



**EAST STAFFORDSHIRE BOROUGH COUNCIL**

**REPORT COVER SHEET**

<b>Title of Report:</b>	S106 prioritisation report and S106 monitoring fee	To be marked with an 'X' by Democratic Services after report has been presented
<b>Meeting of:</b>	Corporate Management Team 15 <sup>th</sup> July 2021	X
	Leader and Deputy Leaders 26 July 2021	X
	Leader's / Leader of the Opposition's Advisory Group / Independent Alliance Advisory Group 5 <sup>th</sup> August 2021	X
	Cabinet 16 <sup>th</sup> August 2021 / Council [DATE]	
	Scrutiny Audit and Value for Money Council Services Committee [DATE] / Scrutiny Community Regeneration, Environment and Health and Well Being Committee [DATE]	



<b>Is this an Executive Decision:</b>	YES	<b>Is this a Key Decision:</b>	YES
<b>Is this in the Forward Plan:</b>	YES	<b>Is the Report Confidential:</b>  <b>If so, please state relevant paragraph from Schedule 12A LGA 1972:</b>	NO

**Essential Signatories:**

**ALL REPORTS MUST BE IN THE NAME OF A HEAD OF SERVICE**

Monitoring Officer: **Angela Wakefield**

Date ..... Signature .....

Chief Finance Officer: **Sal Khan**

Date ..... Signature .....

**EAST STAFFORDSHIRE BOROUGH COUNCIL**

**Report to Cabinet**

**Date: 16<sup>th</sup> August 2021**

**REPORT TITLE: S106 prioritisation and monitoring**

**PORTFOLIO: Planning**

**HEAD OF SERVICE: Sal Khan**

**CONTACT OFFICER: Naomi Perry Ext. No. x1611**

**WARD(S) AFFECTED: All**

**1. Purpose of the Report**

- 1.1. The purpose of the report is to set out an approach to prioritising S106 in those cases where there is limited viability and full contributions cannot be achieved.
- 1.2. The report also sets out the outcome of investigations into whether a S106 monitoring fee could be sought and possible options for how the fee could be calculated.

**2. Executive Summary**

- 2.1. The Borough Council adopted the Planning Obligations SPD in 2019 however this document doesn't offer support for decision makers where viability is in question and not all contributions can be delivered.
- 2.2. The purpose of this report is to set out guidance for decision makers in such situations, taking into account delivery of the Local Plan and associated policy, changes to national planning policy and guidance as well as experiences in securing S106 since the Local Plan was adopted. The report does not propose any changes to current S106 requirements other than the introduction of a monitoring fee.
- 2.3. The Borough Council does not currently seek a fee to monitor S106 agreements however this task can take a substantial amount of officer time. The Government allowed for monitoring fees to be introduced in 2021 and this report

sets out that a monitoring fee could be sought for S106 and presents options for how such a fee could be calculated based on planning guidance and CIL regulations.

### **3. Background**

- 3.1. S016 Planning Obligations (also known as S106 Agreements) are legal agreements which can be attached to a planning permission to mitigate the impact of an otherwise unacceptable development to make it acceptable in planning terms.
- 3.2. In order for planning obligations to be used, they must meet the three legal tests:
  - 3.2.1. it is necessary to make the development acceptable in planning terms;
  - 3.2.2. directly related to the development;
  - 3.2.3. and fairly and reasonably related in scale and kind to the development.
- 3.3. Planning Obligations can include site specific issues as well as the provision of infrastructure, or facilities necessary to support the additional residents and help achieve the council's policy objectives.
- 3.4. The Borough Council adopted the Planning Obligations SPD in 2019 however this document doesn't offer support for decision makers where viability is in question and not all contributions can be delivered. In such cases applications are determined by planning committee supported by an officer recommendation. In coming to a recommendation the case officer will consider all Local Plan policy requirements and the requests for S106 received from statutory consultees including internal consultees and will make a planning judgement regarding which obligation is more important or relevant to the case in question. There is no guidance to assist in this process and this can often cause delays to the decision making process. Without such guidance there is no consistency in decision making and whilst each application is dealt with on a case by case basis it is considered that some generic guidance would assist and allow the requirements of the Local Plan and associated targets be better delivered.
- 3.5. Ultimately any decision on S106 needs also to be negotiated and agreed with the applicant and it is important for the Council to consider how the need for required obligations can/may be met from an alternative source than the developer.
- 3.6. The purpose of the guidance is not to conclude that one obligation is more important than another but set out issues experienced with securing and delivering certain pieces of infrastructure and ensure that development can mitigate its impacts in a timely manner and whether the infrastructure can bring appropriate benefits to the residents of East Staffordshire Borough Council.

