

Overview and Scrutiny Committee

3 March 2021

S106 Agreements

Report of the Director of Planning and Regeneration

1 Purpose

- 1.1 To provide an overview of the S106 process including an understanding on how S106 obligations are negotiated from new developments and to explain the process for oversight and management of our existing S106 obligations (collection, allocation and spend). The report also sets out some of the work that is being undertaken to make the process more efficient, open and transparent.

2 Action required

- 2.1 Note the content of the report, the procedures in place to monitor and administer S106 agreements and proposed improvements that are being investigated.

3 Background information

- 3.1 The use of S106 planning obligations is governed by legislation, national and local policy and government/ministerial advice. An overview is provided below.
- 3.2 Planning obligations are entered into under Section 106 of the Town and Country Planning Act 1990 (as amended) to mitigate the impacts of a development proposal and are legally enforceable documents. The use of planning obligations has evolved considerably since it was first introduced under s52 of the Town and Country Planning Act 1971.
- 3.3 Section 106 outlines what planning obligations might be used for. A planning obligation may impose requirements;
 - a) restricting the development or use of the land in any specified way;
 - b) requiring specified operations or activities to be carried out in, on, under or over the land;
 - c) requiring the land to be used in any specified way; or
 - d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.
- 3.4 Planning obligations should not be used where a planning condition is appropriate and obligations are used for three specific purposes. To;
 1. prescribe the nature of development eg requiring a given portion of housing is affordable,
 2. compensate for loss or damage created by a development eg loss of open space, or

3. mitigate a development's impact eg through increased public transport provision.
- 3.5 The obligations may be provided by the developer "in kind" – by building or directly providing the matters necessary to fulfil the obligation, nearly always on site. Alternatively, planning obligations can be met in the form of financial payments, or a combination of both. Agreements are registered as a local land charge against the site as a whole and although agreements are signed by the developer, they stay with the land if it is sold.
- 3.6 Agreements are drafted with various & varying "trigger" points relating to the development; when these are reached, the developer is liable to pay the agreed contribution to the Council. Under the terms of the agreement, it is the developer's duty to notify the Council when trigger points are reached and payment to the Council becomes due. Agreements may have several trigger points, based on different criteria (often based on a percentage of properties completed/ occupied) which can be difficult to monitor accurately. Funds received are then available to spend on the specific areas contained in the agreement as the Council's obligations. It should be noted that planning permissions may take several years to reach completion or may cease or be amended or superseded; consequently, not all agreements are realised in full.
- 3.7 The current legislation (CIL Regulations 2010) sets mandatory legal tests for S106 which must be met. These tests are well understood by the development community. The effect of these has been to restrict the scope for all contributions from developments. For any planning application where a S106 is required, the officer report sets out whether the CIL tests have been met. They are whether the obligation sought is;
 - a) necessary to make the development acceptable in planning terms
 - b) directly related to the development
 - c) fairly and reasonably related in scale and kind to the development.
- 3.8 Previously, the number of S106s completed since April 2010 that could be pooled together towards any specific infrastructure project had been limited to a maximum of five. However, since 1 September 2019, this is no longer the case.
- 3.9 The National Planning Policy Framework states that where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. Where there are particular circumstances that justify the need for a viability assessment, it is for the applicant to demonstrate this. The NPPF states that the weight to be given to a viability assessment is a matter for the decision maker.

Planning Process - Negotiation Approach

- 3.10 Our current planning policy basis results in S106 obligations as set out in Nottingham's local plan documents including the adopted Local Plan part 2 (2020) and Supplementary Planning Documents (SPDs) primarily covering the following;

- Affordable housing,
- Education,
- Open Space/Parks,
- Employment and Training, and
- Improved infrastructure needed to serve the development

