an appropriate distribution of delivery.	High
Ensure projects can be funded through a maximum of 5 pooled S106 obligations with projected future developments.	High
Liaise with Planning Policy supporting revocation of SPD, now completed.	High
Manage allocation of s106 agreements to ensure alignment with pooling limit.	High
Outstanding	
Establish a system and continually monitor development triggers, to ensure obligation funds are collected at the agreed trigger points from developers.	High
Monitor market signals and review the current obligation generator to ensure robustness of inputs in generating a fair value.	High
Monitor the delivery of projects, liaising with consultees, once funding has been triggered and allocated to the relevant service area to ensure they are delivered within s106 agreement timescales and clearly evidenced.	Medium
In time develop the Councils Infrastructure Delivery Plan, establish and scope the taking forward of CIL and a regulation 123 list following adoption of the Councils Local Plan, if so desired.	Low

- 3.20 To ensure effective management and maximum benefit for the Council from developer obligations, the managing and monitoring of such a system effectively will require additional officer time to be committed to it beyond existing resources. As an indication, six of the ten Greater Manchester authorities currently have, a full or part-time s106 officer.
- 3.21 The service areas benefiting individually from the secured funds will also need to commit time to identify and cost projects and infrastructure items, as they already do from existing resources.
- 3.22 Historically it has been reported that officer time may in part be recoverable through administrative fees with many Councils charging between 4% and 5% to cover the management of such a system. However a recent High Court challenge (Oxfordshire County Council v Secretary of State for Communities and Local Government [2015] EWHC 186 (Admin)) to overturn the decision of a Planning Inspector to not allow the requirement for a monitoring and administration fee failed. The judgement found that the charging of monitoring fee was not compliant with Regulation 122 of the CIL Regulations.

3.23 Therefore resource will be required outside of the obligation fee in order to fully manage, monitor and capitalise on the s106 income stream in ensuring the Borough receives the developer obligations it needs to mitigate the impact of development.

4. AUDIT

4.1 SCP should also note the processes and procedures by which the Council follows in securing developer obligations is currently being audited. Officers will welcome the outcome findings of the audit in helping to further deliver robust and effective measures to manage this process.

5. RECOMMENDATION

5.1 The content of the report is noted

5.2 That approval is given to provide resources to manage consultee engagement, monitor development triggers, project commencement and update the now implemented smart pooling system to ensure the Council receives the developer obligation funds due.

APPENDIX 1