3.7. MHCLG in June 2019 published a response to the reforming development contribution consultation representations. In respect of monitoring fees, the Government confirmed that regulations have been amended to clarify that the monitoring fee should not exceed the authorities' estimate of its cost of monitoring the planning application. Further guidance was expected and this report investigates what has happened since 2019 including a review of the approach adopted by other planning authorities.

#### **4. Contribution to Corporate Priorities**

- 4.1. The Corporate plan includes the following targets
- 4.1.1. VFM 40 - S106 Prioritisation Report Approve
  - 4.1.2. VFM41 - S106 Monitoring Fee Report Approved

#### **5. Main Body of Report**

5.1. In preparing this report a review of signed S106 has taken place along with consultation with internal Council departments. No direct consultation has taken place with external consultees however the commentary provided also includes known issues which have been experienced by the planning team in negotiating S106s.

5.2. Appendix 1 sets out the commentary for each obligation 'type'.

5.3. One key issue to highlight at the outset is the approach towards affordable housing. Currently Local Plan policy allows for a proportion of affordable housing to be delivered on site and the remainder to be delivered as an off site financial contribution. This has resulted in the Borough Council being in receipt of substantial sums, some of which are time limited in that if they are not spent within a set timeframe they would need to be returned to the developer. A planning appeal in September 2020 interrogated this approach with regards to the delivery of affordable housing. The inspector concluded that there was a need for affordable housing to be delivered in the short term and some of these funds would not achieve this.

5.4. The national approach to affordable housing is now that other housing tenures can classify as affordable housing. Some of these housing tenures are likely to be more palatable to a developer. For example low cost home ownership is likely to provide more profit to the developer than providing an offsite contribution and this approach is beginning to filter down to some sites in the Borough. This option is likely to offer housebuilders more control over cash flow.

5.5. Whilst not limited to, most cases where viability is challenged are smaller, more constrained sites. These are more likely to be sites where no on site open space or national forest planting can be provided (if required). The impact of Covid has meant that there is a renewed importance nationally on access to local green spaces, particularly for those who don't have access to a private garden or communal amenity area.

5.6. Overall taking into account the commentary in Appendix 1 it is clear preparing a prioritisation list is a difficult task and all infrastructure is equally important to residents of East Staffordshire however ultimately not all sites will be viable and a decision needs to be made. The guidance isn't anticipated to result in the same outcome on every site and there will always be site specific issues which differ from site to site. The changing landscape of affordable housing and outcome of the appeal referred to means that planning decisions should ensure on site affordable housing is a key priority. Where sites cannot achieve full on site policy requirements these should also be addressed. There will no doubt be other areas where services such as education and healthcare will be at capacity and this should be considered positively as and when requested. The following 'order' of priorities is recommended:

- Full policy compliant level of affordable housing on site, fully investigating all types of affordable housing on site.
- Statutory consultee requests which relate to health, highway safety and education
- Any on site requirement which cannot be delivered on site to be addressed off site – e.g. open space contribution to go towards local green space/play area<sup>1</sup> in the vicinity of the site
- Playing pitch contribution for developments more than 50 dwellings
- Other requests
- Bins – to be secured by way of planning condition<sup>2</sup>

### **5.7. Monitoring S106 agreements**

5.8. Monitoring of S106 agreements is not a new requirement on local planning authorities. The planning team also offer a paid service for those wishing to confirm whether a particular site has complied with the S106.