- 3.11 Planning Officers negotiate for the full S106 obligation that is required either by adopted policy or to mitigate adverse impacts of a development. Where a developer does not propose to provide the mitigation themselves or pay the full S106 obligations these have been and remain subject to a viability assessment that is then subjected to robust independent scrutiny for arbitration. Previously the Valuation Office (VOA) provided this service (since July 2015) however the VOA recently indicated that they were overwhelmed with work and they were taking longer to process assessments. In 2019 HEB Property Consultants were used as a replacement and more recently CP Viability have been providing this service to ensure a consistency of approach and understanding of Nottingham specific issues.
- 3.12 In many cases this process requires negotiation by Planning Officers who seek to balance the viable delivery of positive development and investment in the city with the level of S106 obligations.
- 3.13 Where Officers propose approving a development without requiring a full S106 contribution (and therefore not meeting adopted policy) the application is always referred to Planning Committee for decision.
- 3.14 The use of CP Viability (or alternative) to provide independent scrutiny of S106 viability assessments is felt to provide the necessary robust, up to date and Nottingham specific evidence to support Planning negotiations around S106 obligations.
- 3.15 Likewise it remains appropriate that applications where a less than policy compliant obligation is proposed by a developer be determined by the Planning Committee. Committee reports carry a section referring to S106 implications and viability.
- 3.16 The viability of development will remain an evolving picture within a Nottingham context, especially in light of the pandemic. This picture will be kept under continuous review and advice to planning committee will provide the evidence needed to make sound decisions.
- 3.17 The process for determining the type and amount of S106 contributions will always be determined on a case by case basis taking into account a number of factors including the size and type of development, its location and the resultant impact the development will have and the mitigation that is required to address these impacts. Set out below, in summary is how each main type of contribution is determined;

Infrastructure	Determination
Affordable Housing	Approved Supplementary Planning Document sets out formula for on site or off site contributions (or combination of the two) with contributions received available to be used city wide. Contributions updated annually. Managed by Head of Housing and Regeneration (Mark Lowe) via portfolio holder for Planning, Housing and Heritage/ Building a Better Nottingham: Housing Delivery – Steering Group
Open Space	Approved Supplementary Planning Document sets out formula for on site or off site contributions (or combination of the two). Contributions updated annually. Open space investment plans set out priorities for investment on a Ward by ward basis which are agreed at Area Committee. At the planning application / S106 negotiation stage, discussion between Planning / Public Realm teams agree provisional allocation to a site/project idea by Public Realm. Once notification of receipt of S106 payment by Finance suggestion of funding allocation discussed at Area Committee / with Councilors and then endorsed. Delegated Decision signed by Portfolio Holder for Leisure, Culture and IT to approve allocation.
Education	Determined by need arising specific to the development and provision available in relevant part of city. Location of spend identified at time of planning application. Managed by spending dept.
Employment & Training	Determined by policy and coordinated by Jobs Hub.
Improved infrastructure	Determined on a case by case basis and spent on improvements required on the network. Most often in proximity to the development. Managed by Traffic/Transport teams via PfH.
Other contributions	Determined on a case by case basis.

Monitoring and management of S106 obligations

- 3.18 The monitoring of Section 106 agreements can be complex and time consuming due to the length of time that may elapse between the granting of permission and start on site (indeed, many developments may never take place). Trigger points (eg commencement, completion or occupation of development) have to be reached before contributions are due and although developers should inform the Council when these triggers are reached, this is not always the case. Therefore, agreements require monitoring on a regular basis to determine whether any triggers for payment have been reached.
- 3.19 In 2019 an internal audit review was undertaken to look at the management of S106 agreements with a scope to cover the processes including the negotiation process, monitoring, collection and utilisation of monies due. This provided a number of detailed suggested improvements to the authorisation of agreements, monitoring, reporting and guidance set out in an Action Plan.

- 3.20 It is acknowledged that the availability of monitoring information and the level of colleague capacity to manage the completed S106 planning obligations requires review. A process map is attached at appendix 1 to provide clarity on the roles and responsibilities for the ongoing monitoring and collection of S106 contributions.
- 3.21 Set out below are a number of work streams that are being undertaken to improve processes associated with S106 including the monitoring and administration of these agreements.

Improvement process of S106 – Key work streams

- **Legacy backlog of S106 Agreements**

3.22 In 2017 Major Projects Commercial Management Team were commissioned to carry out checking of legacy S106 agreements to see if triggers points had been met for old S106 agreements in order to recover any outstanding obligations. As part of this work, 100+ cases have been investigated and so far approx. £5million worth of S106 payments have been received. Further work is being explored including possible committee approval to accept lower contributions in a few specific cases.