5.9. Since 2020 there has been a new requirement for local authorities to prepare and publish an Infrastructure Funding Statement setting out what S106s have been secured, received or spent during a certain time period. To fulfil this duty significant work has been undertaken to create a S106 'dashboard' which is completed by relevant departments across the Council so that all S106 and other legal agreements can be monitored in one place. Carrying this exercise out has also allowed officers to highlight where monies/works are due and can make the necessary request/invoice at the appropriate time. Overall this can take considerable officer time.

5.10. Currently S106 monitoring tasks are carried out by the GIS and Monitoring officer and the Programmes and Transformation officer and are

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<sup>1</sup> Where nearby open spaces and play areas are within the ownership of ESBC

<sup>2</sup> This will involve additional work to ensure that all appropriate systems capture this information and bins are provided by the developer and not the council by default.

estimated to take up on average of 1.5 days per week. Liaison with other departments is also required, for example the finance team calculate indexation.

- 5.11. Monitoring tasks include but are not limited to the following:
- 5.12. data entry of S106
- 5.13. Updating the planning obligations database
- 5.14. Preparing the infrastructure funding statement
- 5.15. monitoring of trigger points for obligation actions and for receiving payments
- 5.16. developer liaison and confirmation of compliance of obligations
- 5.17. site visits, as required
- 5.18. monitoring financial obligation time limits and spend
- 5.19. calculation of indexation and interest applied to planning obligations
- 5.20. the issuing of s106 Demand Notices (invoicing)
- 5.21. processing of s106 payments
- 5.22. chasing unpaid invoices
- 5.23. arranging bank transfer of financial obligations
- 5.24. contacting infrastructure providers and organising drawdowns – e.g. Staffordshire County Council, Highways England, National Forest
- 5.25. ensuring timely delivery of infrastructure projects funded through s106 e.g the Tutbury Grant Scheme
- 5.26. gathering and recording of spend data evidence
- 5.27. reviewing projects to comply with legal obligations
  
- 5.28. Previously the use of such fees by other authorities had been legally challenged and in some cases was found to fail in meeting the relevant planning legislation however MHCLG in June 2019 published a response to the reforming development contribution consultation representations. In respect of monitoring fees, the Government stated that regulations have been amended to clarify that the monitoring fee should not exceed the authorities' estimate of its cost of monitoring the planning application and that further guidance was expected. Despite the Government's intention to "provide guidance on different methods that could be used to calculate monitoring costs" no such guidance has yet been made available, nor what 'fair and reasonable' represents in a particular circumstance. Until this has been provided, local planning authorities are required to establish their own charging regime and to justify the monitoring fees for Section 106 agreements.

- 5.29. National Planning Practice Guidance states:
- 5.30. *Authorities, including county councils, should work together to ensure that resources are available to support the monitoring and reporting of planning obligations.*
- 5.31. *Authorities can charge a monitoring fee through section 106 planning obligations, to cover the cost of monitoring and reporting on delivery of that section 106 obligation. Monitoring fees can be used to monitor and report on any type of planning obligation, for the lifetime of that obligation. Monitoring fees should not be sought retrospectively for historic agreements.*
- 5.32. *Fees could be a fixed percentage of the total value of the section 106 agreement or individual obligation; or could be a fixed monetary amount per agreement obligation (for example, for in-kind contributions). Authorities may decide to set fees using other methods. However, in all cases, monitoring fees must be proportionate and reasonable and reflect the actual cost of monitoring. Authorities could consider setting a cap to ensure that any fees are not excessive.*
- 5.33. *Authorities must report on monitoring fees in their infrastructure funding statements (see paragraph (2)(h)(iii) of Schedule 2.*
- 5.34. The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019' which became law on 1 September 2019, Regulation 10 states under the sub-heading 'Fees for monitoring planning obligations' that such monitoring fees can be sought where:
- the sum to be paid fairly and reasonably relates in scale and kind to the development; and
  - the sum to be paid to the authority does not exceed the authority's estimate of its cost of monitoring the development over the lifetime of the planning obligations which relate to that development.
- 5.35. It is quite clear that Local Planning Authorities are now able to seek a fee to cover the cost of monitoring S106. Monitoring of S106 involves many tasks across the organisation, which as a collective, can be time consuming.
- 5.36. Research carried out by the planning policy team in 2021 concludes that many authorities have now begun collecting a fee for monitoring S106. No other Staffordshire authorities currently seek a contribution however most seem to be moving towards introducing a fee.