- **Improvements to S106 Administration Monitoring**

3.23 A number of areas have been investigated for improvement and this has been enabled by the adaption of two planning posts who now have a formal S106 role (part time) as part of their overall duties. A cross council officer group has been established which has enabled better communication and inter-departmental relationships between planning, legal, finance and all the S106 spending departments.

3.24 It is now recognised that there is a need to ensure a fit for purpose and simple system is in place for oversight and management of all planning obligations going forward. This work has identified the need for an automated product to minimise officer time on administration/monitoring and both an in-house solution utilising the existing planning Uniform software as well as an off the shelf add on product to Uniform (Exacom, used by over 100 local authorities) is being investigated.

3.25 It should be noted, however, that any system will only work so long as there is dedicated staff resource to keep it up to date (including adding and updating contribution trigger data), and to act on system reminders to investigate development progress and request payments.

3.26 Currently there is a separate S106 database operated by Finance which is used for the monitoring of developments and collection and spend of contributions in the absence of a monitoring system. In an ideal world the chosen solution would end the need for this duplication of records and staff resource and would enable more detailed reporting.

- **Reviewing Monitoring Charges**

3.27 The current monitoring and administration charge for S106 was established by the Council in 2008. This allowed for top slicing of contributions by 3% to a total of £4,000 subject to the maximum cost increasing in line with the Retail Price Index each year on 1 April (although the top-slice did not begin to be taken until the beginning of 2019). Following a review, this indexing is now incorporated into all new S106 templates. In addition, bench marking with other Councils is being investigated to provide evidence to potentially increase the administration and monitoring charge and having this as a standalone charge rather than top slicing (up to 5%) which is how many Councils calculate their charges. There is also the potential of securing this charge on the signing of a S106 so that monitoring and administration can be carried out as soon as the agreement is signed.

- **S106 Estimator**

3.28 A new tool is being trialled that can provide a summary of the likely financial or on site contributions for;

- Affordable Housing
- Open Space
- Education; and
- Employment & Training

3.29 It is hoped that this will provide a more transparent and consistent approach to calculating S106 contributions for applicants, residents, councillors and officers. It is designed to be a working tool that can be adapted to changing policy and guidance. Although there will be incidences where additional contributions will be required (for example Public Transport, flooding, etc) these will be negotiated on a case by case basis and are therefore not formula based in the same way so cannot be included in the estimator.

3.30 The estimator has had internal testing with the S106 spending department and planning colleagues and some soft market testing with a few key developers and will shortly go on the Council web site. The latest version of the tool is available using the following link [S106 Estimator](#).

- **Infrastructure Funding Statement (IFS)**

3.31 This is a new national requirement set out in the Community Infrastructure Levy (CIL) Regulations that requires all local planning authorities to publish an annual Infrastructure Funding Statement. It is the government's view that IFSs will give communities better insight into how developer contributions are supporting new development and local infrastructure.

3.32 The IFS should, as a minimum contain the following information;

- details of new planning obligations which were **agreed** upon during the reported year
- the amount of money which was **received** during the reported year

- the monies which have either been **allocated or expended** within the reported year
- the amount of monies **retained** at the end of the reported year; and
- the report also gives a **breakdown of any non-monetary obligations**.

3.33 This is Nottingham's first IFS and covers the reporting period of 1 April 2019 to 31 March 2020 and will be publically available on the Council web site at [Nottingham City's Infrastructure Funding Statement 2019-20](#).

4 List of attached information

4.1 None

5 Background papers, other than published works or those disclosing exempt or confidential information

5.1 The following documents are specifically relevant;

- [Nottingham City Aligned Core Strategy - ACS \(2014\)](#) (Part 1 Local Plan)
- [Land and Planning Policies Document - LAPP \(2020\)](#) (Part 2 Local Plan).
- [Nottingham City Infrastructure Funding Statement 2019-20](#)

6 Published documents referred to in compiling this report

6.1 None additional to 5.1.

7 Wards affected

7.1 All

8 Contact information

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Section 106 Workflow