5.37. Following a review of other authority monitoring fees in preparation for the Corporate Plan target there are a number of charging options which could be considered as a suitable basis for calculating the fee. Initial options are set out below:

5.38. **1. Based on percentage value of the total agreement.** Whilst this appears straight forward due to the complex nature of some S106 this could actually take some time to calculate. For example some on site contributions may be difficult to give a value to and some S106 include an either/or situation to be determined at a future date

5.39. **2. Based on the number of obligations within each agreement** – each agreement often has one or more obligations on the landowner and eventual developer. Some obligations will be easier and quicker to monitor than others and so an appropriate fee would need to factor this in.

5.40. **3. Based on the scale and nature of the proposals** – this could be on an incremental scale based on number of dwellings proposed for example

5.41. **4. A formula of  $A \times B \times C \times D$**  based on the following:

A = Number of Obligations to be monitored

B = £XX.XX (hourly rate based on the Officer's salary and supporting requirements)

C = 5 (number of hours of officer time handling each contribution including any site visits)

D = number of years for the expected monitoring of the Application Site

5.42. There may also be other suitable options. It is important that whichever options are considered they reasonably reflect the average hours spent, the number of covenants in the Section 106 agreement and the size of the development.

## **6. Financial Considerations**

*This section has been approved by the following member of the Financial Management Unit: Anya Murray*

6.1. The main financial issues arising from this Report are as follows:

Requiring a monitoring fee will ensure officer time spent monitoring S106 is covered financially. Options for the fee are to be calculated before a final

recommendation is made and the financial implications will be quantified in more detail.

## **7. Risk Assessment and Management**

7.1. The main risks to this Report and the Council achieving its objectives are as follows:

7.2. **Positive** (Opportunities/Benefits):

7.2.1. The intention of the guidance is to assist the decision maker in determining planning applications and in turn mean planning decisions can be made within statutory timescales. It may also result in less applications being deferred to planning committee purely on the basis of viability.

7.3. **Negative** (Threats):

7.3.1. There may challenges to the introduction of a monitoring fee.

7.3.2. Revised systems will need to be implemented to ensure developers pay for bins when included as planning condition.

7.4. The risks do not need to be entered in the Risk Register. Any financial implications to mitigate against these risks are considered above.

## **8. Legal Considerations**

*This section has been approved by the following member of the Legal Team:*  
*Sherrie Grant*

The main legal issues arising from this Report are as follows.

8.1. *Ensuring S106 meet the necessary legal tests.*

8.2. *Ensuring any monitoring fee is proportionate in line with national regulations*

## **9. Equalities and Health**

9.1. **Equality impacts:** The subject of this Report is not a policy, strategy, function or service that is new or being revised.

9.2. **Health impacts:** The outcome of the health screening question does not require a full Health Impact Assessment to be completed.

## **10. Human Rights**

10.1. There are no Human Rights issues arising from this Report.

11. **Sustainability** (including climate change and change adaptation measures)

11.1. Does the proposal result in an overall positive effect in terms of sustainability (including climate change and change adaptation measures) N/A

12. **Recommendation(s)**

12.1. The two recommendations are:

12.2.

12.2.1. To adopt the guidance to use in planning application decision making

12.2.2. To request a S106 monitoring fee on future S106 subject to a separate consideration on various options for calculating the fee.

13. **Background Papers**

13.1. Infrastructure funding Statement

13.2. Planning Obligations SPD

13.3. National Planning Practice Guidance

14. **Appendices**

14.1. Appendix 1 – S106 Commentary and Prioritisation